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SETTLEPOU NEWSLETTER

SETTLEPOU
ATTORNEYS • COUNSELORS

3333 LEE PARKWAY, EIGHTH FLOOR, DALLAS, TEXAS 75219
TEL: (214) 520-3300, FAX: (214) 526-4145
WWW.SETTLEPOU.COM

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SettlePou Welcomes Three New Attorneys



Will G. Bassham

SettlePou has continued a pattern of steady growth over the past several years by hiring top law school graduates. In keeping with that tradition, SettlePou is proud to announce the addition of three new associates: Will Bassham, Kristina Kiik, and Braden Wayne.

Will Bassham is a member of the firm's Creditor's Rights section. In 2005, he graduated *magna cum laude* from Texas Tech University with a B.A. in Philosophy and Political Science. He went on to attend law school at Texas Tech, where he graduated *cum laude* in 2010. Will was also the

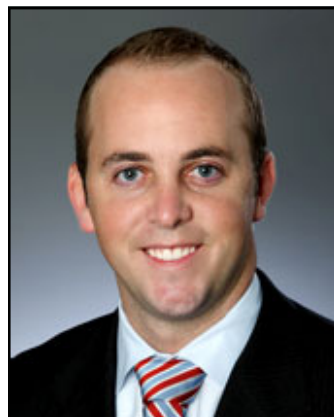


Kristina A. Kiik

Comment Editor of the Texas Tech Law Review.

Kristina Kiik joined the firm's Commercial Litigation section. She attended Southern Methodist University for both her undergraduate and legal education. Kristina received a B.A. in Political Science, International Studies, and Public Policy in 2006, and was a 2010 *cum laude* law school graduate. She was also the Casenote and Comment Editor for the SMU Law Review, and a member of Phi Delta Phi legal honors fraternity.

Braden Wayne is also a member of the firm's



Braden M. Wayne

Commercial Litigation section. He attended the University of Richmond, where he graduated *magna cum laude* in 2007 with a B.A. in Criminal Justice. Braden was a 2010 *cum laude* graduate of Southern Methodist University Dedman School of Law, where he served as the Associate Managing Editor of the International Law Review Association.

Will, Kristina, and Braden were all licensed to practice law in Texas in November of 2010. SettlePou is excited to have these three talented graduates to join the team.

Attorneys:

- BRADFORD E. ADATTO
- BRIAN BAKER
- WILL G. BASSHAM
- MICHAEL S. BYRD
- SCOTT J. CONRAD
- MARK T. CRAIG
- MARSHA L. DEKAN
- J. GARTH FENNEGAN
- DON GWIN
- BARRY D. JOHNSON
- BYRON L. KELLEY
- KRISTINA A. KIIK
- 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
- KERRY M. SOUTHERLAND
- JAMES M. STANFORD
- MICHAEL R. STEINMARK
- STEVEN M. THOMAS
- DANIEL P. TOBIN
- CLIFF A. WADE
- BRADEN M. WAYNE
- KENT D. WILLIAMSON

Personal Liability Pitfalls in Maintaining Corporate Filings, Books and Records

By Michael R. Steinmark



It is widely recognized among large and small business owners alike that running a business through an incorporated business entity can provide officers and directors invaluable protection against personal liability for acts of the business. Whether formed as a corporation or other form of limited liability entity, such as a limited liability company (“LLC”), limited partnership (“LP”), or limited liability partnership (“LLP”), utilizing an entity structure can shield personal assets from those collecting judgments or other debts against the business.

While careful entity planning is the first step in personal liability protection, it is not the only step. In order to enjoy the liability limitations afforded by business entity structures, it is critical to maintain the entity in good standing by filing with various

offices of the State of Texas all required statutory reports, including in particular those arising under Chapter 171 of the Texas Tax Code. It is equally important to maintain corporate formalities and keep corporate books and records up to date.

State Filings

Business entities in Texas are subject to a number of requirements for annual and periodic filings with the Texas Comptroller and Texas Secretary of State. These include, among others, annual Texas franchise tax reports, annual information reports, and other periodic information reports to update corporate information, such as registered agent, registered office, and various shareholder or partnership interests.

