

## SettlePou Insurance Update: Legislative Developments

By H. Norman Kinzy



- Article 21.55 (now § 542.051, et seq.), Texas Insurance Code “Prompt Payment of Claims Act” - Duty to Defend:

Although there is a split in authority, primarily between Texas federal and state courts, the Texas Supreme Court has now denied review in *TIG Insurance Company v. Dallas Basketball, Limited, et al.*, 129 S.W.3rd 232 (Tex. App. - Dallas 2004) (rev. den’d, August 22, 2005). The Court of Appeals in the TIG Insurance case specifically held that an insurer’s failure to defend under a liability insurance policy was not the type of “First Party” claim governed by the Prompt Payment of Claims Act, and thus the Act was not applicable, and the

penalties contained therein did not apply, to an insurer’s failure to defend. Although the denial of petition for review by the Supreme Court is not necessarily conclusive, it is at least the second opportunity that the Supreme Court has had to say otherwise, but declined to do so.

- Legislation:

A number of laws have been passed by the Texas legislature which will be of interest to the insurance industry. For example, insurers may be interested to learn more about the following:

1. House Bill 1328 provides that insurers cannot take previously existing mold problems into account in making insurance underwriting decisions if the insured applicant establishes that the mold problem has been ameliorated by providing a “certificate of mold remediation” or through an independent inspection.

2. The Insurance Code now requires an applicant who is applying for a residential property insurance policy on a property that had mold damage to provide a Certificate of Mold Remediation that must now establish

“with reasonable certainty” that the underlying cause of the mold at the property has been remediated, or inspected by an independent assessor or adjuster to determine that the property does not contain evidence of mold damage.

3. House Bill 941 specifically permits insurers to take into account the claims history of water-related damages pertaining to appliances in setting rates.

4. Effective September 1, 2005, the Texas Workers Compensation Commission has been abolished, and its functions have been transferred to a newly created “Division of Workers Compensation” within the Texas Department of Insurance. Many changes have been made, some of which are: (1) annual performance reviews for insurance carriers and healthcare providers, (2) creation of the “Office Of Injured Employee Counsel” to represent injured employees as they pass through the system and to facilitate their return to work as soon as possible;

*Continued on pages 2-3*

### Attorneys:

- SAYURI BELTRAN
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- MICHAEL P. MENTON
- KELLY J. MIDDLETON
- CARL W. MORGAN
- JEFF MOSTELLER
- DAVID M. O’DENS
- JEFFREY J. PORTER
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- MICHAEL R. STEINMARK
- STEVEN M. THOMAS
- CLIFF A. WADE
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## Insurance Update: Legislative Developments ...Continued from page 1



H. Norman Kinzy

**Areas of Practice:**

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

*Legislative Update:*

*Insurance coverage for "identity theft" may now be written by insurers authorized to write property and casualty insurance in Texas.*

(3) initiation of certification of workers compensation health care networks for use by workers compensation carriers to provide high quality medical care to injured employees, (4) the creation of a pilot return-to-work program for small employers providing grants up to \$2,500 per employer to pay for workplace modification initiatives to facilitate early return to work, (5) expansion of the list of issues that designated doctors may examine with respect to an injured employee, and (6) setting the state average weekly wage at \$540 through September 30, 2006, with provision to increase the same thereafter.

5. The "Insurer Receivership Act" has been amended to actively protect the interests of insureds, claimants, creditors, and the public through "early detection of any potentially hazardous financial condition" of an insurer and "prompt application of appropriate corrective measures." The statute extends the scope of personal jurisdiction over debtors of troubled insurers located outside of Texas and provides for a "rehabilitator" with the powers of the directors, officers, and managers of the insurer to take over such insurers and do whatever may be necessary to return them to good health.

