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# SETTLEPOU NEWSLETTER

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2010

## Texas Monthly Selects Allen Smith as a 2010 Texas Super Lawyer

### Four ways to win with SettlePou

BUSINESS • LENDING • LITIGATION • REAL ESTATE

And winner of four... Congratulations to J. ALLEN SMITH, head of SettlePou's litigation practice, named in *Texas Super Lawyers*<sup>®</sup> for the fourth straight year. But he'd be the first to tell you that action beats acclaim. And tough counts more than trophies. That's why SettlePou clients are the real winners. SettlePou's award-winning attorneys deliver award-worthy results in four practice areas critical to today's companies. Also important today: top legal services respectful of your bottom line. That's a *win-win* for everyone.

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J. Allen Smith: Board Certified, Civil Trial Law, Texas Board of Legal Specialization since 1992



J. Allen Smith

Selected for 2010 *Texas Super Lawyers*<sup>®</sup>

For the fourth year in a row, Allen Smith has been selected by the publishers of *Texas Monthly* magazine as one of its *Super Lawyers*. According to the publisher, "Super Lawyers is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement."

The multi-part selection process involves development of a candidate pool from peer nominations, inde-

pendent research and evaluation of candidates, and peer review of candidates. The background and experience of each candidate is assessed based on 12 indicators, including categories like verdicts, settlements, honors and awards, special licenses and certifications, and scholarly lectures and writings.

Allen can be found on pages 38 and 82 of the 2010 *Texas Super Lawyers* magazine, and in the Texas Super Lawyers supplement to the October issue of *Texas Monthly* maga-

zine, both of which have recently hit newsstands. Allen is a shareholder at SettlePou and Chair of its Commercial Litigation practice group. He has been practicing law for over 25 years, and has been Board Certified in Civil Trial Law by the Texas Board of Legal Specialization for 18 of those years.

To learn more about SettlePou's *Super Lawyer*, and about the firm's other attorneys and areas of practice, please visit the firm's website at [www.settlepou.com](http://www.settlepou.com).

### Attorneys:

- BRADFORD E. ADATTO
- BRIAN BAKER
- MICHAEL S. BYRD
- SCOTT J. CONRAD
- MARK T. CRAIG
- MARSHA L. DEKAN
- J. GARTH FENNEGAN
- DON GWIN
- KERRY M. SOUTHERLAND
- BARRY D. JOHNSON
- BYRON L. KELLEY
- KATHERINE L. KILLINGSWORTH
- NORMAN H. KINZY
- OLIVER B. KREJS
- JACOB L. MCBRIDE
- BRADLEY E. MCLAIN
- MICHAEL P. MENTON
- JEFF MOSTELLER
- DAVID M. O'DENS
- JEREMY OVERBEY
- JEFFREY J. PORTER
- ROBERT L. POU III
- JUSTIN M. PUCKETT
- JAY D. REYERO
- THOMAS SCANNELL
- JOHN D. "Jay" SETTLE
- J. ALLEN SMITH
- JAMES M. STANFORD
- MICHAEL R. STEINMARK
- STEVEN M. THOMAS
- DANIEL P. TOBIN
- CLIFF A. WADE
- KENT D. WILLIAMSON

## High Standard to Plead, Low Standard to Grant Leave: *Ashcroft v. Iqbal*'s Limited Impact

By J. Allen Smith



In 2009, the U.S. Supreme Court in *Ashcroft v. Iqbal* adopted a new standard for pleading a cause of action in federal court. The two-step inquiry first identifies allegations that are mere conclusions in order to disregard them. Courts then determine whether the remaining non-conclusory allegations, accepted as true, plausibly suggest an entitlement to relief.

At first blush, the plausibility prong appears to hold plaintiffs to a heightened pleading standard: in order to survive a motion to dismiss, a plaintiff must plead sufficient factual allegations not just to show that it is “possible” that he is entitled to relief, but further that it is “plausible.”