The specific reports required for each entity vary based upon entity type and ownership, as well as revenues and margins. Business entities in Texas also may be subject to payment of franchise taxes, or may be required to allow the Texas Comptroller to examine the company’s books and records to verify tax obligations.

Failing to timely file required reports, to pay taxes due, or

to allow inspection by the Comptroller can have significant consequences. For example, such failures may lead to the forfeiture of an entity’s corporate privileges, including but not limited to the right to transact business in Texas and the right to sue or defend virtually all lawsuits in Texas. Similarly, under certain circumstances an LLP can be converted to a general partnership for failing to file its annual certificate. When corporate privileges are forfeited or an LLP becomes a general partnership by operation of statute, the directors, officers, or partners may become personally liable for all debts created or incurred in Texas after the date of forfeiture.

While an entity with forfeited or converted status may later be reinstated, the reinstatement generally does not absolve the directors, officers, or partners of any personal liability accruing by statutory operation. In other words, even if the entity’s status is later reinstated, the owners’ and operators’ personal assets may remain exposed to substantial claims based on contracts made, debts incurred, or torts committed during the forfeiture period.

Corporate Books and Records

In addition to filings with the State, it is crucial that Texas business entities keep their

books and records updated to maintain personal liability limitations. Whether a corporation, LLC, LP, LLP, or other type, a limited liability business entity is considered a “legal fiction”—an entity which exists by operation of law as separate and distinct from its owners and operators. Generally this legal fiction protects the owners and operators from personal liability for acts of the business entity.

Under certain circumstances, however, the entity may be disregarded—known as “piercing the corporate veil.” When the veil is pierced, the owners or operators become personally liable for the acts and obligations of the business, just as when an entity’s right to do business is forfeited as discussed above. Failing to maintain the entity’s books and records can support a claim for veil piercing.

Continued on Page 4

Meet Your Legal Support Team:

Michelle Lee Rincones

Position:

Billing Coordinator

Hometown:

Garden City, KS

Education:

North Dallas High School —
College completion in works...
process is much longer than I
expected, but one day!

Family:

Husband, Michael; two daughters,
Briana (12) and Emilee (5); and
two dogs, Lucy and Pebbles.

Personal Favorites

Food:

Granny's Puerto Rican Chicken
and Rice; Chips and Salsa

Drink:

Water and Cranberry Juice

Hobby:

Scrapbooking —
I also enjoy family/friend gatherings
and shopping!

TV Show:

Brothers and Sisters; Desperate
Housewives; and Private Practice

Old Movie:

Ghost, Coal Miner's Daughter
and Hope Floats

Recent Movie:

Mamma Mia — I love it!

Book:

It's been a while, but I enjoy
John Grisham books.

Music:

Music is my motivation. I love
all genres. It depends on my
mood.

Vacation:

San Juan, Puerto Rico and Kansas
(whenever I need relaxation,
this is my spot).

Sport:

College Basketball, Football and
Soccer

Sports Team:

KU Basketball (Rock Chalk!),
Dallas Cowboys and KC Chiefs

Michelle Lee Rincones has
been with SettlePou for almost
four years. She loves being a
mother, as well as chaperoning
her children's activities. She
also enjoys hosting events with
her family at their home.



Michelle Lee Rincones

Michelle Lee Rincones is the Billing Coordinator for SettlePou.

Meet Your Lawyers:

Jacob L. McBride

Hometown:

Salt Lake City, UT

College:

Utah State University

Law School:

SMU - Dedman School of Law

Family:

Wife, Maren; daughter, Tessa
(4); and son, Cole (18 months).

Personal Favorites

Food:

A good hamburger

Drink:

Dr. Pepper

Hobby:

Playing with my kids, mountain
biking, snow shoeing, skiing and
reading.

