SettlePou Newsletter

SettlePou
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SettlePou Welcomes New Attorneys

SettlePou was formed more than a quarter of a century ago with the specific goal of providing highly skilled and service-oriented attorneys for our clients. SettlePou fosters an excellent atmosphere for doing business. With over 25 skilled attorneys and a qualified support staff, the firm represents clients with an unusual brand of big-firm expertise coupled with small-firm attention. With that in mind, SettlePou is proud to announce the addition of two new attorneys, Oliver B. Krejs and Brian P. DeVoss.

Oliver B. Krejs

Brian P. DeVoss

Oliver B. Krejs joined the Insurance Defense Group, as a shareholder, effective January 23, 2006. Mr. Krejs' experience is in insurance defense, third party liability claims (auto, commercial vehicles, tractor trailers, boats, watercraft), premises liability claims, professional malpractice claims and business litigation.

Oliver comes to SettlePou from the firm of Beene & Malone. He received his undergraduate degree in history from Southern Methodist University in 1993 and graduated from St. Mary's School of Law in 1997. He is married to Stephanie, and they have two daughters, Josie (age three) and Kate (age one).

Brian P. DeVoss joined the Commercial Lending Group, effective January 16, 2006. Brian comes to SettlePou after practicing in New Orleans, Louisiana at the firm of Christovich & Kearney. Brian's experience is in handling both transactional and litigation matters.

He received his undergraduate degree in Business Administration/ Marketing from Southern Methodist University in 2000 and graduated from Tulane Law School in 2003.

Brian is married to Nicole Gonzalez DeVoss, and they are the proud parents of Tate Russell DeVoss.

Attorneys:

- Sayuri Beltran
- Michael S. Byrd
- Scott J. Conrad
- Marsha L. Dekan
- Brian P. DeVoss
- J. Garth Fennegan
- Don Gwin
- Barry D. Johnson
- Katherine L. Killingsworth
- Norman H. Kinzy
- Oliver B. Krejs
- Bradley E. McLain
- Michael P. Menton
- Kelly J. Middleton
- Carl W. Morgan
- Jeff Mosteller
- David M. O'Dens
- Jeffrey J. Porter
- Robert L. Pou III
- Sharon Reuler
- John D. "Jay" Settle
- J. Allen Smith
- James M. Stanford
- Michael R. Steinmark
- Steven M. Thomas
- Cliff A. Wade
- C. Russell Woody

How the New Texas Business Organizations Code Affects You

By Michael S. Byrd

Michael S. Byrd

Areas of Practice:

Health Law, Private Business, Private Business-Technology, Private Business Mergers and Acquisitions, Business Litigation and Condemnation Law

ANY DOMESTIC ENTITY (E.G., A TEXAS CORPORATION OR A TEXAS LIMITED LIABILITY COMPANY) FORMED ON OR AFTER JANUARY 1, 2006 IN TEXAS MUST BE FORMED UNDER AND GOVERNED BY THE TBOC

January 1, 2006 is an important date regarding the legal form of business entities because The Texas Business Organizations Code ("TBOC") became effective on this date. Any domestic entity (e.g., a Texas corporation or a Texas limited liability company) formed on or after January 1, 2006 in Texas must be formed under and governed by the TBOC. Domestic entities existing prior to January 1, 2006 will not become subject to the TBOC until January 1, 2010, unless they affirmatively elect to opt in to the TBOC before such date. Any foreign "filing entity" (e.g., a Delaware corporation or Delaware limited liability company that qualifies to transact business in Texas as a foreign entity) that registers with the Secretary of State on or after January 1, 2006 to transact business in Texas will be subject to the TBOC. Similar to domestic entities, foreign filing entities registered with the Texas Secretary of State to transact business in Texas prior to January 1, 2006 will not be governed by the TBOC until January 1, 2010 unless they elect to be governed by the TBOC before such date.

The TBOC represents a codification of eleven separate statutes governing non-profit and for-profit entities. Among the statutes codified and replaced by the TBOC are the Texas Business Corporation Act, the Texas Limited Liability Company Act, the Texas Revised Partnership Act, and the Texas Revised Limited Partnership Act.

For the most part, the purpose of the Code is not to change substantively the laws governing the various types of business entities, but to rearrange those statutes, harmonize various provisions, and eliminate duplicative and ineffective provisions. However, there are some substantive changes that could affect your business. The most notable difference between the old statutes and the new TBOC is the replacement of familiar terminology with new terminology. New vocabulary will be used throughout the TBOC in the context of all types of entities, as well as specialized terms used only in the entity-specific titles.