Yet a recent study by the

Judicial Conference Committee on Rules of Practice and Procedure reveals that since *Iqbal*, there has been no dramatic change in the pleading standard. On the contrary, dismissals have increased only slightly, lower courts are eager to grant leave to amend, and it’s impossible to tell how many of the initially dismissed cases were reinstated following a second (and even third) chance at stating a “plausible” claim.

### Impact on Pleadings

As noted by Judge Mark Kravitz, Chair of the Judicial Conference, *Iqbal* has not proven to be “a blockbuster that gets rid of any case that is filed.” In fact, even under *Iqbal*, courts have denied motions to dismiss in a wide range of cases from civil rights to commercial litigation, and even claims involving government actions taken to defend the nation against terrorism.

Part of the reason behind this result is that *Iqbal* simply reaffirmed the importance of notice pleading. In other words, any assertion without some factual allegation would have been unlikely to satisfy Fed. R. Civ. P. 8(a)(2)’s “short and

plain statement” standard anyway. It should come as no surprise then that *Iqbal* has become one of the most cited Supreme Court decisions of all time. The case essentially clarified well-settled law.

Another reason for *Iqbal*'s limited impact is how lower courts have responded to it. Rather than dismissing a complaint outright, it is now *four times* more likely that a court will allow a plaintiff to cure his defective pleading by amending it. In one instance, a district judge granted the plaintiff leave to amend his complaint three times, even though he had already dismissed it two times before. Consequently, even if the Supreme Court did raise the bar on the plaintiff's pleading standard, lower courts have been reluctant to hold them hostage to it.

### Conclusion

*Ashcroft v. Iqbal* certainly had the potential to arm defense attorneys with a more effective tool against unmeritorious claims prior to the summary judgment stage. But lower courts' quick resort to a liberal standard for granting leave to amend a complaint has limited the case's impact.

Nevertheless, defendants should generally consider an *Iqbal* motion. Courts may use

them to narrow the scope of the case, even if they do not dismiss entire claims. Or they may repeatedly grant leave to amend until the plaintiff can meet the plausibility standard. And this, in turn, may place a burden on the plaintiff equal to the one attempted by the Supreme Court.

For more information, contact J. Allen Smith ([asmith@settlepou.com](mailto:asmith@settlepou.com)) of SettlePou at (214) 520-3300. I appreciate the significant contribution to this article by Kristina A. Kiik of SettlePou.

## Meet Your Legal Support Team:

### Melinda Wawak

**Position:**

Administrative Assistant

**Hometown:**

Forney, Texas

**Education:**

H. Grady Spruce High School;  
Trinity Valley Community College

**Family:**

Five children: Brittney, 20; Blake, 18; Hannah, 15; Sarah, 15; and Kylie, 2

**Personal Favorites**

**Food:**

German and Mexican

**Drink:**

Diet Coke and Tall Black Eye from Starbucks

**Hobby:**

Research

**TV Show:**

Nancy Grace

**Old Movie:**

Old Yeller

**Recent Movie:**

Alice in Wonderland  
(Two-year-old rules the TV!)

**Book:**

The Bible

**Music:**

Contemporary Christian and Country

**Vacation:**

Playa Del Carmen or Germany to visit my family.

**Sport:**

Football

**Sports Team:**

Dallas Cowboys

One of my first supervisors gave me an important piece of information that I have taken with me to each job throughout the years: that the most important part of my job was the customer, because without the customer, I would not have a job. With every job I've held, I've applied that principle. It has been a pleasure working as the Receptionist and greeting and meeting our "customers," and now, I am enjoying my new role as Administrative Assistant for SettlePou.



Melinda Wawak

Melinda Wawak is an Administrative Assistant for SettlePou.

## Meet Your Lawyers:

### Byron L. Kelley

**Hometown:**

Athens, TX

**College:**

University of Texas at Austin

**Law School:**

SMU - Dedman School of Law

**Family:**

Niece, Katelyn (10) and nephew, Kyle (7) who live with my sister and brother-in-law, Kathryn and Wayne Stevens, in Murphy, TX.

