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# SETTLEPOU NEWSLETTER

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## Texas Monthly Selects J. Allen Smith as a 2007 Texas Super Lawyer



SettlePou is proud to announce that Allen Smith has recently been selected by the publishers of Texas Monthly magazine as one of its 2007 Texas Super Lawyers. The selection process began many months ago, when over 60,000 Texas lawyers were invited to participate in the nomination process. Lawyers were asked to nominate the best attorney they've personally observed in action. Once all of the nominations

were in, a specialized research department examined the background and experience of the candidates, evaluating indicators of peer recognition and professional achievement. Allen is shown on pages 66 and 102 of the 2007 Texas Super Lawyers magazine, and in the October issue of Texas Monthly which has recently hit the newsstands.

Allen Smith is a shareholder at SettlePou and Chair of its Commercial Litigation practice group.

He has been practicing law for 23 years, and has been Board Certified in Commercial Trial Law by the Texas Board of Legal Specialization for over 15 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).

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- STEVEN M. THOMAS
- DANIEL P. TOBIN
- CLIFF A. WADE

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## Insurance Update

By H. Norman Kinzy



The Texas Supreme Court has recently written on a number of significant issues of interest to the insurance industry, and the following is a brief synopsis of several of those cases.

### **•CGL Coverage For Construction Defects – Penalty For Wrongful Failure To Defend:**

In *Lamar Homes, Inc. v. Mid-Continent Casualty Company*, Cause No. 05-0832 (Texas, Aug. 31, 2007), the Texas Supreme Court ruled that allegations of “unintended construction defects” may constitute an “accident” or “occurrence” under a CGL policy, and that allegations of damage solely to, or loss of use solely of, the home itself may also constitute “property damage” sufficient to trigger the duty to defend under a CGL policy.

The Supreme Court did not rule upon the duty to indemnify, as that duty is not triggered by allegations but rather

by proof at trial.

The Court adhered to its earlier decisions that intentional torts are not accidents and are thus not “occurrences” within the scope of a CGL policy. Thus, with reference to a CGL policy, a claim does not involve an accident or occurrence “when either direct allegations purport that the insured intended the injury (which is presumed in cases of intentional tort) or circumstances confirm that the resulting damage was the natural and expected result of the insured’s actions; that is, was highly probable whether the insured was negligent or not.”

That said, and central to the *Lamar Homes* decision, the Supreme Court reiterated other of its prior holdings that “a deliberate act, performed negligently, is an accident if the effect is not the intended or expected result; that is, the result would have been different had the deliberate act been performed correctly,” and held that in such cases, a duty to defend may arise under a CGL policy.

Within the context of whether or not an “occurrence” had taken place, the Court refused to attach significance to the fact that a case may involve claims for (i) damage to the insured general contractor’s work or product, and/or (ii) faulty workmanship that damage a third party’s property, on the grounds that the CGL policy does not define “occurrence” in terms of the ownership or

character of the property damaged by the act or event, but rather defines “occurrence” in terms of “accident” which under Texas law depends upon “whether the injury was intended or fortuitous.” The Court noted that the determination of whether an insured’s faulty workmanship was intended or accidental is dependent upon the facts and circumstances of the particular case, whereas for the purposes of the “duty to defend,” those facts and circumstances must be gleaned from comparing the allegations of the plaintiff’s pleading with the actual policy language, under the “eight-corners” rule.

Turning to the exclusions of the CGL policy, the Court noted that in many cases, some acts of faulty workmanship will not fall within coverage, either because they are not an occurrence, or property damage, or because they are excluded from coverage by specific exclusions; e.g., faulty workmanship which is intentional from the insured’s standpoint, or which merely diminishes the value of the home without causing physical injury or loss of use does not involve “property damage.”

The Supreme Court dismissed the insurer’s argument that such an interpretation of a CGL policy would turn the CGL insurance into a performance bond, stating that any such similarities between CGL insurance and perform-

ance bonds are irrelevant since the CGL policy “covers what it covers.”

