BIG-FIRM EXPERTISE COUPLED WITH SMALL-FIRM ATTENTION SM

SettlePou Newsletter

SettlePou
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SettlePou Celebrates 30 Years

SettlePou
ATTORNEYS ▪ COUNSELORS
30th ANNIVERSARY

SettlePou is excited to be celebrating its 30th anniversary this year. What started out as a casual discussion between two boyhood friends during their final year of law school, ultimately led to the formation of a law firm that has withstood the test of both time and the many fluctuations in our local and national economies. Over the past thirty years, there has been a lot of change worldwide — the introduction and growth of personal computers, the tearing down of the Berlin Wall and the proliferation and use of the Internet, to name a few. Within this same time period, there have also been many changes at SettlePou.

Thirty years ago, the Firm focused solely on commercial lending and real estate transactions. Its first location was a three-room office located at the corner of Mockingbird and Central, right next to what is now Mockingbird Station. Co-founders Jay Settle and Robert Pou remember Brookhollow Bank as one of the Firm's very first clients. "Brookhollow was acquired by Regions Bank," said Pou, "and they are still a client of our firm." Now with over thirty attorneys covering six major practice areas and a variety of sub-specialties, SettlePou has outlived many of the firms that were in existence when the doors first opened in 1978. Despite the Firm's tremendous growth, and the expansion of its practice areas and client base, those within the Firm have never lost sight of the values and principles which led to the Firm's success.

Allen Smith, President of the Firm and Chairman of its litigation practice group, attributes the growth and success of the Firm to its people. "We hire quality people," commented Smith. "As a firm, we have a very clear understanding of who we are and where we are going, and we hire and retain the people who believe in our mission and who exhibit the qualities outlined in our Firm's core values."

Each employee at SettlePou embraces the Firm's humble beginnings and recognizes that the growth of the Firm, and its client base, is a direct result of the Firm's client-oriented mindset. The Firm's motto, "Big Firm Expertise, Coupled With Small-Firm Attention," acknowledges SettlePou's expanded client base, national reputation, and diverse practice areas, while highlighting the quality of which it is the most proud – each employee's unwavering commitment to provide superior service and product excellence. "That's what distinguishes SettlePou from other firms", commented Smith. "That's who we are; that's our DNA."

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Attorneys:

- Bradford E. Adatto
- Brian Baker
- Michael S. Byrd
- Scott J. Conrad
- Marsha L. Dekan
- J. Garth Fennegan
- Don Gwin
- Barry D. Johnson
- Katherine L. Killingsworth
- Norman H. Kinzy
- Oliver B. Krejs
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- Michael P. Menton
- Kelly J. Middleton
- Carl W. Morgan
- Jeff Mosteller
- David M. O'Dens
- Jeremy Overbey
- Jeffrey J. Porter
- Robert L. Pou III
- Sharon Reuler
- John D. "Jay" Settle
- J. Allen Smith
- Kerry M. Southerland
- James M. Stanford
- Michael R. Steinmark
- Andrew D. Thomas
- Steven M. Thomas
- Daniel P. Tobin
- Cliff A. Wade

SettlePou Celebrates 30 Years *… Continued from Page 1*

Smith also pointed to the Firm's clerkship program as helping to improve the Firm's measured growth over the years. "In the mid-90's, the firm began a structured clerkship program, formally recruiting top law students as clerks to work at the Firm during their law school summer breaks," said Smith. "The goal of this program was, and is, to discover and hire the best young talent, and it has worked out very well for us." SettlePou has doubled in size since implementing the clerkship program, and today this program is the backbone of the Firm's hiring process. Thirteen of the attorneys within the Firm are a product of that clerkship program.

As SettlePou reflects on its past, it also looks forward to the future. "We have obviously learned a lot over the past 30 years," said Smith, "and we are constantly looking for ways to better ourselves and improve every aspect of the services we provide to our clients. We are a great firm, with a lot of exceptionally talented people, and we are getting better and better every day. I am excited to think about where this Firm will be thirty years from now."

Insurance Update

By H. Norman Kinzy

Over the past several months, the Texas Supreme Court has handed down several important decisions pertaining to the insurance industry.