TV Show:

The Office, 30 Rock and Castle

Old Movie:

Indiana Jones and Raiders of the
Lost Ark

Recent Movie:

Inception

Book:

Milkweed, The Book Thief, Hunger
Games, Band of Brothers
and 1776

Music:

Dave Matthews Band, U2,
Pearl Jam and country music

Vacation:

Brazil

Sport:

Baseball and college basketball

Sports Team:

St. Louis Cardinals and Utah
State Aggies

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

Effective communication and
honesty.



Jacob L. McBride

Areas of Practice:
Commercial Litigation, Business
Litigation, Real Estate Litigation
and Financial Institution
Litigation

Personal Liability Pitfalls in Maintaining Corporate Filings, Books and Records

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For example, a business entity may be disregarded where it becomes a mere “alter ego” for the owners or operators. This occurs when the personal assets or affairs of the owners or operators become so comingled with those of the business that the two become indistinguishable. While failing to maintain the business books and records may not alone be enough to pierce the veil, it can be evidence supporting an alter ego finding. If the entity has not held regular meetings (e.g., shareholder, director, or member meetings), elected entity officials (e.g., directors, officers, or managers), issued shares, or maintained ownership allocation tables, among other things, the veil may be pierced and the

owners or operators of the business may be held personally liable for what would otherwise have been corporate acts or obligations.

Similarly, the veil may be pierced where two or more businesses are operated as a single business enterprise. Under this theory, one entity may be held liable for the acts or obligations of another related entity where the operations of the two are so comingled that they become indistinguishable. As with alter ego, failure to maintain each entity’s books and records can support piercing the veil. Under certain circumstances, a single business enterprise

analysis could be combined with an alter ego analysis to pierce through both corporate entities and hold the owners or operators personally liable.

Accordingly, even the best laid business entity plans can go awry when corporate filings and corporate books and records are not properly maintained. In both contexts, personal liability can be created where it otherwise would not have existed. While this can, of course, pose a significant risk for business owners and operators defending a lawsuit, it can also provide substantial leverage in prosecuting a lawsuit against an entity and its

individual owners and operators relating to actions during a time of forfeited corporate privileges.

For more information, please contact Michael R. Steinmark (msteinmark@settlepou.com), J. Allen Smith (asmith@settlepou.com), or Michael S. Byrd (mbyrd@settlepou.com) of SettlePou at (214) 520-3300.

From Commercial Lender to Residential Landlord:

The Protecting Tenants at Foreclosure Act

By Michael P. Menton



On May 20, 2009, the United States Congress enacted the Protecting Tenants at Foreclo-

sure Act (“PTA”) which grants specific rights to residential tenants affected by foreclosure. The PTA is federal law that acts as a *minimum* requirement for foreclosing lenders with any additional state requirements left unaffected. Congress, in the midst of the recent “foreclosure crisis,” enacted the PTA to protect unsuspecting/innocent tenants by imposing restrictions on a foreclosing lender’s ability to evict a hold-over tenant upon foreclosure. As noble a cause as it may have been, the PTA has resulted in significant post-foreclosure obstacles to lenders.

Requirements Under PTA

Prior to the enactment of PTA, a residential tenant occupying a foreclosed property could be required to vacate the property on 30 days notice, under Texas law. If the tenant failed to vacate upon the expiration of 30 days, the foreclosing lender could then proceed with an eviction action. Under the PTA, a foreclosing lender is now required to provide a residential tenant remaining in the foreclosed property a minimum of 90 days to vacate. The PTA further mandates that a foreclosing lender takes title to a foreclosed property *subject* to an existing lease. In short, a foreclosing lender “steps into the shoes” of the prior land-

lord/borrower and assumes all of the rights, duties, and obligations under the existing lease. Therefore, if a foreclosed property is occupied by a residential tenant who is under a lease that is protected by the PTA, the lender must honor that lease for its term. Although the tenant under the existing lease must continue to make monthly rental payments, this results in a clear obstacle to the foreclosing lender’s ability to market and sell the property.

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From Commercial Lender to Residential Landlord:

The Protecting Tenants at Foreclosure Act ... Continued from Page 4

The PTA allows such a property to be sold to an “investor” who agrees to honor the existing lease or to an “end user” (owner-occupant). A sale to an “investor” or “end user,” however, does not relieve the foreclosing lender of the duty to give the tenant 90 days notice to vacate.

