

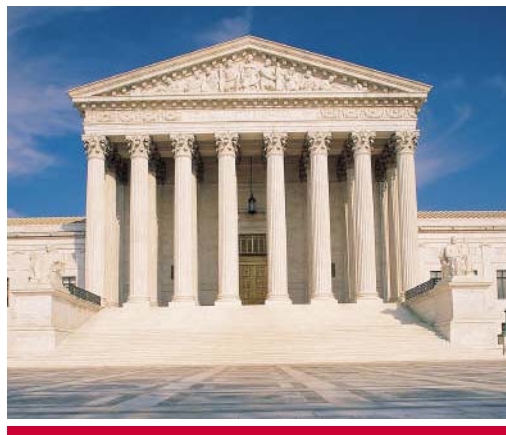
## Property Owners' Rights Addressed in United States Supreme Court

By Scott J. Conrad

Eminent domain was at the forefront of the most recent term of the United States Supreme Court. The High Court issued opinions on whether economic development can satisfy the required "public use" doctrine of eminent domain; recent developments in the regulatory taking field; whether a property owner can assert a takings claim in the Federal Courts under the 5<sup>th</sup> Amendment after asserting the required takings claim in state court under state law; and whether 42 U.S.C. § 1983 creates a separate cause of action if a federal act or statute provides its own judicial remedy.

On June 23, 2005 the Supreme Court in the case of *Kelo v. The City of New London, Connecticut*, with Justice John Paul Stephens writing for the majority, held that in certain instances the government could take a private landowner's property for economic development when such development plan qualifies as a "public use"

within the meaning of the Takings Clause, the Fifth Amendment to the United States Constitution.<sup>1</sup> Authorities cloaked with the



*The United States Supreme Court held that in certain instances the government could take a private landowner's property for economic development, when such development plan qualifies as a "public use" within the meaning of the Takings Clause, the Fifth Amendment to the United States Constitution*

power of eminent domain may see this ruling as an opportunity to utilize the "super power" of condemnation for economic development with ease; however, the *Kelo* decision is not a carte blanche ticket to such entities, and requires that the condemning authorities take several steps to sub-

stantiate such a plan and need for the private property to be taken. Justice Stephens placed emphasis on the fact that Connecticut had an existing statute that specifically authorized the use of eminent domain for economic development, which many other states, including Texas, do not have.

In dissent to the majority opinion, Justice Sandra Day O'Connor, in one of her last opinions on the Supreme Court, noted that historically the taking of a private landowner's property for the benefit of another private individual had been allowed only in the narrow circumstance in which the condemning authority could conclude that elimination of the property was necessary to remedy harm that the property would cause in its existing state.<sup>2</sup> Absent this, a purely private taking could not withstand the scrutiny of the "public use" requirement; it would serve no legitimate purpose of government.<sup>3</sup>

*Continued on page 4*

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## Insurance Updates and Information

By H. Norman Kinzy

### Insurer's Right To Reimbursement From Insured After Assertion of Reservation of Rights By Insurer:

In *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, 2005 WL 1252321 \_\_\_ S.W.3d. \_\_\_ (Tex. 2005) [Not yet released for publication and subject to revision or withdrawal], the Texas Supreme Court has held that an excess insurance carrier that disputed coverage, but which settled third party's claims against its insured, was entitled to recoup the settlement payments from the insured when it was subsequently determined that the claims against the insured were not covered by the policy, even absent the insured's express agreement to reimburse settlement payments made by the insurer if there was no coverage.

In *Excess Underwriters*, the insured issued a *Stowers* demand that *Excess Underwriters* accept a settlement offer. Under the facts of *Excess Underwriters* case, the Supreme Court stated that:

"The facts of the case before us today lead us to conclude that this concern is melio-

rated, if not eliminated in two circumstances:

(1) When an insured has demanded that its insurer accept a settlement offer that is within policy limits, or

(2) When an insured expressly agrees that the settlement offer should be accepted.

In these situations, the insurer has the right to be reimbursed if it has timely asserted its reservation of rights, notified the insured it intends to seek reimbursement, and paid to settle claims that were not covered."

Although the majority decision in *Texas Association of Counties County Government Risk Management Pool v. Matagorda County* was not overruled, a concurring opinion in *Excess Underwriters* indicates that the *Matagorda County* case cannot survive the decision in *Excess Underwriters*.

