I am tempted to say “I told you so”, or use the ever more cerebral phrase, “I warned you thusly”.

I am also tempted to point out what a tremendous difference one simple letter can make; the difference between the letters “i” and “u”. When combined with a couple D’s, two L’s, an A and an R, they make up totally different words, with completely different meanings. Dillard’s is a national department store selling quality clothes and accessories for both men and women. Dullard’s are people who believed Oklahoma’s Opt Out; the “responsible alternative” to Oklahoma workers’ compensation, was in any way responsible.

And Friday, the Oklahoma Workers’ Compensation Commission, acting as a “court of competent jurisdiction” in accordance with Oklahoma law, set the record straight, declaring that states Opt Out legislation “unconstitutional and unenforceable”. The case was Jonnie Vasquez v. Dillard’s Department Stores, and the court ruled that Opt Out plans were not in fact equal to the Oklahoma Workers’ Compensation system benefits. They therefore declared the Oklahoma Employee Injury Benefit Act (the Opt Out law) an unconstitutional special law that treats Oklahoma workers differently. They found it denies due process and equal protection of the laws for all Oklahoma injured workers and denies access to justice as guaranteed by the Oklahoma Constitution.

Oklahoma law required Opt Out plans to provide benefits “equal to or greater” than those available within the state’s workers’ compensation system. Opt Out proponents vociferously maintained that their plans met that standard, and routinely spoke of the superior care and treatment their employees were receiving. I and others repeatedly pointed out, however, that this did not appear to be the case, and we strongly questioned the complete lack of transparency associated with these systems.

For instance, Dillard’s specific plan excluded:

- Mold exposure
- Bacterial infection
- Tornado or lightning injury (In Oklahoma? Not a problem.)
- Asbestos exposure
- Innocent person in attack
- Repetitive use of keyboard injuries (cumulative trauma injury covered ONLY if from “rapid” movement)
- Any worker who works outside state for 90 days

Additionally, the claims were barred unless reported before the end of the shift on which injury occurs and an incident report was completed before the end of the shift. The injury was required to be reported to a toll-free number within 24 hours and medical care must have been received within 14 days. Medical treatment had to be pre-approved, and was not covered if there was a 60-day gap in treatment, or, as previously indicated, the worker failed to see a Company doctor within 14 days of injury.

The provisions for appeal by employees covered under the plan were simply draconian in my view. The Appeals Committee was appointed by the Company, and could only consider the medical opinion of Company-selected doctors. Additionally, the worker was not afforded an opportunity to testify during the appeal.
Sounds like due process to me.

Dillard's may now appeal the decision to the Oklahoma Supreme Court. Ironically, they will be allowed to have input into their own appeal, partaking of a right denied their employees under the plan they would be defending.

The Commission, in their 16 page decision (available here or in attachments box to the right) appears to take great effort to both confirm their proper jurisdiction over the matter, and then properly review the case. They appear to be fairly critical of some of Dillard's contentions and defenses. The Commission appears particularly disturbed by the fact that the employer both determined what an injury was and how much to pay, with no independent review. That assessment rings with familiarity to those of us who have been critical of the Opt Out scheme as designed in Oklahoma.

In its final conclusion, the Commission states:

Having found that Section 203, which establishes the requirements for qualifying Employee Benefit Plans: (1) unconstitutionally deprives injured workers of equal protection; (2) is a special law; and (3) in combination with Section 209 deprives injured workers of access to the Court, we conclude that the provisions of the Oklahoma Employee Injury Benefit Act are inoperative, as the very foundation for establishing a qualified Plan, Section 203, is unconstitutional.

Barring an appeal, the 60 or so employers in the state who have established alternative plans have 90 days to acquire insurance or get approved as self insured.

Clearly this battle is not over, and we do not know the results of an almost certain appeal. Still, employers in Oklahoma cannot say they were not warned of potential liabilities by following the Opt Out path. The interesting thing here is that Toto has finally pulled the curtain back, and it is now that the Wizard's true secrets may ultimately be revealed.

Interestingly, the Commission in its final decision, appears to give some liability protection to Dillard's, stating “we note that under the provisions of Section213 of Title 85A, Dillard's is not deemed to have failed to secure workers' compensation insurance, and that under that section, Dillard's liability is limited to that of an employer who had complied with the provisions of the Administrative Workers' Compensation Act.” I cannot help but think that element will be challenged by attorneys in the state.

Technically, Dillard's and the other Oklahoma Opt Out employers for almost two years have been found to be employing an illegal scheme that has denied their employees due process under the states Constitution. That is not the sort of thing personal injury attorney's take lightly. And what of other injured workers whose claims were denied outright, or improperly handled when compared to the requirements of the Administrative Workers' Compensation Act (AWCA)? Will their claims be subject to review and compensation under the newly established standards? I strongly suspect we will be finding out shortly.

At least two legal experts in the state indicated to me over the weekend that they believe these employers are ultimately “naked” for the period they were under the Opt Out scheme, and despite the Commissions protective declaration may now be facing tremendous liabilities. One indicated they will be “filing several cases in District Court because they do not have insurance”. Employees injured during the period their employers used alternative plans are likely due benefits afforded them under AWCA, and their employers may now be subject to full liability for medical and indemnity under normal law.

I wrote about the potential danger to Opt Out employers last May, saying they “are at increased risks that are either unappreciated or unrecognized by many.” Pending the appeal and ultimate outcome of this decision, it appears that I just might have been correct. The Wizard has been revealed as mortal, the Emerald City is looking a little greener around the gills, and angry Munchkins might be lawyering up for another go.

Dillard's and other employers cannot say they were not aware, as I and others "warned them thusly". It was a warning so obvious, only a dullard could've missed it.