6. The Texas Commissioner of Insurance, in the Commissioner's sole discretion, may now require an

insurer to make a "special deposit" with the Comptroller of Texas if the Commissioner of Insurance determines that certain conditions relating to the finances and/or operation of the insurer are "potentially hazardous" to the insurer's policyholders, enrollees, creditors, or the public.

7. Group life insurance policies that are issued or renewed after January 1, 2006, will be required to cover a minimum of only two employees on the date the policy is issued or renewed.

8. The definition of "pre-existing condition" for coverage under the Texas Health Insurance Risk Pool has been made more restrictive during the first year of pool coverage by expanding the exclusion to include non-payment for any charges or expenses for which the existence of symptoms would cause an ordinarily prudent person to seek diagnosis, care or treatment within the six-month period preceding the effective date of coverage.

9. Insurance coverage for "identity theft" may now be written by insurers authorized to write property and casualty insurance in Texas.

10. Health benefit plans must now provide coverage for each woman 18 years of age or older enrolled in the plan for expenses for an annual, medically recognized diagnostic examination for the early detection of cervical cancer.

11. "Customer inquiries" such as telephone calls or other communications made to an insurer that do not result in an "investigation or claim," may not be considered by an insurer when deciding to issue or to decline to issue an insurance policy to an applicant for a standard fire, homeowners, farm or ranch owners insurance policy.

12. An insurer's attorney's fees and court costs in private passenger automobile insurance policy subrogation cases in Texas may now be recovered by the insurer when pursuing a subrogation claim against a "responsible third party" who is uninsured.

13. Professional liability coverage for volunteer healthcare providers may now be made available by insurers in Texas for injuries to a patient while the provider is acting within the course and scope of the person's duties as a volunteer healthcare provider.

14. The Texas Windstorm Insurance Association may now issue a policy that includes windstorm and hail coverage for a building or other structure in "seacoast territory" that is built wholly or partially over water, as well as for the personal property contained in the building.

15. The legislature has changed Texas law regarding claims involving asbestos and silica exposure similar to claims asserted in the medical

**Insurance Update:  
Legislative Developments ...Continued from page 2**

healthcare provider realm. Specifically, the new Act (a) adopts medically accepted standards for differentiating individuals with non-malignant asbestos-related or silica-related diseases causing functional impairment from individuals with no functional impairment, (b) provides a method to obtain the dismissal of lawsuits involving persons with no functional impairment, while protecting that person's right to bring suit later, (c) creates an extended period before limitations begin to run in which to bring claims for injuries caused by asbestos or silica for those persons who have been exposed but not yet impaired, and (d) requires the preparation and filing of reports by physicians regarding the diagnosis and cause of an

exposed person's medical condition, absent which dismissal of that person's claim may occur. The Act further provides that the Multi-District Litigation Rules apply to any action pending on September 1, 2005, thereby bringing almost all silica and asbestos cases currently pending in Texas Courts into existing multidistrict litigation proceedings.

16. Insurers who offer health benefit plans or annuities or life insurance policies or contracts may not use the fact that a person has been exposed to asbestos fibers or silica or has filed a claim for exposure to asbestos fibers or silica to reject, deny, limit, cancel, refuse to renew, increase the premiums for, or otherwise adversely affect a

person's eligibility for, or coverage under, such a policy or contract.

NOTE: The foregoing are but summaries of various recent legislative developments, and the entire statutory enactments should be read prior to taking any action regarding these matters.

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

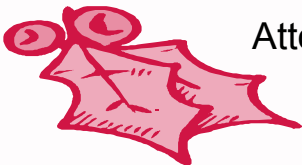
*Legislative Update:*

*Health benefit plans must now provide coverage for each woman 18 years of age or older enrolled in the plan for expenses for an annual, medically recognized diagnostic examination for the early detection of cervical cancer.*

With appreciation of our association during the past year, we extend our very best wishes for a

**Happy Holiday Season**

SettlePou  
Attorneys - Counselors





J. Allen Smith

**Areas of Practice:**

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

FOR THE FIRST TIME  
IN OVER A DECADE,  
THE TEXAS SUPREME  
COURT IS SET TO  
WEIGH IN ON THE  
ENFORCEABILITY OF  
COVENANTS NOT  
TO COMPETE.