With respect to the insurer’s contention that the “economic - loss rule” should be applied in the insurance coverage context, the Supreme Court noted that said doctrine was generally reserved to preclude recovery in tort for economic losses resulting from the failure of a party to perform under a contract, and stated that “the economic – loss rule, . . . is not a useful tool for determining insurance coverage . . . it is a liability defense or remedies doctrine, not a test for insurance coverage.”

The Court further noted that the “CGL policy makes no distinction between tort and contract damages. . . . Therefore, any preconceived notion that a CGL policy is only for tort liability must yield to the policy’s actual language.”

*Continued on page 3*

## Insurance Update ...Continued from page 2

Finally, the Supreme Court held that an insured's claim for a defense under a liability policy is a "first-party claim" under the Texas Prompt Payment Of Claims Act, since it seeks recovery for the insured's own loss of cost of defense, and hence falls within the purview of the Statute, entitling the insured to recovery of 18% per annum interest plus reasonable attorneys fees in the event an insurer fails to provide a defense where a defense is required.

These holdings were given in response to certified questions from the United States Court of Appeals for the Fifth Circuit and, accordingly, both Texas State and Federal Courts should from this point forward be consistent on these issues. Questions remain, of course, as to what effect this decision will have upon future premiums for CGL coverage, and/or future changes to CGL exclusionary language.

### **Hospital May Not Recover Discounted Portion Of Medical Expenses By Filing A Lien Against A Patient's Tort Recovery:**

In *Daughters of Charity Health Services of Waco v. Linnstaedter*, 50 TSCJ 819 (Texas, June 1, 2007), the Supreme Court faced the issue whether a hospital paid by a workers compensation carrier could recover the discount from its full charges by filing a lien against a patient's tort recovery.

The TEXAS LABOR CODE sets limits upon charges of hospitals that may be recovered from Workers Compensation insurers, and a hospital that treats workers compensation patients is bound by the LABOR CODE's provisions. Noting that hospitals cannot sue such patients for the discount, the Supreme Court held that the hospital could not accomplish indirectly (by filing a lien) what it could not do directly (by filing suit). The Supreme Court addressed the

*"... the TEXAS LABOR CODE sets limits upon charges of hospitals that may be recovered from Workers Compensation insurers, and a hospital that treats workers compensation patients is bound by the LABOR CODE's provisions."*

hospital's argument that the injured worker had sought recovery of full medical charges billed by the hospital from a third party tortfeasor, but nevertheless held the hospital not entitled to recover. In so holding, the Supreme Court stated that "we agree that a recovery of medical expenses in that amount would be a windfall; as the hospital had no claim for these amounts against the patients, they in turn had no claim for them against Jones [the third

party tortfeasor]."

Further analysis of this case supports the contention that the Supreme Court has for the first time expressed an opinion on the interpretation of TEX. CIV. PRAC. & REM. CODE, § 41.0105. This is of particular significance in many other personal injury cases and not just those arising under the Workers Compensation Statute, because this Statute effectively limits a plaintiff's right to recover past medical damages to the amount that was actually paid by a third party or insurer, and not the amount billed to the plaintiff by the medical provider in situations where the medical provider has, by law or contract, discounted the amount charged for medical services rendered.

### **Resolution of Tort Actions Arising From Acts of Church Discipline:**

In *Westbrook v. Penley*, 50 TSCJ 949 (Texas, June 29, 2007), the Supreme Court dealt with a tort action filed by a member of a church congregation against her pastor, who was also a licensed professional counselor, where no issues of health or safety were present, and dismissed the case for want of jurisdiction. The Court essentially held that the civil courts had no constitutionally appropriate role in resolving tort actions arising from acts of church discipline. The plaintiff had claimed that her pastor had learned of disclosed information in a secular

counseling session, and then disclosed it to the congregation because of his role as pastor. The Supreme Court noted that in the pastor's dual capacity of pastor and professional counselor, he had conflicting duties. As plaintiff's counselor, he owed her a duty of confidentiality and as her pastor, he owed the church an obligation to disclose her conduct. However, the Supreme Court held that, where no issue of health or safety was involved, intervention by the civil courts for determining civil liability would unconstitutionally entangle the court in matters of church governance and impinge on the core religious function of church discipline. Accordingly, the Supreme Court dismissed the plaintiff's case for want of jurisdiction.