<u>Insurer Must Show Prejudice in Late Notice Cases:</u>

In *PAJ, Inc. v. The Hanover Insurance Co.*, 05-0849 (Tex., Jan 11, 2008), the Supreme Court dealt with whether an insured's failure to timely notify its insurer of a copyright infringement claim defeated coverage under a CGL policy providing coverage for "advertising injury." The insured failed to notify the insurer until four to six months after litigation commenced. Noting that "an immaterial breach does not deprive the insurer of the benefit of the bargain and thus cannot relieve the insurer of the contractual coverage obligation," the Court held that an insured's failure to timely notify the insurer of an alleged "occurrence" or "offense" as soon as practicable" as required by the Policy did not defeat coverage in the absence of prejudice to the insurer. Thus, the Supreme Court has arguably overruled, in broad fashion, long standing precedent in Texas, and held that insurance policies which are subject to Texas law require prejudice to the insurer before the insured's breach of policy terms and/or conditions will preclude coverage.

<u>Insurer's Subrogation Rights and the "Made Whole" Doctrine :</u>

In *Fortis Benefits v. Cantu*, 05-0791 (Tex. 2007), a case involving subrogation to recover medical benefits paid by an insurer, our Supreme Court discussed the "made whole" doctrine which is an equitable rule that an insurer is not entitled to subrogation unless the insured had been "made whole," and held that the "made whole" doctrine does not prevail over an insurer's contract-based right of subrogation. The Court noted that there are three varieties of subrogation – equitable, contractual, and statutory – and held that, while related, these three theories are independent of each other, and not co-equal. The legal maxim that "equity follows the law" requires equitable doctrines to conform to contractual choices and statutory mandates, and not the other way around.

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Where a valid contract prescribes particular remedies or imposes particular obligations, equity generally must yield unless the contract violates positive law or offends public policy. Neither subrogation nor reimbursement clauses violate Texas public policy, *e.g.,* the Texas workers compensation statute specifically embraces an insurer's first-money right of subrogation. Thus, replacing equitable protections with specific contract language is proper in Texas law, and parties are free to contractually negate the "made whole" doctrine and to do so before an event occurs that triggers medical benefits under a policy of insurance.

Third Party Administrators – Fiduciary Duties or Lack Thereof:

In *National Plan Administrators, Inc. v. National Health Insurance Company*, 05-0006, (Tex. 2007), the Texas Supreme Court discussed the relationship between a third party administrator ("TPA") and an insurer with whom the TPA had a contract to administer cancer insurance policies, and held that the Texas Insurance Code does not impose a general fiduciary duty upon insurance agents or upon third party administrators. Rather, the duty of an agent such as a third party administrator must be analyzed in conjunction with various factors to determine not only the scope of the TPA's duties in general, but also as to the TPA's fiduciary duties, if any, and such duties are defined by not only the nature and purpose of the agency relationship, but also by the contractual agreements in effect between the TPA and its principal insurer. Although some tasks, such as the holding of funds on behalf of insurance companies, are normally looked upon as a fiduciary relationship, other duties are not. In this particular case, where the TPA represented other insurers and its contract with the insurer specified that the TPA was to be an "independent contractor" whose activities in administering and marketing insurance products were not exclusive to the principal in question, the Court held that the TPA did not owe a fiduciary duty to the particular insurer.

"Where a valid contract prescribes particular remedies or imposes particular obligations, equity generally must yield unless the contract violates positive law or offends public policy."

Medical malpractice – Two year statute of limitations:

In *Yancy v. United Surgical Partners Internat'l, et al.,* 05-0925 (Tex. 2007), the Texas Supreme Court held that an adult incapacitated plaintiff who was represented by a guardian who timely filed suit against some defendants but not others, was barred from suing additional defendants by the absolute two year statute of limitations applicable to medical malpractice cases. The court left the door open for other cases involving other incapacitated plaintiffs under other circumstances, where the same result might not occur.

Co-Insurance Clauses – No Rights of Contribution Between Co-Insurers:

In *Mid-Continent Ins. Co. v. Liberty Mutual Ins. Co.*, 05-0261 (Tex. 2007), the Supreme Court dealt with two insurers which provided primary liability insurance coverage to the same insured under two CGL policies containing "other insurance" clauses providing for equal or "pro-rata" sharing between co-insurers. One of the two insurers also provided excess insurance through a separate excess policy. The claims of the injured plaintiffs against the common insured were settled by unequal payments from the two co-insurers. The co-insurer which paid the most (probably because of greater coverage at risk under its primary and excess policies), then sought contribution from the under-paying co-insurer which had issued only a primary policy, but which had refused to pay a full pro-rata share of the settlement.