### Texas Governor Signs New Law in Response to *Kelo*

By J. Allen Smith

Our last two issues featured reports on the United States Supreme Court's decision on eminent domain in *Kelo v. The City of New London, Connecticut*.<sup>1</sup> We previously reported that Governor Rick Perry and the Texas Legislature had responded to *Kelo* by mobilizing to enact legislation that would minimize the impact of the Supreme Court's decision. Their efforts came to fruition on August 31, 2005, when Governor Perry signed into law an act limiting the ability of the government to take property by eminent domain for private parties or for economic development

purposes.<sup>2</sup> The new law prohibits takings which benefit a particular private party through the use of the property and which are primarily for economic development. Also prohibited are takings where the stated public use constitutes a mere pretext for conferring a benefit on a particular private party. The new law does not restrict the use of eminent domain for legitimate public purposes, including projects related to transportation, water supply and flood control, public parks, hospitals, libraries, and museums, and where economic development is a secondary purpose.

For further information, feel free to contact J. Allen Smith or Scott J. Conrad of SettlePou at (214) 520-3300.

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<sup>1</sup>*Kelo v. City of New London, Conn.*, No. 04-108 (U.S. June 23, 2005).

<sup>2</sup>S.B. 7, 79th Leg., 2d Called Sess. (Tex. 2005).

### Texas Supreme Court to Rule on Covenants Not to Compete

By Michael S. Byrd

One of the hottest topics in employment law in Texas is the enforceability of covenants not to compete. Covenants not to compete are agreements prohibiting employees from working for competitor companies for a defined scope, time, and geographic area after termination. These covenants are viewed as a restraint on trade, which the United States Constitution protects against. Thus, while Texas employers have long sought to enforce covenants not to

compete against former employees, winning the favor of Texas courts has been a daunting task, with courts typically being reluctant to enforce the agreements. For the first time in over a decade, the Texas Supreme Court is set to weigh in on the enforceability of covenants not to compete. Employers and attorneys are anxiously awaiting the Court's pending decision in *Alex Sheshunoff Management Services, L.P. v. Johnson*. This case is expected to have a significant impact on the enforceability of covenants not

to compete in Texas, and will likely, either materially change or affirm the way in which Texas courts deal with these covenants. Look for a feature-length article in an upcoming issue once the Court has handed down its decision.

For questions on the current status of covenants not to compete or any future changes, feel free to contact Michael S. Byrd or J. Allen Smith of SettlePou at (214) 520-3300.

## Meet Your Lawyers:

### Barry D. Johnson

**Hometown:** Fort Smith, Arkansas

**College:** Rhodes College (Southwestern at Memphis)

**Law School:** Southern Methodist University

**Family:** Wife, Susana; daughter, Allie

**Personal Favorites:**

- **Food:** Italian
- **Drink:** Gin and Tonic
- **Hobby:** Anything musical: choral composition, performing with my quartet, playing guitar
- **TV Show:** Orange

County Chopper and Mythbusters (it's a toss up).

- **Old Movie:** It's a Wonderful Life
- **Recent Movie:** O Brother Where Art Thou
- **Book:** Master of the Senate, Caro
- **Music:** Classical, Classic Rock, Blues, Country and Western Swing. In short, anything that's "good."
- **Vacation:** Anything outside and far away, where cell phones and Blackberries don't work.
- **Sport:** Baseball
- **Sports Team:** Rangers

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

The most important quality for being a good lawyer is loving your area of practice and the industry you represent. This love leads you to do more than master the legal aspects of your client's business. It leads you to become connected with your client's industry and learn what makes that industry "tick." We win when our clients achieve their goals, and great lawyers assist their clients in formulating their business goals.