### **Waiver of Sovereign Immunity As To Counterclaims:**

The Texas Supreme Court continues to adhere to its recent opinion in *Reata Construction Corp. v. City of Dallas*, which holds that when a governmental entity brings an action against a defendant, the governmental entity waives immunity from suit for counterclaims that are "germane to, connected with, and properly defensive to its action, to the extent of an offset." *Texas v. Precision Solar Controls, Inc.*, 50 TSCJ 583 (Texas, April 16, 2007).

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## Insurance Update ...Continued from page 3

The State does retain immunity from suit, however, to the extent that a defendant's counterclaim damages exceed the amounts offsetting the State's monetary recovery. *Texas v. Fidelity & Deposit Company of Maryland*, 50 TSCJ 731 (Texas, May 4, 2007).

### **•Dram Shop not automatically responsible for all damages caused by an intoxicated patron:**

In *F.F.P. Operating Partners, L.P. v. Duenez*, 50 TSCJ 764 (Texas, May 11, 2007), the Texas Supreme Court dealt with a case which involved an intoxicated motorist who had purchased beer from a defendant convenience store and was involved in a motor vehicle collision with a third party who sued the beer vendor. The Supreme Court discussed the history of the Texas Dram Shop Act, affirmed its prior decision in *Smith v. Sewell*, and held that the Dram Shop Act does not make a dram shop automatically, nor vicariously, responsible for all the damages caused by an intoxicated patron. Rather, pursuant to the Texas Proportionate Responsibility Act, a dram shop is only responsible for "its proportionate share of the damages as determined by a jury." In that connection, the Texas Supreme Court envisions that an injured plaintiff's suit would ask the jury to determine the proportionate responsibility of not only the plaintiff, but also that of the dram shop and the intoxicated patron, and the Supreme

Court noted that nothing in the Dram Shop Act prevents a provider of alcoholic beverages from lessening or escaping liability altogether if the jury determined that the intoxicated patron was completely responsible for the damages suffered by a third party. The Supreme Court thus expressly confirmed that the Court's earlier decision in *Sewell* was not limited to first party actions in which the intoxicated patron was suing the dram shop for the patron's own injuries.

### **•Medical Malpractice - Failure of Patient To Give Accurate Medical History Constitutes Contributory Negligence:**

In *Jackson v. Axelrad*, 50 TSCJ 628 (Texas, April 20, 2007), the Supreme Court dealt with an unusual malpractice case wherein the plaintiff was a psychiatrist, and the defendant was an internist. In holding that the plaintiff psychiatrist was precluded from recovery by his contributory negligence, the Court ruled that a patient's failure to give an adequate medical history may constitute negligence. The Court further ruled the standard of care required in a case in which a defendant is a physician (and also required of the plaintiff where the plaintiff is a physician) is not a higher standard of care such as found in strict liability cases or common carrier cases. Rather, it is the "ordinary-care standard, modified to instruct jurors that 'under the same or simi-

lar circumstances' they must consider a physician's training" as well, and that when a party is an expert, the negligence attributed to that party must be judged in light of a standard of care that takes into account that expert's special skill and training, even though it is, in fact, simply a form of the normal standard of care of "reasonable prudence under the circumstances."

### **•Medical Malpractice - Total Lack of Consent Is Not A Lack of Informed Consent:**

In *Schaub v. Sanchez*, 50 TSCJ 919 (Texas, June 27, 2007), the Supreme Court dealt with our cause of action of "informed consent," which is statutorily defined as a claim based upon a physician's failure to "disclose or adequately disclose the risks and hazards involved in the medical care of surgical procedures." The Court held that an action for "total lack of consent" such as where no information at all is given or where the plaintiff is treated while unconscious, is akin to a battery or negligence, and is not the same as the claim of lack of "informed consent."