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Insurance Update ...Continued from page 3

The Supreme Court held that under these circumstances, the over-paying insurer was not entitled to recover from the under-paying co-insurer, because there was no actionable duty owed (either directly or by way of subrogation to the insured's rights) by the underpaying insurer to the overpaying insurer which would require reimbursement of the latter by the former. The Court reaffirmed its earlier decision that there was no direct right of contribution available to the over-paying co-insurer because of the existence of the "pro-rata" clauses in the CGL policies. The Supreme Court then held that there was no right of subrogation available to the over-paying insurer because subrogation requires an insurer to stand in the shoes of the insured, and the joint settlement had made the insured whole. Therefore, the insured had no claim remaining against the under-paying insurer, to which the over-paying insurer could be subrogated. Finally, the Supreme Court declined to expand the Texas *Stowers* doctrine to create a common law "duty to act reasonably when handling an insured's defense - including reasonable negotiation and participation in settlement" which an over-paying insurer could utilize against a co-insurer which paid less than a pro-rata share.

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How the New Anti-Markup Rules Will Control a Physician's Ability to Bill and Collect Medicare, Even with the Delay; and Stark II, Phase III Final Rule is Released

By Bradford E. Adatto

Editor's Note: *Based on the release of the Phase III Final Regulations for Stark II and the adoption of the final changes to the Medicare Physician Fee Schedule for 2008, SettlePou has delayed the publication of the second part of the three-part series on protecting physician's professional and personal assets to publish this article. SettlePou will resume the three-part series in the next Newsletter.*

Since 1989, when the original self-referral prohibition was enacted with the purpose of prohibiting physicians from referring patients for laboratory services, the federal government has slowly made it more difficult for a physician to receive reimbursement for "self-referrals." With the release of the Medicare Physician Fee Schedule of 2008, the federal government has made it even less profitable for physicians that fall outside of certain provisions, specifically the Anti-Markup Rule. This article will briefly describe the Anti-Markup provisions of the Physician Fee Schedule, and some changes with the release of Phase III of Stark II, commonly referred to as Stark Law. It is important to note that on December 28, 2007, the Centers for Medicare and Medicaid Services ("CMS") delayed certain aspects of the new Anti-Markup Rule until January 1, 2009.

Introduction

Stark II, Phase III. On September 5, 2007, CMS issued the third phase of its final regulations addressing the federal physician self-referral ban, Stark Law. Phase III became effective on December 4, 2007.

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Meet Your Legal Support Team:

Cindy Hawkins

Position:
Administrative Assistant

Hometown:
Lompoc, California

Family:
Husband, Charlie; two daughters, Okeyma and Latrice; and son, Charlie II

Personal Favorites

Food:
Grilled steak and lobster and a good salad with Italian dressing

Drink:
Margarita

Hobby:
Crocheting, decorating and walking

TV Show:
Anything on HGTV

Old Movie:
Calamity Jane

Recent Movie:
Snow Buddies

Book:
Bible

Music:
Christian rock, light R&B and some country

Vacation:
California, Florida and Bahamas

Sport:
Baseball

Sports Team:
Any team Charlie II plays on!

Cindy Hawkins has been with SettlePou for five years. In 2003, she began as an office clerk with David Turner. In 2004, she began working in Human Resources as an Administrative Assistant.

Cindy Hawkins

Cindy Hawkins is an Administrative Assistant in SettlePou's Administration Group.

Meet Your Lawyers:

Don Gwin

Hometown:
Ada, Oklahoma

College:
Oklahoma University

Law School:
Oklahoma University

Family:
Wife, Marianne; daughter, Adrianne; and son, Evan

Personal Favorites

Food:
Baked Potato

Drink:
Water and Heineken

Hobby:
Gardening

TV Show:
Lost

Old Movie:
To Kill a Mockingbird

Recent Movie:
Blood Diamond

Book:
The Black Swan and The Secret

Music:
Country

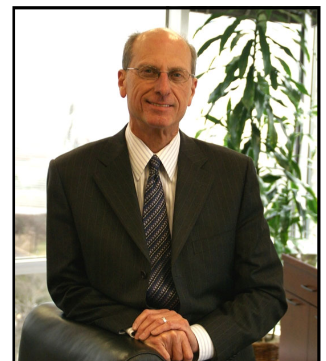
Vacation:
Hawaii

Sport:
Hiking and Snow Skiing

Sports Team:
Oklahoma Sooners

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

Effective communication to include good listening, thoughtful solutions, decisive implementation and critical analysis of results.



