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SETTLEPOU NEWSLETTER

SettlePou Newsletter

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2011

Two in Honors for SettlePou

2011 Texas Super Lawyers: J. Allen Smith and Michael S. Byrd

SettlePou is proud of the repeat performances by Allen Smith and Michael Byrd, both selected as 2011 Texas Super Lawyers.

Allen was selected as a Super Lawyer for the fifth year in a row. Allen is a shareholder at SettlePou and Chair of its Commercial Litigation practice group.

Although this is his first selection as a Super Lawyer, Michael was selected as a Rising Star in 2009 and 2010. Michael is a shareholder at SettlePou and Chair of its Business Counsel Services practice group.

Allen and Michael can be found in the 2011 Texas Super Law-



yers magazine and the Texas Super Lawyers supplement to the October issue of Texas Monthly magazine.

To learn more about SettlePou's Super Lawyers and the firm's other attorneys and services, please visit www.settlepou.com.

SettlePou Selected in Dallas Morning News Top 100 Places to Work

The Dallas Morning News

TOP 100

PLACES TO WORK 2011

SettlePou is honored to have been selected for the 3rd year in a row in *The Dallas Morning News*' "Top 100 Places to Work," the ultimate list of companies with the best work-

ing environments and happiest employees in the DFW Metroplex, as determined by anonymous employee polling. SettlePou is one of only 2 law firms in the elite group of 34

SettlePou thanks our employees for taking pride in the firm and our core values – *Respect, Results, Responsiveness* – and for delivering success to our clients!

companies selected for the 3rd straight year, and one of only 4 law firms on this year's list. SettlePou advanced 18 spots to number 12 on the list of Top Small Companies, those with up to 149 employees, and is the top-rated law firm in its class.

Attorneys:

- BRADFORD E. ADATTO
- 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
- KATHERINE L. KILLINGSWORTH
- NORMAN H. KINZY
- OLIVER B. KREJS
- JACOB L. MCBRIDE
- BRADLEY E. MCLAIN
- MICHAEL P. MENTON
- JEFF MOSTELLER
- DAVID M. O'DENSE
- JEREMY OVERBEY
- JARED T.S. PACE
- JEFFREY J. PORTER
- ROBERT L. POU III
- JUSTIN M. PUCKETT
- JAY D. REYERO
- THOMAS C. SCANNELL
- EMILY G. SCHULTE
- 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

Rules of Civil Procedure: Potential Game-Changers

By Michael R. Steinmark and
Daniel P. Tobin



The Texas Rules of Civil Procedure (“**TRCP**”) and the Texas Civil Practice and Remedies Code (“**CPRC**”) are the predominant rulebooks for civil litigation in Texas state courts. There are 822 rules in the TRCP that govern every stage of litigation, with many rules having numerous subparts and intricacies. Likewise, the voluminous CPRC has many nuances affecting the outcome of civil lawsuits in Texas.

Generally every golfer, even a novice, will know the “major” rules of the game—how to keep score, how to penalize a ball hit out of bounds, etc. But even some of the most experienced golfers are unfamiliar with rules that can lead to penalties or advantages on which success or failure can turn.

Like golfers, trial lawyers and many litigation-savvy parties know the “major” rules in the TRCP and CPRC—when to file an answer, what discovery is permissible, what is required for summary judgment, etc. Familiarity with new, lesser-used, and nuanced rules of civil procedure, however, can give parties competitive advantages in litigation.

For example, Texas House Bill 274 (“**HB 274**”), enacted this past summer and effective as of September 1, 2011, broadens the availability of “interlocutory appeals,” those brought during the course of a lawsuit, before trial or even discovery. Parties will now be able to file interlocutory appeals on controlling questions of law where the appeal “may materially advance the ultimate termination of the litigation.” The new interlocutory appeal rules may help a party avoid the time and expense of full discovery and trial by having outcome-determinative legal issues finally decided through the court(s) of appeal.