### Workers Compensation Statute — Temporary Employment Agencies and Their Clients:

In *Garza v. Exel Logistics, Inc.* 48 TEX. S. COURT JOURNAL 544 (Tex. 2005), our Supreme Court dealt with a situation where a worker was provided by a temporary employment

agency (not covered by Texas' Staff Leasing Services Act) to the agency's client. The worker was injured while performing tasks for the client of the temporary employment agency. The temporary employment agency had procured Workers Compensation insurance, which listed only the temporary employment agency as an insured, and the client company did not obtain Workers Compensation coverage.

Despite the contention of the client company that it, through its payments to the temporary employment agency, was intended to be covered under the temporary employment agency's Workers Compensation policy, the Supreme Court held that was not the case since the client neither paid premiums nor was it named as an insured under the Workers Compensation policy obtained by the temporary employment agency. Accordingly, the client, for whom the injured worker was working at the time of injury, was not entitled to the statutory bar from suit afforded employers covered by the Texas Workers Compensation Act. The Supreme Court stated that:

"The [Workers Compensa-



H. Norman Kinzy

#### Areas of Practice:

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

In *Allstate Insurance Co. v. Hallman*, the Texas Supreme Court held that there was no duty to defend under a homeowners insurance policy against an insured's potential liability for damages resulting from limestone mining operations conducted on the insured's property, since such commercial limestone mining fell within the policy's business

## Insurance Updates... continued from page 2

tion] Act does not permit a temporary employment agency... to obtain coverage for a client simply by obtaining coverage for itself. There must be explicit coverage for the client.”

(Bracketed material added.)

### Homeowners Insurance Policy — “Business Pursuits” Exclusion:

In *Allstate Insurance Co. v. Hallman*, 48 TEX. S. COURT JOURNAL 474 (Tex., March 11, 2005), the Texas Supreme Court held that there was no duty to defend under a homeowners insurance policy against an insured’s potential liability for damages resulting from limestone mining opera-

tions conducted on the insured’s property since such commercial limestone mining fell within the policy’s business pursuits exclusion.

In this case of first impression in Texas, the Texas Supreme Court held that the business pursuits exclusion of a homeowner’s policy encompasses more than an insured’s primary occupation, and adopted a two-part standard for that exclusion, wherein the term “business pursuits” is defined as involving two elements:

- (1) continuity or regularity of the activity, and
- (2) A profit motive, usually as a means of livelihood,

gainful employment, earning a living, procuring subsistence or financial gain, a commercial transaction or engagement,

and impliedly held that a profit need not be realized since business ventures often result in a loss.

### Texas Standard Automobile Insurance — Definition of “Motor Vehicle Accident:”

In *Texas Farm Bureau Mutual Insurance Co. v. Sturrock*, 146 S. W. 3d 123 (Tex. 2004), the Supreme Court held that an insured who was injured when his foot became entangled with his truck’s door while he was exiting the vehicle was involved in a “motor

vehicle accident.” The Supreme Court held that for purposes of personal injury protection coverage under a Texas standard automobile insurance policy, a “motor vehicle accident” occurs when:

- (1) one or more vehicles are involved with another vehicle, an object, or a person,
- (2) The vehicle is being used, including exit and entry, as a motor vehicle, and
- (3) A causal connection exists between the vehicle’s use and the injuring producing event.

For more information, contact H. Norman Kinzy of SettlePou at (214) 520-3300.

## Meet Your Lawyers:

### Jeff Mosteller

**Hometown:** Dallas, Texas

**College:** University of Texas, Austin

**Law School:** Southern Methodist University

**Family:** Wife, Misti, and daughter, Samantha

**Personal Favorites:**

- **Food:** Tex-Mex
- **Drink:** Shiner
- **Hobby:** Taking (too many) pictures of my daughter; movies; any-

thing outdoors

- **TV Show:** Daily Show
- **Old Movie:** Seven Samurai
- **Recent Movie:** The Brotherhood of War
- **Book:** House of Leaves by Mark Z. Danielewski
- **Music:** All types
- **Vacation:** Hawaii
- **Sport:** Football
- **Sports Team:** Texas Longhorns/Dallas Cowboys

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

*To always be responsive to our clients’ needs and concerns and to provide them with our highest level of service in a timely and efficient manner.*