### **•Relevance Has Its Limits In Discovery:**

The Supreme Court addressed unbridled discovery requests in the case of *In Re All State County Mutual Insurance Company*, 50 TSCJ 902 (Texas, June 15, 2007), and stated that "discovery is a tool to make the trial process more focused, not a weapon to make it more

expensive." The Court held that trial courts "must make an effort to impose reasonable discovery limits." The Court addressed impermissibly overbroad discovery requests, as well as those which seek irrelevant information, and held that "overbroad requests for irrelevant information are improper, whether burdensome or not, and that defendants are not required to detail what such requests might encompass in order to prevail against them. Accordingly, the Supreme Court granted a writ of mandamus directing the trial court to vacate its discovery order.

For more information, contact H. Norman Kinzy ([nkinzy@settlepou.com](mailto:nkinzy@settlepou.com)), or Oliver B. Krejs ([okrejs@settlepou.com](mailto:okrejs@settlepou.com)) of SettlePou at (214) 520-3300.

# Meet Your Legal Support Team:

## Betty Black

**Position:**

Legal Assistant

**Hometown:**

Mabank, Texas

**Family:**

Son, Zac (21)

**Personal Favorites**

**Food:**

Angel hair pasta with chicken, pesto, pine nuts, black olives and roma tomatoes

**Drink:**

Vino blanco and dark beer

**Hobby:**

Cooking, gardening and learning new words in Spanish and Italian

**TV Show:**

24

**Old Movie:**

The Sons of Katy Elder

**Recent Movie:**

Blades of Glory

**Book:**

Leeway Cottage

**Music:**

All genres except rap

**Vacation:**

Italy will be the next one

**Sport:**

To watch — football  
To play — basketball

**Sports Team:**

Dallas Cowboys

Betty Black grew up in a small town in East Texas. In 1990, she moved to Colorado and returned to her hometown in 1998. After her son left the nest, Ms. Black moved to Dallas and joined SettlePou in October of 2005 with 18 years of legal experience.



Betty Black

Betty Black is a legal assistant in SettlePou's Commercial Lending group.

# Meet Your Lawyers:

## Bradford E. Adatto

**Hometown:**

New Orleans, Louisiana

**College:**

Texas Christian University

**Law School:**

Loyola University School of Law

**Family:**

Wife, Micha; and son, Ellis

**Personal Favorites**

**Food:**

Cheeseburger and fries

**Drink:**

Cold beer

**Hobby:**

Watching movies and reading

**TV Show:**

Lost and Heroes

**Old Movie:**

The Jerk and Blues Brothers

**Recent Movie:**

Casino Royale and the Pursuit of Happyness

**Book:**

Spy Novels and Science Fiction

**Music:**

All types

**Vacation:**

Any beach

**Sport:**

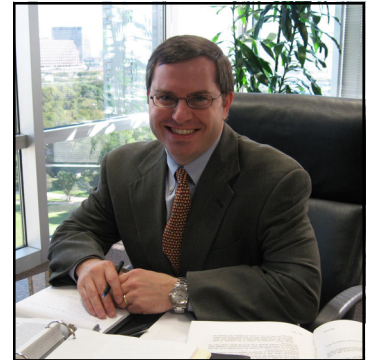
Football

**Sports Team:**

New Orleans Saints

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

Comprehending your clients' needs and efficiently providing the right resolution.



Bradford E. Adatto

Bradford E. Adatto is a member of SettlePou's Business Counsel Services group focusing on representing healthcare and corporate clients.



Jeremy Overbey

## SettlePou Welcomes New Attorney

SettlePou is pleased to announce that Jeremy Overbey joined our firm as an Associate in the Commercial Litigation Section on July 2, 2007.

Prior to joining SettlePou, Jeremy was an associate at Chamblee & Ryan in the insurance defense section. Jeremy's experience includes motor vehicle accident,

products liability, trucking, premises liability, and medical malpractice cases. Jeremy is a great fit for the firm, as both the Insurance Defense and Commercial Litigation Sections work together from time to time. We are excited to have him on the SettlePou team.

Jeremy received a J.D. from

Texas Tech University School of Law in 2004, *magna cum laude*, and a B.A. from Texas Tech University in 2001, *summa cum laude*. He is a member of the Dallas Bar Association, State Bar of Texas and Transportation Lawyers Association.