Another significant change under HB 274 will be the adoption of “rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without evidence.” The Texas Legislature has directed the Texas Supreme Court to adopt such rules (as part of the TRCP), although no deadline has been set and fairly broad discretion has been given on the mechanics of the new rules. While the content and effective date of the new rules is thus uncertain, mandates in HB 274 ensure the new procedures will have a short time frame and will include a mandatory award of attorneys’ fees to the prevailing party.

HB 274 also imposes a new requirement for designating a “responsible third party”—a person or entity that is not

actually made a defendant in the lawsuit, but whose responsibility a jury may consider in a comparative fault analysis thereby potentially reducing an actual party defendant’s liability exposure. Specifically, a defendant cannot designate someone as a responsible third party if the defendant does not disclose the third party’s identity before the statute of limitations runs on claims against that party. Failure to adhere to this requirement may prevent a defendant from taking advantage of the potential liability-reducing benefits of responsible third party practice.

In addition to new rules, some lesser-used and nuanced rules can afford parties significant advantages in litigation. For example, Rule 167 of the TRCP puts in place settlement offer procedures that can make attorney’s fees and litigation costs recoverable where they might not otherwise be available. For a more detailed discussion of Rule 167, please see *Rule 167 Offers: Encouraging Early Settlement*, by J. Allen Smith and Katherine L. Killingsworth, *SettlePou Newsletter* Volume 6, Issue 4, available at <http://www.settlepou.com/newsletter.html>. Rule 167 was recently expanded by HB 274, which now allows a party to recover “reasonable deposition costs” in addition to attorneys’ fees, court costs, and reasonable fees for up to 2 testifying expert witnesses.

Other lesser-used and nuanced rules in the TRCP with potential strategic impacts include:

Rule 1 – states that the purpose of the rules is to ensure that the parties receive a just, fair, equitable, and impartial adjudication of the rights. This may serve as authority for equitable motions not specifically governed by other rules.

Rule 6 – prohibits a lawsuit from being commenced or served on a Sunday. This can be critical for default judgments or other issues related to perfecting service.

Rule 12 – allows a party to challenge the authority of an attorney to represent a party and requires that the attorney respond by proving its authority to the Court. This can be useful in cases where questions arise as to an opposing party’s actual authorization of an attorney to take certain actions on the party’s behalf.

Rule 176.3 – states that a subpoena, when issued to a person or company that is not a party to the lawsuit, may not require the witness to appear or produce documents in a county more than 150 miles from where the witness resides or is served. Given the size of the State of Texas, this can be an important limitation when either defending or prosecuting a lawsuit. For instance, it can mean that a subpoena issued in Dallas would not be enforceable on a nonparty witness residing in San Antonio.

Continued on Page 4

Meet Your Legal Support Team:

Stephanie Brand

Position:

Legal Secretary

Hometown:

Rockwall, TX

Education:

ESS College of Business
(Legal Secretary Program)

Family:

Husband of 19 years, Robert;
and three teenage daughters:
Ashley (17), Megan (15) and
Rachel (14)

Personal Favorites

Food:

Nano's Chicken & Dumplings
and Mom's Carrot Cake

Drink:

Iced Tea and Water

Hobby:

Cooking, hanging with my
girls (which usually includes
shopping), and running

TV Show:

Body of Proof and old epi-
sodes of *The Brady Bunch*

Old Movie:

How to Lose a Guy in 10 Days,
Wizard of Oz

Recent Movie:

Country Strong,
It's a Boy Girl Thing

Book:

Choosing to See
by Mary Beth Chapman

Music:

Country and Oldies

Vacation:

Winterpark, Colorado

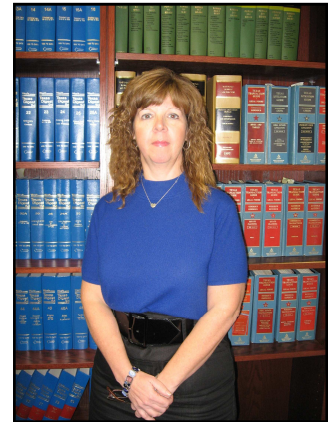
Sport:

Football

Sports Team:

RHHS Hawks and
Dallas Cowboys

Stephanie Brand was born in
Dallas and grew up in Gar-
land. She started working for
SettlePou in November
2009. In her spare time, she
loves spending time with her
family. Stephanie's biggest
accomplishment (after turn-
ing 40) was starting and
FINISHING the White Rock
Lake Marathon in the fall of
2008.