Jeff Mosteller

**Areas of Practice:**  
Acquisitions and Divestitures, Business Entity Creation, Commercial Leasing, Commercial Property Development, and Resort and Golf

### Property Owner's Rights *continued from page 1*



Scott J. Conrad

**Areas of Practice:**

Business Litigation, Condemnation Law, Financial Institution Litigation and Real Estate Litigation

Justice Stephens further emphasized that nothing in the *Kelo* decision precludes states from placing further restrictions on the exercise of the takings power as the Court noted that the protections under the 5<sup>th</sup> Amendment is simply the federal baseline. In a rapid reaction to the U.S. Supreme Court decision in *Kelo*, the Texas Governor, Rick Perry, authorized a special session of the Texas state legislature where a constitutional amendment to limit the power of eminent domain by the government for economic purposes was proposed in an attempt to overturn the effects of the *Kelo* decision. The proposal is an addition to the Texas Government Code under Chapter 2206, and is entitled *Limitation on Use of Eminent Domain For Private Parties or Economic Development Purposes*. This amendment was passed by the Texas Senate on July 13, 2005, and is under consideration by the Texas House of Representatives at the time of publication of this issue. Additionally, federal legislation has been proposed that would limit the effects of the *Kelo* decision.

Concerning the area of regulatory takings, the Supreme

Court addressed the case of *Lingle v. Chevron U.S.A., Inc.*<sup>4</sup> *Lingle* examined whether the "substantially advances legitimate state interests" test set forth in *Agins v. City of Tiburon*<sup>5</sup>, is still viable for determining whether a regulation results in a Fifth Amendment taking. The High Court ultimately disposed of the test in cases involving takings based on regulatory action, but recognized that it could still be relevant to a due process analysis.

Regarding the area of takings claims in both state and federal courts, the Supreme Court addressed the case of *San Remo Hotel, L.P. v. City and County of San Francisco*.<sup>6</sup> The Court's opinion holds that if the state Takings law is similar to the federal Takings clause, and the state courts apply that law identically to the federal clause, the federal court must give full faith and credit to the state court's judgment, even on the party's federal law claims. As a result, the party is precluded from litigating its federal Takings claim in the federal court inasmuch as those rights involve the same issues that the state court decided.

Finally, in reviewing whether 42 U.S.C. § 1983 creates a

separate cause of action in addition to a cause of action under an existing act or statute, the Supreme Court addressed the case of *City of Rancho Palos Verdes v. Abrams*.<sup>7</sup> In a unanimous holding, the Supreme Court ruled that individuals may not sue a local government under § 1983 for the violation of another federal statute when the federal statute provides its own judicial remedy.

If you have any further questions or comments concerning these developments in eminent domain law, please feel free to contact J. Allen Smith or Scott J. Conrad of SettlePou at (214) 520-3300.

<sup>1</sup>*Kelo v. City of New London, Conn.*, No. 04-108 (U.S. June 23, 2005). Justice Stevens delivered the Majority Opinion, joined by Justices Kennedy, Souter, Ginsburg and Breyer. Justice Kennedy filed a separate concurring opinion. Justice O'Connor filed a dissenting opinion joined by Justices Rehnquist, Scalia and Thomas. Justice Thomas filed a separate dissenting opinion.

<sup>2</sup>*Kelo*, No. 04-108, slip op. at 8 (O'Connor, J., dissenting).

<sup>3</sup>*Kelo*, No. 04-108, slip op. at 7 (O'Connor, J., dissenting).

<sup>4</sup>*Lingle v. Chevron U.S.A., Inc.*, 125 S.Ct. 2074, 2081 (2005).

<sup>5</sup>*Agins v. City of Tiburon*, 477 U.S. 255 (1980).

<sup>6</sup>*San Remo Hotel, L.P. v. City and County of San Francisco*, No. 04-340 (U.S. June 20, 2005).

<sup>7</sup>*City of Rancho Palos Verdes v. Abrams*, No. 03-1601 (U.S. March 22, 2005).