Don Gwin

Areas of Practice:
SBA and USDA Lending and Loans; Real Estate Lending; Financial Institutions; Loan Workouts and Restructuring; Commercial Foreclosures; Asset Recovery; Bankruptcy; Lender Liability; and Financial Institution Litigation

How the New Anti-Markup Rules Will Control a Physician's Ability to Bill and Collect Medicare

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In general, Stark Law prohibits a physician from referring Medicare patients from certain designated health services ("DHS") to entities with which the physician (or family member) has a financial relationship, unless an applicable exception applies.

Phase III provides more insight as to how CMS will enforce the Stark Law.

Physician Fee Schedule – Anti Markup of Diagnostic Studies

On November 1, 2007, CMS published the Final Changes to the Physician Fee Schedule. Among many changes in the Fee Schedule was added a new Stark-related rule that makes changes to the reassignment and physician self-referral rules relating to diagnostic tests, commonly referred to as the Anti-Markup restrictions. Medicare rules currently prohibit marking up the technical component of certain diagnostic test. The new Anti-Markup Rule was going to be more restrictive by including technical and professional components. The effects from these changes were to take place on January 1, 2008. However, CMS failed to clearly define certain key terms of the Anti-Markup Rule. As such, CMS has delayed implementing the Anti-Markup Rule except for those outlived in this Newsletter.

New Restrictions

A. Stark II, Phase III. Phase III is anticipated to address the primary concerns of the industry, and protect the beneficiaries of the federal health care program. There are numerous comments and new definitions that are addressed in Phase III. Some highlights are as follows:

"In general, Stark Law prohibits a physician from referring Medicare patients from certain designated health services ("DHS") to entities which the physician (or family member) has a financial relationship, unless an applicable exception applies."

Physician Recruitment

Under Phase II, an Employer of a physician could not restrict the physician with a non-compete clause if the physician had entered into a physician recruitment agreement with a hospital. However, under Phase III, practice restrictions are permitted if the covenants do not "unreasonably restrict the recruited physician's ability to practice medicine in the geographic area served by the hospital." CMS has not defined what it considers "reasonable restrictions" but meeting a state laws interpretation of the reasonable restrictions most likely will be permitted.

Financial Relationship - Compensation, and Ownership or Investment Interest

(a) Ownership of Security Interest in Equipment. Phase III clarified that ownership or investment interest does not include a security interest in the equipment of a hospital held by a physician who both sold the equipment to the hospital and financed his purchase through a loan to the hospital.

(b) Stand in the Shoes. Phase III also adds a new requirement known as the "stand in the shoes" provision. CMS now requires that referring physicians will be treated as "standing in the shoes" of their group practices (and certain other physician organizations) for purposes of applying the rules that describe direct and indirect compensation arrangements. This basically means that the financial relationship between the physician and compensating party will be collapsed into the group practice, thus adding a new focus on the arrangements.

There are many new changes under Phase III that are not discussed in this Article. Parties entering into financial arrangements with physicians should review and confirm that their business transactions meet the applicable Stark Law exceptions.

B. Anti-Markup. The Anti-Markup provision provides a Stark Law like requirement on diagnostic tests. It basically will impose additional Anti-Markup restrictions on technical and professional components. The rule will apply when a physician or other supplier bills for the technical or professional components of diagnostic tests and the test is: (1) Purchased from an outside supplier (not an employee of physician), or (2) Performed at a site other than "offices of the billing physician or supplier."

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How the New Anti-Markup Rules Will Control a Physician's Ability to Bill and Collect Medicare *... Continued from Page 6*

If the Anti-Markup provision applies, payment to the billing physician or other supplier for the technical or professional components must be the lower of:

The performing supplier's "Net Change" to the billing physician or other supplier;

The billing physician's or other suppliers' actual charge; or

The fee schedule amount for the test that would be allowed if the performing supplier billed Medicare directly.

Of the three above requirements, the vast majority of transactions will follow the first requirement.