Stephanie Brand

Stephanie Brand is a Legal
Secretary for SettlePou's
Lending Division.

Meet Your Lawyers:

Mark T. Craig

Hometown:

Dallas, TX

College:

Southern Methodist
University

Law School:

St. Mary's

Personal Favorites

Food:

Steak

Drink:

Vodka & Soda

Hobby:

Golf and Fishing

TV Show:

The Office and *Seinfeld*

Old Movie:

Animal House

Recent Movie:

The King's Speech

Book:

A Terrible Glory
by James Donovan

Music:

Country

Vacation:

Yellowstone

Sport:

Golf

Sports Team:

Dallas Cowboys

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

The ability to effectively listen
and, most importantly, being
responsive to your client's
needs and requests.



Mark T. Craig

Areas of Practice:
Texas Nonsubscriber Defense
and Insurance Defense

Rules of Civil Procedure: Potential Game-Changers ...Continued from Page 2

If the discovery deadline passes before the party issuing the subpoena realizes the error, the requested discovery could be prevented, which in certain instances could have a significant impact on the outcome of a case.

Rule 202 – allows a person to obtain court permission to take a deposition to investigate a potential claim or in anticipation of a lawsuit, but before a suit is actually filed. This rule can be very useful in obtaining information

from third parties before a potential defendant is aware of a potential suit.

Rule 263 – presents an alternative to a traditional trial by allowing parties to agree to the facts of a case in writing and submit those facts to the court for the judge to render judgment by applying the law to the agreed facts. Although not practicable in every case, this rule can significantly reduce the time and expense of full litigation,

can ensure judgment is rendered (which is not guaranteed with competing summary judgment motions), and can limit appellate issues. For more detailed discussion of Rule 263, please see *The Rule 263 Trial By Agreement*, by J. Allen Smith and Bradley E. McLain, *The Texas Lawyer Special Edition, Litigation and E-Discovery*, April 18, 2011, Volume 27, Number 3, page 20; and *A Trial Without Having a "Trial,"* by Bradley E. McLain and J. Allen Smith, *SettlePou Newsletter* Volume 4,

Issue 2, available at <http://www.settlepou.com/newsletter.html>.

For more information, please contact Michael R. Steinmark (msteinmark@settlepou.com) or Daniel P. Tobin (dtobin@settlepou.com) of SettlePou at (214) 520-3300.

The Dilution of Texas Corporate Practice of Medicine

By Bradford E. Adatto and Michael S. Byrd



Until recently, Texas had one of the strongest corporate practices of medicine in the United States. Basically, the corporate practice of medicine required that any entity providing clinical medical services in Texas had to be a professional entity wholly owned by a physician. In addition, only a physician could be an officer or manager of that professional entity. There are several states that have corporate practice of medicine statutes but most states are more diluted to the extent the statutes allow non-physicians to own a medical practice.

On June 17, 2011, the Governor of Texas signed House Bill 2098, which immediately amended the Code of the Texas Business Organization Code and the Texas Occupation Code to authorize joint ownership of professional entities by physicians and physician assistants. This is a significant change from the past limitations of the corporate practice of medicine in Texas.

Although this law does allow the physicians and physician assistants to partner together, these joint ownerships still have certain criteria that they must meet to be legal under the new corporate practice of medicine law. These criteria include the necessity to have significant language as it relates to the governance and ownership of the professional entity. For example, the physician assistant

cannot contract or employ a physician to be the supervising physician of that physician assistant. In addition, the physician assistant may have only a minority ownership interest in that entity and the physician assistant may not have any ownership that is equal to or exceeding that of any other individual physician owner. Furthermore, the statute limits the control that the physician assistant may have in governing the entity. Finally, physician assistants with these types of ownership will have annual reporting requirements with the physician assistant board.