**Personal Favorites**

**Food:**

8 oz. filet (medium rare) and escolar sashimi

**Drink:**

Crown Royal and water

**Hobby:**

Playing golf, reading and following all Longhorn sports

**TV Show:**

Six Feet Under; It's Always Sunny in Philadelphia; Mad Men; Bored to Death; and Eastbound and Down

**Old Movie:**

Usual Suspects, Labyrinth and Heathers

**Recent Movie:**

Catfish, The Strangers and Michael Clayton

**Book:**

Wind Up Bird Chronicles, Freakonomics and Tipping Point

**Music:**

Ra Ra Riot, Passion Pit, Flaming Lips, Beck and Notorious B.I.G.

**Vacation:**

Carmel, CA

**Sport:**

College football and baseball

**Sports Team:**

Texas Longhorns

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

Humility, writing skills and preparation.



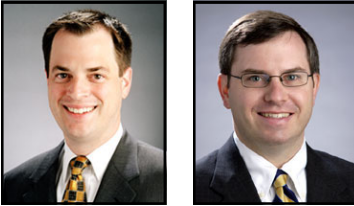
Byron L. Kelley

**Areas of Practice:**

Business Litigation, Lender Liability, Real Estate Litigation, Third Party Liability Claims and First Party Insurance Claims

## Health Care Reform — A Brief Look at Two Arising Issues

By Michael S. Byrd and  
Bradford E. Adatto



### Introduction

As you no doubt recall, in late March of this year President Obama signed sweeping legislation overhauling the health care system. This legislation is commonly referred to as the “Health Care Reform,” or more formally “The Patient Protection and Affordable Care Act of 2010 as amended by the Health Care and Education Reconciliation Act of 2010.” The intent behind the legislation is to improve the quality of care in America and provide millions of Americans with access to health insurance coverage. The law presents a host of new legal requirements, health insurance reforms, and the massive expansion of the federal and states’ health care authority. While it is still much too early to determine the legislation’s success in achieving its purported intent, we can begin examining some of the effects that have become apparent since the legislation was signed into law.

Beginning with this article and continuing with future articles, we will attempt to focus on a few key issues that have arisen or been

clarified through the issuance of interpretative regulations. In this article we will (1) examine the effect on the Federal self-referral law (more commonly known as the Stark laws), and (2) review the constitutional challenges that have been launched against the legislation.

### Federal Self-Referral Law (“Stark”)

One of the effects of the Health Care Reform that is approaching is an expansion of physician disclosure requirements under the In-Office Ancillary Services exception to Stark.<sup>1</sup>

Stark prohibits physicians (or their family members) from referring certain designated health services to any entity where a financial relationship exists between the referring physician and such entity. This prohibition only applies if services are provided to Medicare, Medicaid, TRICARE, or other federally funded patients (“Program Patients”). In addition to the prohibitions, exceptions have been created allowing arrangements that are prohibited under Stark to avoid violating Stark by meeting each and every requirement of the exception. One such exception is the “In-Office Ancillary Services” exception, which allows physicians to provide designated health services within the office of the physician or group practice. There are limitations on who can furnish

the service, where the service can be performed, and who can bill for the service.

The Health Care Reform expands the In-Office Ancillary Services exception to include an additional requirement that physicians must make certain disclosures to patients. This additional disclosure requirement is only applicable to the designated health services magnetic resonance imaging (“MRI”), computed tomography (“CT”), and positron emission tomography (“PET”). Simply, referring physicians must inform patients that they may obtain the services (MRI, CT, PET) from someone other than the referring physician or someone in the physician’s group and must also provide the patient with a list of suppliers who furnish such service.<sup>2</sup>

In implementing this expansion, Centers for Medicare and Medicaid Services (“CMS”) has issued Calendar Year 2011 Physician Fee Schedule Proposed Rule in an attempt to clarify what is required to comply with the disclosure requirement. In the proposed rule, CMS has stated that the following will be required to meet the disclosure requirement:

- The disclosure notice must be given to the patient at the time of the referral;
- A record of the patient’s signature on the disclosure notice must be maintained as an element

- of the patient’s medical record;
- The disclosure notice must indicate to the patient that the services may be obtained from a person other than the referring physician or his or her group practice;
- The disclosure notice must provide patient a list of at least 10 suppliers within a 25 mile radius of the physician’s office location;<sup>3</sup>
- The disclosure notice must include the supplier’s name, address, phone number, and distance from the physician’s office location at the time of referral; and
- Nothing on the notice or supplier list may indicate to the patient that they must receive the services from a supplier on the list if not receiving it from the referring physician.