## Lease Obligations in Bankruptcy

By Cliff Wade and  
Barry Johnson



Very few tenants enter into leases without the intent to pay all of the rent when due. But lease defaults are a reality. While nonpayment of the rent is bad enough for a landlord, in a commercial tenancy, a tenant's default has far reaching consequences that may affect other tenants (by reducing traffic) or affect the project in general (by making a project appear less attractive). Therefore, a quick resolution to lease defaults is always in the landlord's best interest.

Many times, after falling behind on lease payments and other financial obligations, a tenant

will seek protection under the United States Bankruptcy Code in order to try and salvage the business. In recent years we have heard many horror stories about bankruptcies in general, but the good news for a landlord is that a debtor's options in bankruptcy as toward the landlord are very limited. Below are a few important bankruptcy concepts and tenant alternatives in bankruptcy for a landlord's use in evaluating and reacting to a tenant bankruptcy.

At the outset, the filing of a bankruptcy case imposes an "automatic stay." Thus, although the tenant must pay all rent that is due from the date of the bankruptcy going forward, the automatic stay prevents the landlord from taking any action, including, for example, use of the landlord's "self help" remedies. The automatic stay is designed to preserve the debtor's estate either for reorganization or

liquidation. In general, the debtor's affairs are supervised by the bankruptcy court, and action cannot be taken against the debtor without permission of the court or obtaining "relief from the automatic stay." Therefore, even in the circumstance where a tenant stops paying rent after filing bankruptcy, a landlord must first obtain relief from the automatic stay before exercising any of the landlord's normal default remedies such as lock out, taking possession of collateral securing the lease for non-payment, or suing the tenant for past due rent.

Of primary importance in a Chapter 11 reorganization bankruptcy, a lease obligation is referred to as an "executory" contract. Executory contracts are a special type of contract wherein the parties have some continuing mutual obligation to one another. So, for example, in a lease, the landlord has a continuing obligation to provide

the space to the tenant, and the tenant has a continuing obligation to make rental payments. Executory contracts are subject to special rules under the Bankruptcy Code and present the Bankruptcy Court and the debtor with essentially a "binary" option. The debtor must either "accept" or "reject" an executory contract. Acceptance of an executory contract means just that -- the contract is affirmed in all of its respects and the debtor is required to make all payments and perform all the actions that are required under the terms of the contract. Rejection, on the other hand, means that the debtor is refusing to continue the contract and surrendering the space to the landlord. It is important to understand from this discussion that the debtor does not have the opportunity to renegotiate a lease obligation.

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### Lease Obligations in Bankruptcy ...Continued from page 6

With an executory contract, the debtor's only decision is to accept or reject the lease. If the landlord elects to negotiate a "workout," then that is the landlord's choice. But the landlord cannot be ordered to amend or modify the lease on behalf of the debtor.

When confronted with a tenant in bankruptcy, a proper landlord's strategy is aimed towards forcing the debtor to make the acceptance or rejection decision as early as possible in the bankruptcy process. While the Bankruptcy Code provides set deadlines for this decision to be made, in many bankruptcies, the debtor will attempt to delay the decision for some period of time. In a

Chapter 11 Bankruptcy, especially, a debtor may attempt to delay the decision until confirmation of the plan. However, even if delayed for some period of time, the fact remains that at some point the debtor must accept or reject the executory contract. If the tenant accepts the lease, the tenant must bring the lease obligations current. If the tenant elects to reject the lease, the landlord gets the property back and has an unsecured claim for unpaid rent.

While bankruptcy is often viewed as a negative event, landlords and other property owners in a leased property can take some comfort in the fact that their contracts will

largely survive as is or be rejected. Bankruptcy can actually be a good event in a landlord-tenant context, because it requires the tenant to either bring the account current or give the property back. And ultimately, this is what landlords are looking for — some "closure" for a defaulted obligation.

For more information, contact Cliff Wade ([cwade@settlepou.com](mailto:cwade@settlepou.com)) or Barry Johnson ([bjohnson@settlepou.com](mailto:bjohnson@settlepou.com)) of SettlePou at (214) 520-3300.