Barry D. Johnson

**Areas of Practice:**  
Mortgage Banking Regulation and Lending, Lender Liability, Commercial Bankruptcy, Financial Institution Litigation, Real Estate Litigation

## Meet Your Legal Support Team:

### David Turner

**Position:** Director of Administration

**Hometown:** Slater, Missouri

**Education:** BS, Wildlife Management, University of Missouri; MA, Zoology, University of Missouri; MBA, Finance, University of Texas at Dallas

**Family:** Wife, Denise; five children (none at home), two grandchildren

**Personal Favorites:**

- **Food:** Anything but liver
- **Drink:** single malt Scotch
- **Hobby:** Grandkids and woodworking
- **TV Show:** Frasier

- **Old Movie:** Maltese Falcon
- **Recent Movie:** The "not so recent" Monty Python and the Holy Grail
- **Book:** Bible
- **Music:** Eclectic mix of 50's - 70's rock, classic country, classical
- **Vacation:** Silverton, Colorado
- **Sport:** NASCAR
- **Sports Team:** Cowboys

David was born and raised on a central Missouri farm, which he left in 1966 to attend college. He married in 1969 and went into the Army as a Huey heli-

copter pilot in 1973. He was the Environmental Programs Officer at Fort Hood, Texas until 1977. He left service with rank of Captain. David and his wife, Denise, live in an historic 1916 home in East Dallas and just completed building a new woodworking shop. Before coming to SettlePou, he worked with an oilfield services company's environmental consulting subsidiary and as the Business Manager for an architectural firm. David has been with SettlePou since 1994.



David Turner

### New Identity Theft Laws May Impact Your Business's Document Retention Policy



Michael S. Byrd

Areas of Practice:

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

By Michael S. Byrd

The advent and increased reliance on the Internet has encouraged the growth of countless small businesses, permitting even one-person start-ups to level the playing field with larger competitors by providing inexpensive and immediate access to information and communication. An unfortunate byproduct of this instant access to information has arisen in the form of identity theft, the stealing of an individual's name, social security number, credit card numbers, or other information not otherwise publicly available.

Texas is the latest state to enact legislation requiring businesses to protect their customer information more stringently, and specifically outlaws identity theft in conjunction with Congress's Fair and Accurate Credit Transactions Act (FACT Act), which amends the federal Fair Credit Reporting Act. The effect on businesses in the state is profound. Texas House Bill 698 and Texas Senate Bill 122, both of which were signed into law and took effect on September 1, 2005, profoundly alter the way businesses must treat their customers' personal information as well as the personal information of potential employees.

House Bill 698, amends Sec-

tion 35.48 of the Texas Business and Commerce Code. The new law imposes new duties on employers with respect to the disposal of "personal identifying information", which is defined to include an individual's first name or initial and last name in combination with any one or more of the following: (1) date of birth; (2) social security number or other government-issue identification number; (3) mother's maiden name; (4) unique biometric data, including fingerprint, voice identification, retina or iris image; (5) unique electronic identification number, address or routing code; (6) telecommunication access device, including credit or debit card information; or (7) financial institution account number or other financial information.

When disposing of a business record that contains a customer's personal identifying information, a business must modify the information to make it unreadable or undecipherable by shredding, erasing or any other means. For each record that is not rendered unreadable, an employer is liable for a penalty of up to \$500. Under this new law, simply throwing out client billing records or customer contact information may constitute a violation. A business must be vigilant in shredding the documentation, erasing the electronic data and otherwise rendering un-

readable any personal information of its customers.

Senate Bill 122, which adds Chapter 48 to Title 4 of the Texas Business and Commerce Code, also imposes newly created duties on businesses to protect the personal identifying information of their customers. In addition to containing similar language regarding the disposal of personal information as House Bill 698, the Senate bill also requires businesses to implement and maintain reasonable procedures, including the taking of any appropriate corrective action, to protect and safeguard against the unlawful use or disclosure of sensitive personal information collected or maintained by the business in the regular course of business. The Bill also contains notification duties and procedures with respect to any breach of security of computerized data that includes sensitive personal information.