Not all residential tenants or leases are protected under the PTA. There are situations in which the occupant of a foreclosed property does not rise to the level of a “tenant” under the PTA and, therefore, is not entitled to its protections. These occupants include, but may not be limited to, the child, spouse, or parent of the defaulting borrower. Moreover, not all leases will actually qualify as a “lease” protected under the PTA if: (1) the lease was not negotiated at arms-length; (2) the lease is not for fair-market rent; or (3) the lease was not entered into prior to foreclosure. These situations, however, are highly fact intensive and need to be addressed on a case by case basis to ensure that the foreclosing lender is not only protecting its rights against opportunistic “tenants,” but also complying with the PTA as to not violate the rights of protected tenants under legitimate leases. Although it may be eloquently asserted at times, it is important to note that the PTA does not provide protections to the owner/borrower on which the lender has foreclosed.

Real Effects of PTA on Foreclosing Lenders

One of the most significant effects of the PTA is that a foreclosing lender is now forced into the residential landlord business

with all its attendant obligations and responsibilities. These obligations include, but are not limited to, yard/building maintenance, repairs, payment of water utilities, and safety requirements such as installation and maintenance of smoke detectors. In addition, foreclosing lenders need a strong and experienced local agent to collect rental payments and manage the property. Tenants may require a 24 hour local contact for emergency matters, and the local agent needs to be able to make decisions (such as hiring a plumber or electrician) on nights and weekends without waiting for the lender’s office to open the next business day. Foreclosing lenders must also be mindful of the physical condition of the property, including the installation and maintenance of any security devices required by Texas law. These obligations alone are enough to cause concern, but what happens when these obligations remain without the reciprocal obligation of the tenant to actually pay rent to the foreclosing lender?

In the higher-end “spec” house market, it is not uncommon for the tenant to pre-pay lease payments for up to a year. This in turn causes substantial economic issues for a foreclosing lender. For example, a lender forecloses on a property in June 2011 that is under a written lease term from January 2011 through December 2011, and the tenant has already pre-paid rent for one year to the defaulting borrower/landlord per the terms of the lease. As a result, the lender is forced to allow the tenant (assuming the tenant is not otherwise in default under

the lease) to remain in the property “rent free” for six months. To add insult to injury, the lease terms may require that the landlord is responsible for yard maintenance and water. Now, a commercial lender has essentially been transformed into a residential landlord with no rent stream and yet saddled with maintenance expenses and obligations.

Minimizing the Impact of PTA

Many foreclosing lenders have discovered that “cash for keys” provides a clean, cost-effective means of obtaining a vacant property in order to prepare and market the property for sale prior to the expiration of 90 days. Although the pre-paid tenant in the above example is not likely to accept a “cash for keys” deal, many tenants under a month-to-month lease or an expired lease are all too happy to hand over the keys for a reasonable sum. This sum should be determined by the foreclosing lender via a cost/benefit analysis based on factors unique to the specific case. To a foreclosing lender, the idea of passing out money to an occupant of property already owned by the lender may be of little attraction, but given the requirements under the PTA and the possibility of a quick sale to a third-party, “cash for keys” can provide a sensible solution to the post-foreclosure problems created by the statute.

Prior to foreclosure, lenders should be aware of the status of the property and whether it is occupied by a residential tenant who will be protected under the PTA. Often, commercial

builders will lease properties that they are unable to sell without notifying the lender. Many times copies of any leases can be obtained by request to the borrower or borrower’s counsel. Knowing the terms of a lease in connection with a property prior to foreclosure can provide invaluable information to a foreclosing lender and may even affect the liquidation strategy depending on the terms and whether rent has been pre-paid as in the above example.

There are numerous nuances to the PTA and an infinite number of directions a case can take upon foreclosure of a property that involves a residential tenant. This article is intended merely to provide a general overview of the statute’s requirements and a sample of its effects. As with all situations involving a relatively untested area of law, there are many legal issues that may arise at different stages of the foreclosure process involving property with residential tenants, and each and every issue requires examination and analysis to ensure that the foreclosing lender’s rights are maintained and the tenant’s rights are protected within the confines of the law.