*"When confronted with a tenant in bankruptcy, a proper landlord's strategy is aimed towards forcing the debtor to make the acceptance or rejection decision as early as possible in the bankruptcy process."*

### Specific Relief Concerning Fraud in Real Estate and Stock Transactions

By J. Allen Smith



Parties to real estate and stock transactions need to be aware of the specific relief for fraud in real estate and stock transactions. Typically, under common-law fraud, a plaintiff must prove that (1) the defendant knowingly or recklessly made a material misrepresentation with the intent that the plaintiff rely on the misrepresentation and (2) the plaintiff

relied on the misrepresentation to his detriment.

For real estate and stock transactions, Chapter 27 of the Texas Business & Commerce Code provides a statutory fraud remedy that is essentially the same as common-law fraud with one key exception—under statutory fraud, the plaintiff need not prove that the defendant acted knowingly or recklessly. Thus, the standard of proof is not as great for this statutory fraud as opposed to common-law fraud.

Under statutory fraud, a defendant is liable if it is shown that (1) the defendant made a material misrepresentation or a false promise and (2) the

plaintiff relied upon this misrepresentation to his detriment. Thus, in real estate and stock transactions a party may be liable for statutory fraud even though that party acted with care and was unaware of the falsity of the representation. Conceivably, a party could commit statutory fraud without having any intention to defraud merely by making representations that the party believed were true but later turned out to be false. Additionally, if the plaintiff can prove that the defendant acted knowingly, the plaintiff can recover exemplary damages.

A defendant may also be liable for statutory fraud under Chapter 27 for benefitting from a misrepresentation made by a

third party that the defendant knew was false. When the misrepresentation is made by a third party and the defendant is aware of its falsity, the plaintiff may also recover exemplary damages because the defendant acted knowingly.

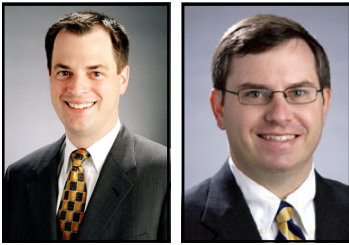
Accordingly, this relief is to be considered in the event a party has concerns as to the accurate nature of any representations in connection with a real estate transaction by another party to the transaction or a third party.

For more information, contact J. Allen Smith, chair of the commercial litigation section at [asmith@settlepou.com](mailto:asmith@settlepou.com) or (214) 520-3300.

Just when you thought it was safe again...

A National and State Review on Holes in Malpractice Damage Caps

By Michael S. Byrd and  
Bradford E. Adatto



SettlePou is pleased to announce a three part series from the Business Counsel Service Section for physicians, discussing the following: (1) the attack on malpractice damage caps; (2) increasing the physician’s professional protection; and (3) increasing the physician’s personal protection.

**Part One**

As children growing up in the 70’s, nothing scared us more than being attacked by a great white shark when jumping into the deep end of the pool (“Cue-Jaws Soundtrack”). But just when you thought it was safe again, *Jaws 2* came out, terrifying us all over again.

Just as *Jaws* scared us out of the pool, many lawsuits have scared medical practices into limiting the types of procedures performed or out-right retiring. In 2004 Texas legislation, as in many other states, introduced a medical malpractice cap as a means of protecting physicians. For example, in Texas a patient can only recover \$250,000 for non-economic losses and \$500,000 for wrongful death. However,

just when physicians thought it was safe again, physicians are encountering new lines of attack. The two most prominent attacks, which will be discussed in this article from both a national and state perspective, are: (1) using of consumer protection laws against physicians, and (2) establishing high economic damages in a malpractice case, which many times are uncapped.

**Consumer Protection Laws**

Consumer Protection laws are designed to protect the state’s citizens from unfair and deceptive bargaining power against larger, more capitalized entities. Because the legislature cannot specifically address each area where a consumer might encounter an unfair business practice, the state statutes giving rise to consumer protection claims are often broad. Courts then have the final say on to whom the statute applies, or in other words, how consumers will be limited in pursuing damages under consumer protection statutes.

**Developments Across the Nation.**

To combat the medical malpractice caps, plaintiffs look for other avenues to pursue their claims. Essentially, in many states, plaintiffs are now either tacking on consumer claims against physicians to get around the medical malpractice limitations, or they are abandoning their physician negligence claims altogether

and seeking only the consumer protection claim. The critical issue for courts, so far, has been how carefully the legislature drafted the statute when limiting liability. For instance, **Pennsylvania** decided that consumer protection statute did not apply at all to physicians supplying medical services, but only to business enterprises engaged in trade or commerce. However, this is an exception as most states allow consumer protections claims against physicians in a limited capacity.