It is important to note that the above requirements have only been proposed by CMS and may change when the Final Rule is published on or about November 1. CMS has received comments through August regarding the proposed rules and should be analyzing them in an effort to draft the Final Rule. CMS is anticipating a January 1, 2011, effective date for these disclosure requirements to apply so the Final Rule should be closely monitored so proper notices can be prepared accordingly.

*Continued on page 5*

<sup>1</sup>It should be noted that this does not relate to the requirement under Section 102.006 of the Texas Occupation Code that a person commits an offense if the person accepts remuneration to secure or solicit a patient or patronage for a person licensed, certified, or registered by a state health care regulatory agency and does not, at the time of initial contact and at the time of referral, disclose to the patient: (A) the person’s affiliation, if any, with the person for whom the patient is secured or solicited; and (B) that the person will receive, directly or indirectly, remuneration for securing or soliciting the patient.

<sup>2</sup>Suppliers are defined as physicians or other practitioners, facilities, or other entities (other than a hospital, critical access hospital, skilled nursing facility, comprehensive outpatient rehabilitation facility, home health agency, or hospice program) that furnish MRI, CT, or PET services.

<sup>3</sup>It should be noted that the Health Care Reform provides that the list of suppliers should be created based on a radius extending from where the patient resides. However, CMS acknowledged the administrative burden this could cause and the fact that patients may travel outside their residing area to seek medical care. Therefore, CMS proposed a radius from the physician’s office location.

## Health Care Reform — A Brief Look at Two Arising Issues... *Continued from Page 4*

### **Constitutional Challenges**

As many had previously predicted, since its enactment constitutional challenges have commenced against the Health Care Reform. The challenges focus on the application of the mandate that requires individuals to obtain health insurance or otherwise be penalized.

### **State of Virginia Challenge**

The first challenge came from the Commonwealth of Virginia, who argues that the provision in the Health Care Reform requiring individuals to obtain health insurance or be penalized exceeds the Government's power under the Constitution. Specifically, Virginia argues that the Constitution's Commerce Clause, which gives the Government the right to regulate interstate commerce, does not extend to an individual's choice not to participate in economic activity. Virginia also argues that the provision exceeds the Government's authority to tax for the general welfare. In response, the Government filed a motion asking the Court to dismiss the case on the basis that Virginia's complaint failed to include viable claims. After review of extensively researched briefs and oral arguments in support of both sides position, the Court denied the motion, stating:

While this case raises a host of complex constitutional issues, all seem to distill to the single question of whether or not Congress has the power to regulate — and tax — a citizen's decision not to participate in interstate commerce. Neither the U.S. Supreme Court nor any circuit court of appeals has squarely addressed

this issue. No reported case from any federal appellate court has extended the Commerce Clause or Tax Clause to include the regulation of a person's decision not to purchase a product, notwithstanding its effect on interstate commerce. Given the presence of some authority arguably supporting the theory underlying each side's position, this Court cannot conclude at this stage that the Complaint fails to state a cause of action. *Commonwealth ex rel. Cucinelli v. Sebelius*, 702 F. Supp. 2d 598, 615 (E.D. Va. 2010).

As a result, the lawsuit will move forward and we must await the Court's decision after thorough examination of the issues. For more detailed analysis of the issues raised in the motion and the Court's review of the issues, the Memorandum Opinion is Document 84 of Case 3:10CV188-HEH in the United States District Court for the Eastern District of Virginia—Richmond Division.