Some of the other more significant changes under the TBOC include: the TBOC establishes a new presumption that entities have a perpetual duration unless stated otherwise in the governing documents of the entity; the Secretary of State will no longer be required to issue a separate certificate evidencing a recorded instrument, but instead will return a duplicate copy of the recorded instrument stamped with the word "Filed"; and, generally, filing fees have increased by 50% from existing filing fees, which will apply to new and existing entities as of January 1, 2006.

Because most of the substantive changes will be relevant only on a case-by-case basis, please call Michael S. Byrd, Chair of the Business Counsel Services Section at (214) 520-3300 if you have any questions regarding whether the TBOC applies to you, how it will affect you; and if it does not apply, whether it is beneficial to opt in to the TBOC before 2010.

Mortgage Fraud: Identifying the Problem and Seeking Help

By J. Allen Smith

Mortgage fraud has been a source of increasing concern in the mortgage lending community. One of the fastest growing white-collar crimes in the United States, mortgage fraud occurs when borrowers or industry professionals make material misstatements, misrepresentations, or omissions to lenders or underwriters in connection with funding, purchasing, or insuring loans. There are generally two types of mortgage fraud: fraud for property, and fraud for profit.

Fraud for property, also known as fraud for housing, usually involves a borrower perpetrating fraud to secure an affordable loan because the borrower is otherwise financially incapable of legally securing that financing. The typical case involves a borrower misrepresenting his income, his personal debt, and/or the property value in order to qualify for financing otherwise unavailable to him. Often the borrower desperately wants the property and actually intends to repay the loan. It is not uncommon for the borrower to be coached by unscrupulous industry professionals. According to FBI reports, fraud for property accounts for roughly 20 percent of all mortgage fraud.

The more common form of mortgage fraud is fraud for profit, which is generally committed by industry professionals rather than borrowers. These cases typically involve industry insiders with no interest in the property and no intent to ever repay the loan. They make numerous gross misrepresentations on items including the borrower's income, assets, debts, credit history, or employment, with the misstated items often being backstopped by co-conspirators. They also seek to artificially inflate the sales price over the listing price or market value, often by amending the sales contract, obtaining a fraudulent appraisal, or flipping the property in successive transactions between related entities. Down payments often do not exist or are borrowed and disguised with a fraudulent gift letter. The inflated property value or sales price is used to make up for the lack of a down payment and fraudulently generate cash proceeds. Other common scenarios involve contract and loan conditions providing for purported future improvements, with contractors providing false or inflated estimates and never performing the work.

As the problems mount, lenders and their attorneys are looking to the law for help. Currently, a federal statute requires Fannie Mae and Freddie Mac to report any suspicious mortgage lending activity. The FBI and HUD investigate large-scale fraud operations and ultimately seek to indict conspirators under federal mail, wire, and bank fraud statutes. Prosecutors typically seek restitution payments to compensate defrauded lenders, but guilty parties also potentially face jail time, such as up to 30 years in federal prison for a single count of bank fraud.

Texas law also provides avenues of protection for lenders, including the imposition of both criminal and civil liability on parties committing mortgage fraud. It is a criminal offense, for example, to obtain property or credit by knowingly making materially false or misleading written statements, and violators potentially face first-degree felony charges. Lenders seeking to recover foreclosure deficiencies or other losses resulting from mortgage fraud can file civil suit asserting common law claims such as fraud. The effectiveness of the current legal framework has come into question recently, and state lawmakers have proposed several bills to improve lenders' options. Thus far, however, none of the proposed bills has survived committee.

Lenders seeking help with ways to identify or prevent mortgage fraud can contact the FBI, the Texas Real Estate Commission, the Texas Department of Savings and Mortgage Lending, or the Texas Department of Insurance. If you would like help coordinating with these agencies, or if you have any further questions or comments concerning mortgage fraud, please feel free to contact J. Allen Smith or J. Garth Fennegan of Settle-Pou at (214) 520-3300.

J. Allen Smith

Areas of Practice:

Business Litigation, Financial Institution Litigation, Condemnation Law, Legislation and Regulatory Affairs, Real Estate Litigation and Appellate Law

Meet Your Lawyers:

Robert L. Pou III

Robert L. Pou III

Areas of Practice:

Financial Institutions, Mortgage Banking Regulation and Lending, SBA and USDA Lending, Loan Workouts and Restructuring, Acquisitions and Divestitures, Business Entity Creation, Commercial Leasing, Commercial Property Development, Asset Recovery, Commercial Bankruptcy, Lender Liability and SBA Liquidation

Hometown: *Dallas, Texas*

College: *Southern Methodist University*

Law School: *Texas Tech University*

Family: *Wife, Cindy; two sons, Robin and Lathram*

Personal Favorites:

- **Food:** *Mexican*
- **Drink:** *Cerveza*
- **Hobby:** *Spending quality time with family and friends*
- **TV Show:** *Boston Legal (just kidding); 24*
- **Old Movie:** *The Big Chill*
- **Recent Movie:** *Walk the Line*
- **Book:** *Any type of self-improvement book*
- **Music:** *Country and Oldies*
- **Vacation:** *Cedar Creek Lake*
- **Sport:** *Walking and Cycling*
- **Sports Team:** *Dallas Cowboys*

What do you consider as the most important qualities of a good lawyer?