The other extreme is when the legislature drafts a statute broadly enough to allow for consumer protection claims for a physician’s negligence. Thus, even though the state has medical malpractice limitations for recovery resulting from a physician’s negligence, it allows patients to circumvent the limitations by bringing consumer protection claims to recover for their injuries. The plaintiff will point to written representations, advertisements, or other oral representations made by or on behalf of the physician as lulling the patient into a false sense of security. If this activity rises to the level of a deceptive or unfair trade practice, it could subject the physician to hefty damages for something that essentially arose out of a negligent rendering of medical services. In **Kansas**, for example, the Supreme Court decided that the language of the statute was broad enough to allow consumer protection claims to be brought against physicians who provide

medical treatment or services.

Most states strike a balance between these two extremes and allow claims against physicians under a consumer protection statute only in limited circumstances. Generally, consumer protection claims can be brought against a physician when the nature of the claim arises out of the “entrepreneurial, commercial, or business aspect of a physician’s practice”. A patient cannot simply recast a negligence claim as a consumer protection claim to avoid malpractice limitations. **Colorado** requires a certificate for review for all cases brought against physicians, so if a consumer protection claim sounds in negligence as well, the plaintiff must provide expert testimony to support its claim. The need for medical expert testimony often suggests a negligence claim rather than a consumer protection claim. Similarly, with regard to **federal claims** brought under the Federal Trade Commission Act (“FTCA”), federal courts have also required the claim to arise out of the commercial or business aspects of a physician’s practice.

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### A National and State Review on Holes in Malpractice Damage Caps ...Continued from page 8

**The Texas Approach.** Texas has addressed the issue several times and has been very reluctant to allow claims against physicians under the consumer protection statute. Even when a dentist represented that he could do a bone graft “with no problems,” said a skin graft would work as well as a bone graft, and made statements about a patient’s prognosis, the Supreme Court said the dentist’s statements had to do with the medical standard of care sounding in negligence and not deceptive or unfair trade practices. The plaintiff’s claims was dismissed for failure to submit an expert report. Ultimately, the court looks to the underlying nature of the claim to determine whether it involves a breach of the accepted standard of medical care rather than a claim for deceptive trade practices. In another case, even when the physician expressly warranted to a patient that she would not be sedated and he thereafter sedated her, the Supreme Court said the representations all have to do with whether the administration of a general anesthetic under all the circumstances met the standard of care for anesthesi-

ologists.” Therefore, the Texas approach only allows a claim to be brought under the Deceptive Trade Practices Act if it does not have to do with the standard of medical care.

#### **A Cap is not a “CAP” when it’s Economic.**

Tort reform measures place some limitations on physician liability, and, in many states including Texas, have helped significantly reduce frivolous lawsuits and reduce insurance premiums (at least for some specialties). However, tort reform does not eliminate the risk for a substantial judgment against a physician.

In explaining tort reform, the damages caps typically put in place cover non-economic damages. Non-economic damages include things that do not involve a cash loss, with no precise value, such as pain and suffering, emotional distress and loss of consortium or companionship. In **Texas**, patients are limited to recovering \$250,000 for non-economic damages. **California** and **Montana** also cap non-economic damages.

Few have a counterpart limitation, however, on economic

damages. Economic damages encompass actual pecuniary losses, such as health care expenses, loss of wages, medical bills, and damage to property. As a result, there can be significant exposure for a physician where a catastrophic injury occurs to a patient, particularly to a well educated patient who can establish significant lost wages damages.

While many physicians believe that tort reform eliminates their exposure for malpractice claims, the reality is that tort reform helps but cannot be relied upon as the sole protection from a massive malpractice judgment. It remains important for physicians to review their professional and personal structures as a means to taking needed steps for protection.

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.

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*“Texas has addressed the issue several times and has been very reluctant to allow claims against physicians under the consumer protection statute.”*

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