A business that violates Chapter 48 is liable to the state for a civil penalty in excess of \$2,000 and not to exceed \$50,000 for each violation. While such an action is designed generally to be brought by the Texas Attorney General, a person who has filed a criminal complaint alleging identity theft may also bring a civil action against the accused business or person under this section.

## New Identity Theft Laws May Impact Your Business's Document Retention Policy ...Continued from page 6

In addition to the state legislation, businesses must be aware that Congress has also enacted a disposal rule to protect the personal information of customers. The FACT Act amendments to the Fair Credit Reporting Act took effect on June 1, 2005. Like the Texas House and Senate bills, the FACT Act sets forth duties, procedures and penalties for the treatment and disposal of personal identifying information, which the Act calls "consumer report information." The FCRA recognizes two types of consumer reports - "consumer reports" and "investigative consumer reports." Only the former is relevant to the topic of this article.

A consumer report is generally a written or other communication of any information by a consumer reporting agency that addresses a customer's creditworthiness, standing, capacity, character, reputation, personal characteristics or details of living

that is collected or used in establishing eligibility for employment, loans, credit or insurance. The Act applies primarily to third-party information collectors, such as background check companies. If an employer uses its own

staff to collect information, the collected information does not ordinarily constitute a consumer report under the Act.

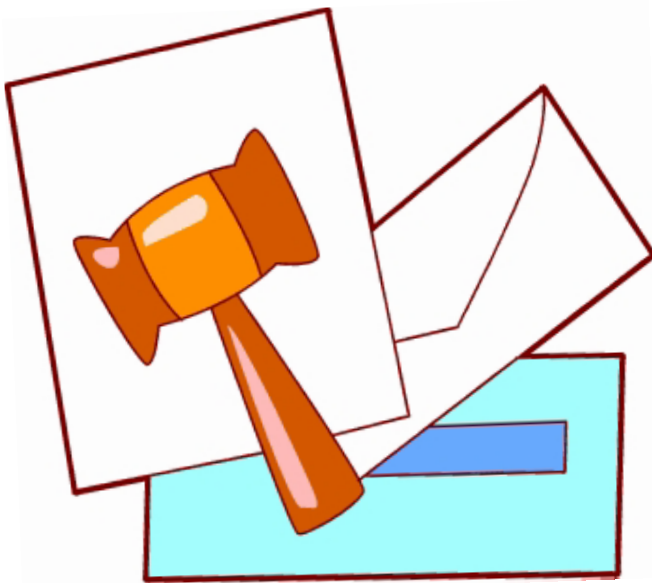
The disposal of such consumer report information, however, must be done in compliance with the Act's requirements. Under the Act, the business must use "reasonable measures" to avoid the access or use of the protected information. Examples of reasonable meas-

ures include shredding or burning of documents, destroying or erasing electronic data compilations, as well as establishing policies and procedures to monitor the business's compliance with the Act.

Due to the strict restrictions and penalties set forth in the state and federal laws, many businesses are turning to third-party vendors to ensure compliance with the respective laws. Such a decision requires its own due diligence to ensure the vendor's capability and understanding

of the changes in both state and federal law.

For more information regarding this or other employment business or employment law issues, please contact Michael S. Byrd at [mbyrd@settlepou.com](mailto:mbyrd@settlepou.com) or (214) 560-1724.



TEXAS IS THE LATEST STATE TO ENACT LEGISLATION REQUIRING BUSINESSES TO PROTECT THEIR CUSTOMER INFORMATION MORE STRINGENTLY SPECIFICALLY OUTLAWING IDENTITY THEFT IN CONJUNCTION WITH CONGRESS'S FAIR AND ACCURATE CREDIT TRANSACTIONS ACT (FACT ACT).

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