Counseling our clients in a manner to effectively conduct their business in ways to prevent needing legal services. Providing excellent legal services to our clients in a timely and cost-effective manner — "big-firm expertise coupled with small-firm attention."

Meet Your Legal Support Team:

April Houser

April Houser

Position: *Legal Assistant*
Hometown: *Lancaster, Texas*
Family: *Husband, Craig; two children, Logan (age eight) and Brayden (age four)*
Personal Favorites:

- **Food:** *Mexican*
- **Drink:** *Flavored Tea*
- **Hobby:** *The boys' activities, tennis and gardening*
- **TV Show:** *CSI and Two and a Half Men*
- **Old Movie:** *A World Apart*
- **Recent Movie:** *Glory Road*
- **Book:** *40 Days of Purpose*
- **Music:** *Contemporary Christian*
- **Vacation:** *We try to plan our family vacations to places we have not been before, to experience new adventures.*
- **Sport:** *Love all sports*
- **Sports Team:** *All local sports teams*

April grew up in Lancaster, Texas, as the daughter of a high school football coach; therefore, sports were a big part of her life. Hard work and a determination to succeed were the expectations of her family. April continues to maintain this work ethic as an adult with her career and family. April has always loved the law. She has been with SettlePou for almost 17 years and enjoys the satisfaction she experiences working with lenders and borrowers to close transactions and help them achieve their goals.

Recent Insurance Developments in Texas Courts

By H. Norman Kinzy

The following recent developments in Texas Courts may be of interest:

• NO BAD FAITH WHEN NO COVERAGE EXISTS UNDER INSURANCE POLICY:

In *Progressive County Mutual Insurance Co. v. Boyd*, No. 04-0055, 48 TSCJ 1020 (Tex. 2005), the Supreme Court held that where there was no coverage under an automobile policy for physical damage to an automobile, there can be no liability as to bad faith and extracontractual claims, even if the trial court erred in granting a summary judgment as to those extracontractual claims.

The Supreme Court further held if the insured's claim is not covered by the policy, there can be no liability under Art. 21.55, the Texas Prompt Payment Of Claims Act, and that since the common law bad faith standard is the same as the statutory standard, an insured's claim for treble damages predicated on bad faith pursuant to Art. 21.21, Texas Insurance Code, or Section 17.46 of the Texas Deceptive Trade Practices Act, must likewise fail.

• ADDITIONAL INSURED ENDORSEMENT TO CGL POLICY:

In *Atofina Petrochemicals, Inc. v. Continental Casualty Co.*, No.04-0170, 49 TSCJ 225 (Tex. 2005), the Supreme Court dealt with coverage for an additional insured in a case involving injuries to an employee of an independent contractor. In holding that the premises owner was entitled to coverage under the independent contractor's policy, the court interpreted the "additional insured endorsement" to require coverage for the landowner despite the fact that the landowner had only orally accepted the independent contractor's written construction proposal and despite the fact that the certificate of insurance evidencing the landowner as an additional insured was not issued prior to the accident.

• DUTIES OWED BY INSURER UNDER CGL POLICY TO INSURED CONTRACTOR:

In a case involving frequently litigated issues in Texas with conflicting rulings by intermediate State and Federal Courts, the Texas Supreme Court has accepted certified questions from the U.S. Court of Appeals for the Fifth Circuit in *Lamar Homes, Inc. v. Mid-Continent Casualty Company,* No. 05-0832. The questions upon which the Texas Supreme Court may rule include coverage under a commercial general liability policy where a home buyer sues his general contractor for construction defect, *inter alia*, as well as whether Article 21.55, Texas Insurance Code (our "Prompt Payment of Claims Act") applies as to a CGL insurer's breach of its duty to defend. We will be watching this case with interest and will report further.

For more information, contact H. Norman Kinzy of SettlePou at (214) 520-3300 or nkinzy@settlepou.com.

H. Norman Kinzy

Areas of Practice:

Aviation, First Party Insurance Claims, Insurance Coverage Litigation, Insurance Subrogation, Third Party Liability Claims and Business Litigation