For more information, please contact Michael P. Menton (mmenton@settlepou.com) or David M. O’Dens (dodens@settlepou.com) of SettlePou at (214) 520-3300.

Another Arrow in Your Quiver:

Considering the Benefits of Receivership for Secured Lenders

By Cliff A. Wade and
Will B. Bassham



When secured lenders intend to foreclose on collateral securing a defaulted loan, they are sometimes faced with the prospect of having to manage or maintain an ongoing business operation on the foreclosed premises. Suppose that the collateral is a multi-unit apartment structure with multiple tenants, and the secured lender wishes to maintain tenant occupancy to preserve the value of the business upon foreclosure. How might the lender most easily gain access to the rent roll, leases, security deposits, access keys, and other information necessary to maintain operations? Or suppose that a lender seeks to collect on a borrower's accounts receivable, but the borrower is uncooperative and the accounts are worthless without the borrower's records. What is the best course of action for the lender when the value of such accounts may be tied up in *information* (such as contact information and historical invoices) that is under the exclusive control of the borrower? What are the lender's options?

Perhaps in a more favorable economic environment, lenders could pursue foreclosure, collection on accounts receivable, or

similar remedies with less worry over such complexities. However, given the current financial climate, lenders must consider the potential drawbacks of taking title to distressed real estate or otherwise assuming control of collateral, regardless of whether an ongoing business is involved. Such drawbacks and obstacles can include, but are not limited to, the following:

Managing business affairs; obtaining important documents and elusive information; lender liability; assuming control over properties with multiple code violations; assuming control over properties with incomplete construction; and environmental concerns.

Receivership as a Possible Solution

In today's uncertain lending environment, a court-supervised receiver can offer a useful and cost-effective solution, avoiding some or all of the obstacles listed above. A receiver is an officer appointed by the court (upon motion by a lender) that can hold possession of the property, manage the property, and preserve it on behalf of the creditor. Moreover, a receiver can be appointed pre-foreclosure, while generally enjoying judicial immunity. The primary legal authority establishing the receivership remedy is set forth in the Texas Civil Practice and Remedies Code § 64.001, et seq. In short, the statute allows a lender to communicate directly with the receiver and monitor its collateral while remaining insulated from the various vexations that can arise.

In the case of our multi-unit apartment structure above, upon court appointment before foreclosure, a receiver can assume control of the apartments, receive rents, make disbursements (salaries, utilities, maintenance and insurance), reconcile bookkeeping, and generally perform any other acts authorized by the court. In this way, the lender is able to protect its collateral while the receiver, under court guidance, navigates pitfalls and facilitates a smoother transition in ownership.

A great advantage of employing a receiver is that the receiver's powers and duties are limited only by the necessities of the situation at hand and the auspices of the court. Thus, a prudent secured lender can have a receivership specifically tailored to whatever situation (or court proceeding) it may be involved in. In addition to the powers described above, a partial listing of a receiver's potential powers includes the following:

- 1) Gaining access to and control of collateral (real and personal property);
- 2) Collecting and compromising accounts;
- 3) Listing any and all collateral for sale or auction and making transfers;
- 4) Borrowing and investing funds held as receiver;
- 5) Retaining support professionals (such as appraisers, surveyors and property managers); and
- 6) Closing and opening borrower bank accounts.

It is also worth mentioning that

a secured lender can use a receivership to gain leverage or secure performance under a forbearance agreement should the lender wish to delay foreclosure for any reason. Lenders should also be aware that their loan documents may provide for the appointment of a receiver upon default, and this can factor into a court's decision as to whether a receivership is appropriate, and if so, under what terms and conditions the receiver should operate.

This article is intended only as a general overview of the scenarios under which a receivership may benefit a secured lender and the powers a court may grant a receiver. Multiple legal issues are implicated in petitioning a court for a receivership, including applicable statutory and common law requirements. Each issue must be evaluated and analyzed on a case-by-case basis. Depending on the lender's goals and the nature of the collateral, a receivership may provide an invaluable tool to maximize the value of a lender's collateral while reducing the risks associated with lender liability.