The Anti-Markup provision requires that the "Net Charge" be determined "without regard to any charge that is intended to reflect the cost of equipment or space leased to the performing supplier by or through the billing physician or other supplier. The group or supplier can only charge for the salary and benefits of the personnel performing the diagnostic test." As such, the federal government has effectively found a way to make it close to unprofitable to bill it, if a transaction does not meet the Anti-Markup provision. The non-delayed Anti-Markup provisions which will apply in 2008 are as follows:

The technical component of a purchased diagnostic test; and

Any anatomic pathology diagnostic testing furnished in space that: (1)is utilized by a physician group practice as a "centralized building" (as defined by Stark Law) for purposes of complying with the physician self-referral rules; and (2)does not qualify as a "same building" under Stark Law.

CMS felt that the anatomic pathology testing arrangements are one of CMS' core concerns with potential abuse by physicians. As a result, it chose not to delay this portion of the Anti-Markup Rule. Finally, CMS chose not to delay the applicability of the Anti-Markup Rule, as it relates to the technical component for diagnostic tests, because such arrangements will violate longstanding Anti-Markup Rules.

This is not a Stark Law rule, but a billing and collection rule. If a physician fails to meet the imposed additional Anti-Markup restrictions, a physician will not be subjected to any Stark Law fines, but will implicate the False Claims Act if the physician bills in violation of these new rules. As such, physicians or suppliers that work with diagnostic tests should examine their business arrangements to confirm that they will meet the non-delayed 2008 Final Physician Fee Schedule Anti-Markup provision.

Conclusion

"Clearly, the federal government continues to provide more restrictions on the ability for physicians to own and bill for diagnostic tests."

Clearly, the federal government continues to provide more restrictions on the ability for physicians to own and bill for diagnostic tests. Phase III continues to clarify CMS' interpretation and enforcement of Stark Law. However, even if a physician meets an applicable Stark exception, the physician will also need to meet the non-delayed Anti-Markup qualifications to bill and collect from the federal government as it relates to certain diagnostic tests. Over the next year, CMS plans on closing the gaps and conflicts between the Anti-Markup provision and Stark Law. Once resolved, providers will need to make sure that they meet both requirements. Physicians should contact an attorney prior to entering into any financial arrangements based on these new changes to assure that the transactions will not be prohibited.

For more information, contact Michael S. Byrd (mbyrd@settlepou.com) or Bradford E. Adatto (badatto@settlepou.com) of SettlePou at (214) 520-3300.

Judgment Liens vs. Texas Homesteads: Down for the Count?

By David M. O' Dens

Perhaps one of the most famous lines in American pugilism was Muhammad Ali's: "Float like a butterfly, sting like a bee." For decades, judgment creditors and judgment debtors have been trading punches in the post-judgment ring, either in an effort to collect judgments owed or to avoid paying the same. The ebb and flow of this fight has seen the exchange of heavy punches, sometimes staggering one or the other. Now, the Texas Legislature may have delivered a knock-out blow to judgment creditors.

The fight usually starts the same. In the first round, a creditor secures a judgment against a debtor and then files an abstract of the judgment in every county where the debtor possesses, or may possess, real property. The filing of the abstract creates a judgment lien on any real property in that county. TEX. PROP. CODE ANN. § 52.001 (West 2007). Usually, although not always, the judgment lien attaches to the debtor's homestead property. This, in and of itself, is not an issue. The Texas Supreme Court has observed that a lien against a homestead is never valid (in the sense of being enforceable) unless it secures payment for certain debts provided for in the Texas Constitution. TEX. CONST. art. XVI, § 50; *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 660 (Tex. 1996). This does not mean, however, that a lien that is not valid and enforceable is completely without effect. As one Texas Court of Appeals has observed: "Under [the Texas Property Code] statutory provisions, a judgment lien is 'perfected,' or brought into existence against a debtor's property, by recording and indexing an abstract of judgment in the county where the property lies. The debtor's homestead is not exempt from the perfected lien; rather, the homestead is exempt from any seizure attempting to enforce the perfected lien." *Exocet, Inc. v. Cordes*, 815 S.W.2d 350, 352 (Tex. App. – Austin 1991, no writ).