### **State of Florida Challenge and 19 other States**

The next challenge occurred in Florida where twenty states (including Texas) similarly argued that the requirement on individuals to purchase health insurance is beyond the scope of the Commerce Clause, along with other claims. Once again the Government responded to the lawsuit by filing a motion to dismiss the case. As was the case in Virginia, the Court denied the Govern-

ment's motion as to the claim involving the Commerce Clause, finding that there was a plausible claim to allow the lawsuit to proceed. Once again, we will have to wait for a thorough examination of the issues before we get a final decision by the Court. For more detailed analysis of the issues raised in the motion and the Court's review of the issues, the Memorandum Opinion is Document 79 of Case 3:10-cv-00091-RV-EMT in the United States District Court for the Northern District of Florida—Pensacola Division.

### **State of Michigan Challenge**

Finally, in Michigan, the Thomas More Law Center and four individuals filed a complaint and an injunction against the Government to prevent the application of the mandate requiring individuals to obtain health insurance. After a thorough analysis of the Commerce Clause and the power to tax for the general welfare, the Court denied the injunction and dismissed the claims against the Government relating to these two clauses. The Court found that the Government's regulation of individuals requiring the purchase of health insurance falls within the purview of both the Commerce Clause and the power to tax for the general welfare. For more detailed analysis of the issues and the Court's review of the issues, the Order Denying Plaintiffs' Motion for Injunction and Dismissing Plaintiffs' First and Second Claims for Relief is Document 28 of Case 2:10-cv-11156-GCS-RSW in the United States District Court for the Eastern District of Michigan—Southern Division.

It is important to understand the implications of these constitu-

tional challenges. These challenges are narrowly focused on a single issue within the much larger legislation. Even if all challenges are successful, it would not necessarily mean that the entire legislation would be unconstitutional. It could be that the single provision mandating individuals to have health insurance would be struck down while the rest of the Health Care Reform is left in place. Of course, this provision is so integral to the overall reform that it may indirectly result in the legislation collapsing. Given the differing opinions in the Courts as described above, it will be some time before we have any resolution to these issues. It is likely the Supreme Court will be required to review the issues in order to make a final determination.

For more information, contact Michael S. Byrd ([mbyrd@settlepou.com](mailto:mbyrd@settlepou.com)) or Bradford E. Adatto ([badatto@settlepou.com](mailto:badatto@settlepou.com)) of SettlePou at (214) 520-3300. We appreciate the significant contribution to this article by attorney Jay D. Reyer of SettlePou.

## Understanding Real Estate Secured Note Purchase Transactions

By Jeffrey J. Porter and  
Jeff Mosteller



Since its inception in 1978, SettlePou has represented every imaginable type of party in real estate, lending, and commercial transactions. In that time, there has arguably never been a better environment for the opportunistic acquisition of real estate assets than the one that exists now. However, given the current status of the real estate and financial markets, parties seeking to take advantage of these circumstances must use non-traditional methods to acquire the real estate assets that they covet. One such method is through the purchase of notes secured by the desired real estate – whether commercial mortgage-backed securities (CMBS), commercial bank, or private notes.

SettlePou represents all manner of buyers in these transactions – from large private funds to individual investors. In evaluating a real estate secured note purchase, buyers must determine whether (a) the borrower and/or guarantors of the note being purchased are capable of honoring the terms of

the note, and (b) the value of the property securing the note justifies purchasing a non-performing note (in the event that the purchaser ultimately forecloses on the borrower's interest and becomes the owner of the property). Generally, for collateral to justify purchasing a non-performing note its value must exceed the amount paid for the note plus the expected incidental costs of acquiring the collateral under the terms of the loan documents.

A party investing in real estate secured notes must be prepared to wear two hats throughout the purchase process: that of (i) lender, and (ii) real estate investor. The due diligence associated with evaluating a note purchase must first determine the lender's obligations and rights under the loan documents (including whether any further advances are due to the borrower), whether the borrower has any notice or cure rights which need to be addressed, and whether the lender has its full anticipated scope of remedies upon a borrower default, among other concerns and any lien priority issues. As a potential real estate investment, a proposed note purchaser must also address issues familiar to a more traditional real estate acquisition, such as title, environmental, and property man-

agement issues like leasing, among other issues.