For more information, please contact Cliff A. Wade (cwade@settlepou.com) of SettlePou at (214) 520-3300.

Update on Recent Insurance Law Decisions

By H. Norman Kinzy



There have been a number of recent court decisions which are of significance to the practice of insurance law. These include cases dealing with the CGL contractual liability exclusion, products liability, health care and asbestos claims, *inter alia*.

Always, each case involves different facts and law, and accordingly the following must be taken for general information purposes only, rather than for action upon any specific fact situation.

Insurance - Commercial General Liability – Contractual Liability Exclusion:

A substituted opinion in *Gilbert Texas Construction, LP v. Underwriters at Lloyds, London*, 08-0246 (Tex. 2010) was handed down by the Texas Supreme Court on December 17, 2010. The court reiterated its earlier decision that under the ISO form CGL policy exclusion for contractual liability, coverage is excluded for all liabilities assumed by contract except for two situations:

where an exception to the exclusion brings a claim back into coverage, e.g., certain policy-defined contracts including an “insured contract,” i.e., an indemnity agreement by which the insured assumes another’s tort liability; and where the insured would have liability in the absence of the contract or agreement.

The Supreme Court also ruled that the insured could not recover a settlement payment under estoppel theory against the insurer. The court explained that even if an insurer assumes an insured’s defense when no coverage for the risk exists, the policy is not expanded to cover the risk simply because the insurer assumes control of the defense of the lawsuit, unless the insurer’s actions prejudice the insured. Finding that no prejudice existed in this case, the court held that the insurer was not estopped to deny coverage.

Insurance - Auto and CGL – “Insured Contracts” and the “Subsequent to Execution” Requirement:

In *Mid-Continent Casualty Company v. Global Enercom Management, Inc.* 09-0744 (Tex. 2010), the Supreme Court examined provisions in an auto policy and in a commercial general liability policy which extended the insured’s coverage to “insured contracts” so long as the liability occurred “subsequent to the execution of the contract or agreement.” In this particular case, although one party had signed the contract before the accident occurred, the other party did not sign the contract until after the accident. The

insurer claimed that the accident occurred before the “execution” of the contract, but the Supreme Court held that formal signing of the contract was not required, and explained that an unsigned agreement all of the terms of which are embodied in a writing, unconditionally assented to by both parties, is a written contract. Thus, the court recognized that the term “execute” as used in an insurance policy means “to finish” or to “make complete,” and does not require formal signing of an “insured contract” by the parties prior to the accident for which coverage is sought.

Products Liability - Manufacturer’s Statutory Duty to Indemnify:

In *Fresh Coat, Inc. v. K-2, Inc.*, 08-0592 (Tex. 2010), the Supreme Court examined a manufacturer’s statutory duty to indemnify a subcontractor/installer which installed a stucco-type exterior insulation and finishing system commonly known as “EIFS.” The court found that the synthetic stucco was a “product” and that the contractor which installed it on a house was a “seller,” thereby making applicable Texas’ statutory duty of a manufacturer to indemnify a seller for product defects. The court noted that the statutory definition of “seller” does not exclude a seller who is also a service provider, nor does it require the seller to only sell the product. Significantly, the court also held that the manufacturer’s statutory obligation to indemnify the contractor covered a settlement payment made by the contractor/installer to the homebuilder even where

the contractor/installer may have been independently obligated by a contract to indemnify the homebuilder, because the language of the statute provides that the manufacturer’s duty to indemnify “is in addition to any duty to indemnify established by law, contract, or otherwise.”