## Meet Your Lawyers:

### J. Garth Fennegan

**Hometown:** Harlingen, Texas

**College:** Brigham Young University

**Law School:** Southern Methodist University

**Family:** Wife, Amy; sons, Cade and Samuel; and daughter, Reaves

**Personal Favorites:**

- **Food:** Mexican
- **Drink:** Pepsi
- **Hobby:** All sports, music

- **TV Show:** Sports Center, Everybody Loves Raymond
- **Old Movie:** Cool Hand Luke
- **Recent Movie:** Cinderella Man
- **Book:** Lord of the Rings Trilogy
- **Music:** U2
- **Vacation:** Beach - South Padre Island
- **Sport:** Football
- **Sports Team:** Tampa Bay Buccaneers

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

*Listening to your clients; being honest and responsive; and finding solutions that make sense.*



J. Garth Fennegan

**Areas of Practice:**  
Real Estate Litigation, Business Litigation, Appellate Law, Asset Recovery and Lender Liability

## Meet Your Legal Support Team:

### Penny Grawunder

**Position:** Legal Assistant

**Hometown:** Abilene, Texas

**Education:** Certified through SMU Legal Assistant Certification Program of General Studies with specialty certificates in the areas of litigation and real estate; Board Certified Legal Assistant — Civil Trial Law — Texas Board of Legal Specialization

**Family:** Husband, Leroy, and cat, Princess Mildred Maxine

**Personal Favorites:**

- **Food:** Grilled salmon

- with asparagus
- **Drink:** Cherry Limeade from Sonic
- **Hobby:** Cooking, gardening
- **TV Show:** Wheel of Fortune, Without a Trace
- **Old Movie:** Breakfast at Tiffany's
- **Recent Movie:** Being Julia
- **Book:** Mitford Series, Jan Karon
- **Music:** Vintage Rock, Eagles
- **Vacation:** Mountains
- **Sport:** Horse racing
- **Sports Team:** Horse/jockey

Penny has been a legal assistant with SettlePou since October 2, 1989. She supports the attorneys in the commercial litigation section and assists in bringing quality services to the firm's clients. Penny is active in various legal assistant organizations such as the Paralegal Division, State Bar of Texas and the Dallas Area Paralegal Association. She is also president-elect of the Legal Assistants of North Texas Association.



Penny Grawunder

## Texas Approves Contractual Waivers of Jury Trial



Steven M. Thomas

Areas of Practice:  
SBA and USDA Lending, Financial  
Institutions, and Loan Workouts  
and Restructuring

“THE OUTCOME OF EVERY LAWSUIT IS GOVERNED BY AN EXAMINATION AND DETERMINATION OF VARIOUS QUESTIONS OF LAW AND FACT... IN A JURY TRIAL, THE JUDGE WILL DECIDE ALL QUESTIONS OF LAW, WHILE THE JURY WILL DECIDE THE QUESTIONS OF FACT.”

By Steven M. Thomas

The right to a trial by jury in civil cases is firmly imbedded in American jurisprudence. The Seventh Amendment to the United States Constitution, which is part of the Bill of Rights passed into law in 1791, grants citizens the right to a jury trial in cases brought in federal court or in cases involving questions of federal law being decided in state court. With respect to civil cases brought in Texas state courts, the State of Texas, through Article I, §15 and Article V, §10 of the Texas Constitution, has also recognized the right of its citizens to have their civil disputes determined by a jury.

The outcome of every lawsuit is governed by an examination and determination of various questions of law and fact. A “question of law” is an issue which involves the application or interpretation of a law, while a “question of fact” is an issue involving the resolution of a factual dispute. In a jury trial, the judge will decide all questions of law, while the jury will decide the questions of fact. The judge will then instruct the jury as to the applicable law and the jury must reach a decision by applying the law to the facts. In a non-jury

trial, the judge will decide both questions of law and fact and make a decision based upon those findings.

The right to a trial by jury was originally intended to protect citizens from having their disputes examined and determined solely by the judge, a figure deemed by our Founding Fathers to be an arm of the government and, therefore, not always to be trusted to reach a fair decision. Today, while there may be some lingering distrust of the judiciary by some citizens, this is no longer the driving force behind those who seek to have their cases heard by a jury. In fact, jury trial requests are often made for tactical reasons having nothing to do with concerns over the fairness of the judge.