The actual acquisitions process is fairly straightforward – at least in the initial stages – in that the purchaser will enter into a Note Purchase Agreement with a lender that has determined, for one of many reasons (including poor note performance, the note being under-secured, or pressure from regulators) that it must divest itself of the note. While the process has some similarities with a purchase and sale agreement that would be utilized in a traditional real estate transaction, there are also many differences. For example, a Note Purchase Agreement will often contain far fewer of the assurances to which purchasers of real estate are accustomed, for example, far fewer (if any) representations from the seller as to the status of the property.

In non-CMBS transactions, the loan files and documentation may be fairly bereft of records and historical data or have poor organization or retention of correspondence with the borrower, leading to lack of comfort as to the status of the property and, potentially, the note itself. In contrast, due to extensive regulation and oversight, CMBS transactions typically are more heavily detailed and complete in documentation, with up-to-

date property records. This reality is one with which the note purchaser must become comfortable. However, the typical transaction generally involves a discount on the face value of the note, giving the purchaser an opportunity to offset the potential risk.

A carefully drafted Note Purchase Agreement is essential to ensuring a successful transaction. The contract should provide for the seller's unconditional agreement to sell the note and transfer its rights under all other loan documents relating to such note, including the loan agreement, deed of trust, assignment of leases and rents, all guaranties, and any other loan documents. A purchaser must ensure that it can enforce the terms of the loan documents and exercise all remedies against the borrower, including foreclosure, deficiency collection, and actions against guarantors.

The Note Purchase Agreement should contain certain provisions to specifically identify the interests assignable to purchaser. First, the agreement must clearly identify all loan documents and require that seller deliver such original loan documents at closing, including the seller's loan file with all correspondence.

*Continued on Page 7*

### Understanding Real Estate Secured Note Purchase Transactions... *Continued from Page 6*

The agreement must also provide for an assignment of the original lender's title policy, for which purchaser will obtain a policy transfer endorsement from the title company.

As with a standard real estate purchase contract, the Note Purchase Agreement must identify an adequate inspection period in which the purchaser can perform all due diligence on the loan and property, and allow the purchaser to terminate the contract. The loan file must either be delivered to purchaser for review or made available for review at seller's offices. To aid purchaser's due diligence review, in addition to access to the loan files referenced above, the agreement should require delivery of seller's existing property due

diligence materials including a survey, copies of all leases, environmental reports, and other collateral assessment records.

Finally, the Note Purchase Agreement must provide certain protections to purchaser regarding the status of the loan. Ideally, the agreement will require the seller to deliver a certified payment history related to the note through the closing date and contain a provision whereby the seller represents and warrants: (a) that seller is the current owner of the note and there is no prior assignment to any third party, (b) that seller has no further financial obligations under the loan, such as further distributions or escrow requirements, and (c) that the note is free

and clear of all claims and liabilities.

Understanding the key concerns and concepts involved in the purchase of a real estate secured note is only the first step. A potential purchaser must also understand the key differences between various types of note products, and be prepared for the possible paths that note ownership can follow after closing a purchase and how purchaser's ability to exercise its rights as the new lender may be affected.

This article serves as the first in a series of three articles which will further address note purchase transactions. While this article addressed the general implications and structure of a note purchase transaction, part two of the

series will address the processes and structure of both CMBS and standard commercial note purchase transactions. The third installment will address several common strategies used by note purchasers to realize a return on their investment, as well as potential pitfalls that can result.

For more information, contact Jeffrey J. Porter ([jporter@settlepou.com](mailto:jporter@settlepou.com)) or Jeff Mosteller ([jmosteller@settlepou.com](mailto:jmosteller@settlepou.com)) of SettlePou at (214) 520-3300. We appreciate the significant contribution to this article by attorney Brian H. Baker of SettlePou.



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