Products Liability Federal Preemption – Federal Motor Vehicle Safety Standards:

In *MCI Sales and Service, Inc. v. Hinton*, 09-0048 (Tex. 2010), the Texas Supreme Court dealt with whether or not a jury verdict against a manufacturer of a motor coach was pre-empted by federal safety regulations because the jury held the manufacturer to a higher standard than that required by the National Traffic and Motor Vehicle Safety Act. The court noted that there is a presumption against preemption, and also noted the absence of any clear and manifest purpose by Congress to preempt the issues (1) of the need to install passenger seatbelts and (2) the selection of any one certain type of window glazing materials. Accordingly, the Supreme Court held that federal law did not preclude a jury from finding against a manufacturer who failed to install seatbelts in its motor coaches (which were not otherwise required by law) and for choosing one form of window glazing material (as opposed to another approved type).

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Update on Recent Insurance Law Decisions ... Continued from Page 7

Implicit in the court's holding was its determination that federal motor vehicle standards impose only minimum standards and that the jury's finding did not present an obstacle to the accomplishment and execution of federal policy and was thus not preempted thereby.

Healthcare Liability Claims v. Ordinary Negligence Claims:

In *Yamada v. Friend*, 08-0262 (Tex. 2010), the court held that where a plaintiff's lawsuit is based upon one set of underlying facts which support claims against a healthcare provider under both the Texas Medical Liability Act and ostensibly also under ordinary negligence rules, such claims may not escape the requirements of the Texas Medical Liability Act, simply by recasting the claims in terms of ordinary negligence. Hence the plaintiff's failure to provide a timely expert report as required by the Texas Medical Liability Act required dismissal of all of the claims against the physician, including those claims plead as ordinary negligence claims.

Healthcare Liability Claims v. Defective or Unsafe Equipment Claims:

In another substituted opinion, the Supreme Court withdrew its former opinion in *Marks v. St. Luke's Episcopal Hospital*, 07-0783 (Tex. 2010), and held that even claims arising from "an unsafe condition created by an item of furniture" such as a defective or improperly assembled hospital bed, come within the ambit of Texas Medical Liability Act, and are thus health care claims which require statutory expert opinions in order to proceed under

Texas law. This decision recognizes that "medical equipment" specific to a particular patient's care or treatment is an integral and inseparable part of the health care services provided. When the unsafe or defective condition of that equipment injures the patient, the gravamen of the resulting cause of action is a health care liability claim. Since the Plaintiff had not timely filed the statutorily required expert report, the case was dismissed.

Healthcare Liability Claims – Medical Causation:

In *Jelinek v. Casas*, 08-1066 (Tex. 2010), the Supreme Court dealt with the sufficiency of circumstantial evidence to support causation in a health care claim. Our court held that when circumstantial evidence of medical causation is consistent with several possible medical conclusions, only one of which establishes that the defendant's negligence caused the plaintiff's injury, an expert witness must explain why, based on the particular facts of the case, such a conclusion of causation is medically superior to the others. If the expert fails to give any reason beyond his unsupported opinion, the expert's testimony is legally insufficient evidence of causation.

Workers Compensation – Course and Scope of Employment While Traveling Home from Work:

In *Leordeanu v. American Protection Insurance Company*, 09-0330 (Tex. 2010), the Supreme Court dealt with the issue of whether or not an employee, while traveling home from work may be in the course and scope

of employment for injuries received during transit. Generally, traveling home from work is not deemed to be in the "course and scope of employment" for compensation in Texas, but the court held that where an employee is traveling from one workplace to another workplace, which happens to be on her way home, the employee may be found "in the course and scope of employment" and entitled to worker's compensation benefits, despite the fact that her ultimate destination was her home.

Texas Tort Claims Act – Timely Filed Lawsuit May Constitute Required Notice:

In *Colquitt v. Brazoria County*, 09-0369 (Tex. 2010), the Supreme Court examined the six month notice requirement under the Texas Tort Claims Act, and held that the statutory notice requirement was satisfied by the filing of a lawsuit where the lawsuit was served on the government unit within six months after the accident, and contained all the notice information required by the Texas Tort Claims Act. Accordingly, since the Texas Tort Claims Act does not require that separate "formal" notice be given before filing suit, if a lawsuit containing all the required notice information is served within the statutory six month period, the suit papers themselves will constitute sufficient notice.