Thus, although there may be many instances in which a party would prefer to have its disputes determined by a jury, there are several reasons why litigants may find it preferable to take their case away from a jury and put their fate entirely in the hands of the trial judge, including the following:

(1) Time. Jury trials generally take longer to be reached on the docket and, when they are finally called to trial, can take a

considerably longer period of time to try,

- (2) Expense. Because jury trials take far longer to try, the cost of a jury trial, both in terms of legal expenses as well as time away from one’s normal business calling, is often overwhelming for most litigants,
- (3) Bias. A jury of your “peers” is often anything but that. Depending upon the locale of the court in which the case is tried, it is not inconceivable that some or all of the prospective jurors may have a bias in favor of one litigant and/or against the other, and
- (4) Complexity. In a complex civil dispute, unsophisticated jurors can sometimes be overwhelmed by the task of sifting through days or weeks worth of evidence to reach a fair determination of the facts in dispute. There is not a trial lawyer alive that cannot relate his or her own “horror stories” about their experiences with sometimes-nonsensical jury determinations.

Even though the federal and state constitutions would seem to guaranty every citizen the right to a trial by jury

### Waivers of Jury Trial... continued from page 6

in all civil cases, there have always been exceptions to this rule. In the case of *In re Prudential Insurance Company of America*<sup>1</sup>, decided toward the end of last year, the Texas Supreme Court recognized that, as with other constitutional rights, a party is free to contractually waive its right to a trial by jury.

*Prudential* was a dispute between a landlord and tenant under a lease which contained the following language: "Tenant and Landlord both waive a trial by jury of any or all issues arising in any action or proceeding between the parties hereto or their successors, under or connected with this Lease, or any of its provisions."<sup>2</sup> About nine months into the lease, the tenant sued the landlord, claiming that it could not conduct business on the leased premises because of the persistent smell of sewage. Not to be outdone, the landlord counterclaimed against the tenant for various amounts due under the lease. The tenant requested a jury trial, and the landlord immediately responded that the tenant had waived its right to a jury trial, citing the lease provision quoted above. Without boring you with the various arguments raised by the tenant in support of its position that

the jury trial waiver should not be enforced, the end result was that the Texas Supreme Court upheld the waiver.

So what is the effect of the Supreme Court's decision in



Even though the federal and state constitutions would seem to guaranty every citizen the right to a trial by jury in all civil cases, there have always been exceptions to this rule

*Prudential*? It means that parties to a contract may, if they so choose, agree to waive their right to a trial by jury. However, while the *Prudential* case provides an out for those who would prefer not to be subjected to a lengthy, expensive jury trial, the decision is limited to its facts and a different result might be reached if the court were faced with a different fact pattern.

Generally, waivers of rights are closely scrutinized and the court must find that the waiver was made knowingly, voluntarily and intelligently, "with sufficient awareness of the relevant circumstances

whether a jury trial waiver provision must be conspicuous. After examining these issues, the Court concluded that "[tenant's] waiver of trial by jury was knowing and voluntary as a matter of law."<sup>5</sup>

Although the *Prudential* holding is important, beware of future attacks on jury waiver provisions, because the Supreme Court has left the door open in cases where a party might be able to show that the waiver was not made knowingly, voluntarily and intelligently. Obviously, the closer you can get to the fact situation in *Prudential*, the safer your waiver provision will be. In addition, although the Court in *Prudential* did not rule directly on the issue of conspicuousness, I would recommend that any jury waiver provision be in bold type and placed near the signature line of the document in order to avoid any argument or appearance of artifice.

For more information, contact Steven M. Thomas of SettlePou at (214) 520-3300.

and likely consequences."<sup>3</sup> In *Prudential*, the Court pointed out that the tenant had negotiated commercial leases in the past, and had negotiated the lease in question over a six-month time period with the assistance of its own legal counsel. The Court also noted that the jury waiver in the lease was "captioned in bold type"<sup>4</sup> to draw attention to its importance, although the Court was quick to point out that it was not ruling on

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<sup>1</sup>In re *Prudential Insurance Company of America*. 148 S.W.3d 124 (Tex. 2004)

<sup>2</sup>Id. at 127-128.

<sup>3</sup>Id. at 132.

<sup>4</sup>Id. at 134.

<sup>5</sup>Id.

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### **SettlePou Events**

*SettlePou has been enjoying the summer season with a number of special events. Pictured above, associates and law clerks visited Lone Star Park on June 30th. Pictured left, Cliff Wade grills at the SettlePou associate cookout held on July 21st.*