This is true, because as a principle of Texas law, "a judgment lien attaches to the judgment debtor's interest if he abandons the property as his homestead before he sells it." *Hoffman v. Love*, 494 S.W.2d 591, 594 (Tex. Civ. App. – Dallas 1973, no writ). For example, where a debtor acquires a second homestead before selling the first homestead, the first homestead is deemed abandoned and is no longer exempt from seizure. *England v. Federal Deposit Insurance Corp.*, 975 F.2d 1168, 1175 (5th Cir. 1992). Furthermore, if the debtor retains the property as his homestead until he sells it, unless the debtor reinvests the proceeds of the sale in another homestead within six months from the date of the sale, the proceeds are subject to seizure by creditors. TEX. PROP. CODE ANN. § 41.001(c) (West 2007); *Sharman v. Schuble*, 846 S.W.2d 574, 576 (Tex. App. – Houston [14th Dist.] 1993, no writ). Even during this six-month window, if the debtor purchases another homestead, any remaining proceeds from the sale of the first homestead are instantly rendered non-exempt. *England*, 975 F.2d at 1174. Thus, judgment lien holders have a significant interest in filing and maintaining their judgment liens, even against a debtor's homestead property.

As the fight moves toward the middle rounds, the debtor who was attempting to sell his homestead property demands that a judgment lien creditor release the judgment lien so as to not interfere with the sale of his homestead. Although the abstract does not create a lien on the debtor's homestead, it can still create a cloud on the title. Where a judgment lien creditor refuses to release the judgment lien in conjunction with the debtor's sale of his homestead, when requested to do so by the debtor, the judgment creditor may be held liable for damages occasioned by the refusal. *Tarrant Bank v. Miller*, 833 S.W.2d 666, 667-68 (Tex. App. – Eastland 1992, writ denied). Notwithstanding the requirement that a judgment lien creditor release a judgment lien on homestead property when requested to so, the creditor is entitled to evidence that the property is, in fact, a debtor's homestead.

To this end, most judgment lien creditors require that the debtor(s) sign and file in the appropriate county real property records, an affidavit designating the property at issue as their homestead.

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Judgment Liens vs. Texas Homesteads: Down for the Count? … Continued from Page 8

This practice finds support in the Texas Property Code, which provides for the filing of such a voluntary designation of homestead. TEX. PROP. CODE ANN. § 41.105 (West 2007). Indeed, under Chapter 41, Subchapter B entitled "Designation of a Homestead in Aid of Enforcement of a Judgment Debt," the judgment creditor may force the judgment debtor to elect his homestead and file such a designation. TEX. PROP. CODE ANN. § 41.021 *et seq.* (West 2007).

That procedure has now been amended by the Texas Legislature, effective September 1, 2007. A new section to Chapter 52, Subchapter A of the Texas Property Code was enacted to address homestead property interests and the release of judgment liens. TEX. PROP. CODE ANN. § 52.0012 (West 2007). Under this new provision, entitled "Release of Record of Lien on Homestead Property," a judgment debtor may now avoid *and* remove an abstracted judgment lien without the judgment creditor signing a release of that lien. The judgment debtor does so by first preparing and then later filing a prescribed form of an affidavit in the real property records of the county in which the homestead is located. TEX. PROP. CODE ANN. § 52.0012(b) (West 2007). Once filed, if a judgment creditor does not respond to the filing, the affidavit "serves as a release of a judgment lien," upon which a bona fide purchaser or a mortgagee for value (including successors and assigns) "may rely conclusively," so long as the affidavit complies with the statutory requirements. TEX. PROP. CODE ANN. § 52.0012(c) & (d) (West 2007).

The affidavit must state that the judgment debtor: (1) sent a letter and a copy of the affidavit (without attachments and before execution of the affidavit), notifying the judgment creditor of the affidavit and the judgment debtor's intent to file it of record; and (2) the letter and affidavit were sent by registered or certified mail, return receipt requested, at least thirty days before the affidavit was filed, (a) to the judgment creditor's last known address; (b) to the address appearing in the judgment creditor's pleadings in the underlying lawsuit (if different from the last known address); (c) to the address of the judgment creditor's last known attorney as shown in those pleadings; and (d) to the address of the judgment creditor's last known attorney as shown in the records of the State of Bar of Texas. TEX. PROP. CODE ANN. § 52.0012 (d) (1) & (2) (West 2007).