Asbestos Constitutional Law – Prohibition Against Retroactive Laws:

In *Robinson v. Crown Cork & Seal Company, Inc.*, 06-0714 (Tex. 2010), the Supreme Court dealt

with whether a statute which absolved one specific corporation from its successor liability for personal injury claims arising from asbestos exposure violated the prohibition against retroactive laws contained in the Texas Constitution. In this mesothelioma case, the legislature passed a statute absolving Crown Cork of any liability to which it succeeded by virtue of its merger with a manufacturer of asbestos products. Despite the fact that Crown Cork had never itself engaged in the manufacture or sale of asbestos products, the Texas Supreme Court held that the statute violated the Texas Constitution's prohibition against the passage of retroactive laws. The Supreme Court held that the statute in question significantly impacted the substantial interest which the plaintiffs had in a well recognized common law cause of action, and that the retroactive statute was accordingly impermissible and void.

For more information, please contact H. Norman Kinzy (nkinzy@settlepou.com), Oliver B. Krejs (okrejs@settlepou.com), or Kent D. Williamson (kdwilliamson@settlepou.com) of SettlePou at (214) 520-3300.

J. Allen Smith Featured in Managing Partner Roundtable in Texas Lawyer

J. Allen Smith is featured in the December 27, 2010, *Texas Lawyer* as a participant in a managing partner roundtable consisting of managing partners from various size Texas law firms. The article addresses the state of the legal industry in Texas and is on the front page of the issue. To see a copy of the article, please follow the link available at: www.settlepou.com/about_the_firm/firm_news.html.

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STATE PENSIONS AUGMENT SOME FEDERAL JUDGES' FINANCES, REPORTS SHOW

by MARY ALICE ROBBINS

State pensions supplement the income of eight Texas judges who currently sit on federal district courts or the 5th U.S. Circuit Court of Appeals. That's according to 71 judges' 2009 financial disclosure reports reviewed by *Texas Lawyer*.

Senior U.S. District Judge James Nowlin of the Western District of Texas in Austin reported receiving \$39,219 in 2009 for his service in the Texas House from 1967 to 1981. However, he doesn't use that money for his own benefit.

"The truth is I give most all of that legislative check and my Social Security [check] to scholarships," Nowlin says.

Nowlin says he took senior status in 2003 and qualifies for federal judicial retirement benefits. His state retirement and Social Security benefits provided him with surplus funds, Nowlin says, noting that he has used that money to help four or five students who otherwise might not be able to go to college.

"My view is that when you've got more than you need, you ought to help somebody in need,"

he says.

The Ethics in Government Act requires all federal judges to disclose sources and amounts of income — other than their judicial salary — for themselves and the sources of their spouses' non-investment income. In addition, the judges must report for themselves, spouses and dependent children all debts incurred, gifts and reimbursements for trips. The reports provide a way to check for potential conflicts of interest that judges may have when it comes to litigation pending in their courts.

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Firm Leaders Discuss Challenges — Past, Present and Future

On Dec. 3, *Texas Lawyer* brought together managing partners from four Texas firms of various sizes to discuss the legal environment and the big issues they deal with on a daily basis. In a wide-ranging discussion, the firm leaders talked about their firms' financial performance in 2010 and touched on just about everything that takes up their time, such as billing, how to incentivize every lawyer and employee at their firm, and how and why they should grow their firms. The managing partners also talked about the hot practice areas in the Texas market, how to deal with lateral hires who just don't fit in or meet expectations, and how social media can be useful to their firms.

The managing partner roundtable took place in Dallas. The participants were Terry Conner, managing partner of Haynes and Boone in Dallas; Pollard Rogers, managing partner of Cantey Hanger in Fort Worth; Susan Schwartz, managing partner of Henslee Schwartz in Dallas; and J. Allen Smith, president of SettlePou in Dallas. A transcript of part of the discussion, edited for length and style, follows. The second installment will appear in the Jan. 3, 2011, issue of *Texas Lawyer*.

Brenda Sapino Jeffreys, senior reporter, *Texas Lawyer*: . . . Do you feel like we've turned the corner with the economy? Do you feel like your business is up? . . .

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