However, the affidavit will not result in a release of the judgment lien if the judgment lien creditor files a contradicting affidavit in the real property records of the county in which the property is located asserting that: (1) the affidavit filed by the judgment lien debtor is untrue; or (2) "another reason exists as to why the judgment lien attaches to the judgment debtor's property." TEX. PROP. CODE ANN. § 52.0012(e) (West 2007). The new statutory provision does not address two very important issues. First, the new statute does not set a deadline or a timeframe for a judgment creditor to file its contradicting affidavit. Because the new statute provides that a *bona fide* purchaser or mortgagee may rely upon the judgment debtor's filed affidavit "conclusively," a judgment lien creditor will necessarily have to file its contradicting affidavit almost immediately upon the expiration of the thirty-day notice. Second, assuming that such a contradicting affidavit is filed, the new statute does not provide a procedure or mechanism for resolving the dispute. Presumably, the parties will be left to pursue litigation to resolve the dispute, with the attendant risk that if the judgment creditor is wrong, it may be held liable for damages.

> *"Under this new provision, entitled "Release of Record of Lien on Homestead Property," a judgment debtor may now avoid and remove an abstracted judgment lien without the judgment creditor signing a release of that lien."*

It appears that the Texas Legislature has now added a haymaker punch to the homestead judgment debtor's arsenal of punches. If a judgment creditor is not careful, it may find itself on the canvas only to learn that it has been counted out of the fight. As George Foreman quipped: "There's more to boxing than hitting. There's not getting hit, for instance."

For more information, contact David M. O'Dens of SettlePou at odens@settlepou.com or (214) 520-3300.

Is a Limited Liability Company Always the Right Choice?

By James M. Stanford

Given the significant flexibility of a limited liability company ("LLC") in terms of formation, corporate governance, and tax status, LLCs are emerging as the preferred entity choice for private business. However, because of a recent ruling in the case *McNamee v. Department of Treasury, Internal Revenue Service* 488 F. 3d 100 ("*McNamee*"), a careful evaluation of your business objectives, financial and tax considerations, and desired level of liability protection should be made in determining the right entity for your situation. In *McNamee*, the Second Circuit Court of Appeals affirmed a federal trial court's ruling that the owner of an LLC can be held personally liable for unpaid payroll taxes of the LLC.

One of the benefits of an LLC, which also may be its Achilles' heel in certain situations, is the ability to elect to treat the entity as a corporation or a partnership (or sole proprietorship if only one member) for federal tax purposes. An LLC exercises that option simply by filing IRS Form 8832 to elect to be treated as a corporation. In the absence of such an election, an LLC that has only one owner is disregarded as a separate entity and will be treated as a sole proprietorship for tax purposes.

According to the Treasury Regulations of the Internal Revenue Code, as discussed by the court in *McNamee*, if a single-member LLC elects to be treated as a corporation, the owner will avoid tax liabilities that may otherwise fall upon him if the LLC were disregarded as an entity. However, the owner is subject to double taxation since the LLC is taxed once at the corporate level and once at the shareholder level. If a single-member LLC elects not to be treated as a corporation, either by affirmative election or by default, the owner will be liable for the tax obligations incurred by the LLC, but the owner will avoid double taxation.

Sean McNamee was the single-member owner of the now-defunct accounting firm W.F. McNamee & Company, LLC ("WFM, LLC"), which on average employed six persons. Mr. McNamee did not elect to have WFM, LLC treated as a corporation for tax purposes. Thus, under the Treasury Regulations, the LLC was disregarded as a separate entity and was treated as a sole proprietorship for federal tax purposes. WFM-LLC failed to make some of its required payments of payroll taxes with respect to its employees. The IRS assessed those taxes against Mr. McNamee personally and placed a lien on his property, having disregarded WFM-LLC as a separate entity. The court ruled against Mr. McNamee, and he was found personally liable for the unpaid payroll taxes. It is unclear whether the case will be appealed to the Supreme Court.

However, it is important to note that the IRS proposed Treasury Regulations in 2005 would eliminate this liability. Although the proposed regulations had no bearing on the case in McNamee, since they have not been adopted, it is a good sign of what the law may eventually be with respect to LLCs and payroll taxes. The proposed regulations would treat subchapter S subsidiaries and single-owner eligible entities that currently are disregarded as entities separate from their owners for federal tax purposes (e.g., single-member LLCs), as separate entities for employment tax and related reporting requirement purposes. According to the proposed regulations, the Treasury Department and the IRS believe that treating the disregarded entity as the employer for federal employment taxes purposes will improve the administration of the laws and simplify compliance.

An LLC may still be an excellent choice for a business in many situations, but these developments highlight the need for careful planning with both your attorney and CPA prior to selecting the type of entity to form for your business.

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