This law is the first considerable step into allowing non-physicians to own professional entities with physicians. As previously noted, the law applies only to physician assistants and not to other medical professionals or non-medical pro-

fessionals. Nevertheless, there are new creative ownership models for physician practices. Because of the regulatory constraints involved with physician assistants owning a part of a medical practice, it is imperative that the entity and governing documents be carefully developed.

For more information, please contact Michael S. Byrd (mbyrd@settlepou.com) or Bradford E. Adatto (badatto@settlepou.com) of SettlePou at (214) 520-3300.

Real Estate Secured Note Purchases — You’ve Purchased the Note, Now What?

By Jeffrey J. Porter and
Jeff Mosteller



In the first two installments of our three-part series of articles addressing the various issues that arise in connection with real estate secured note purchase transactions, we first discussed the general framework and issues related to all note purchase transactions and then looked more specifically at issues unique to the purchase of commercial mortgage backed securities (“CMBS”) notes. This article explores the options available following the acquisition of the note, and identifies some potential pitfalls that note purchasers should be prepared to address.

So, you’ve purchased a note secured by real property – what to do now? A purchaser acquires the note for any number of reasons, but it will (nearly) always lead to dealings with the borrower. Upon the completion of the note purchase, the purchaser typically sends the borrower a “hello” letter, putting the borrower on notice that the purchaser has purchased the note and providing the borrower with the contact information for payment and notice purposes pursuant to the loan documents. The purchaser will likely have determined how it intends to proceed with (or against) the borrower.

If the borrower declines to cure defaults and offers no agreeable methodology for settling claims, the primary option available to a note purchaser is to institute foreclosure proceedings to acquire title to the real property. A noteholder should be prepared for the borrower’s efforts to thwart lender’s attempts to secure its rights under the note such as seeking a restraining order or filing bankruptcy. Prior to undertaking foreclosure proceedings or other actions against the borrower, the noteholder should assure that it has analyzed all third party relationships and other property related matters (indeed, these activities are best undertaken prior to the purchase of the note as detailed in our prior newsletter articles). The completion of a foreclosure sale can, under certain circumstances, have unintended and potentially disastrous results. For example, certain leases may be terminated by a foreclosure unless preemptive actions are taken, thereby potentially impacting the value of the asset. If the noteholder has taken the proper precautions, it can exercise all of the remedies available by complying with all requirements imposed by the loan documents and applicable laws related to the foreclosure of real property, such as notices to borrower, filing of the foreclosure action, and undertaking the actual sale, for instance.

Immediately after the completion of a foreclosure sale, the noteholder will stand as the owner of the property and should immediately take all activities to secure the property

and its valuable elements. For example, the noteholder (as the new “landlord” under any leases related to the property) should contact all tenants informing them of its acquisition of the property, directing that rent payments and notices to landlord be sent to the noteholder. In this regard, it is important to review the provisions of the leases prior to taking any actions to determine any specific language which needs to be included in the letter to assure that the leases are either retained or terminated pursuant to the specific case facts and desires of the landlord.

It should be noted that dealing amicably with the borrower is often possible, and the particular circumstances of a relationship with the borrower may eventually lead to a settlement of a payment of the note at a discounted amount or a “friendly foreclosure” which will save all parties time, money and aggravation. An option available to all lenders is to determine if any workout can be achieved with the borrower. Given some of the pitfalls and delays which can be involved with the other options available to the purchaser, these types of borrower-friendly transactions can often be the best case scenario, as they can be more expeditious and economical than the more contentious alternatives.

We are hopeful that our three part series has been helpful in addressing the opportunities which can be realized in the acquisition of promissory notes which are secured by real prop-

erty. The interested reader should understand that these articles have been general in scope given the depth of substance and the varying fact situations potentially involved in these transactions. We encourage any reader which has specific interest and inquiries to contact the authors at their convenience.

For more information, please contact Jeffrey J. Porter (jporter@settlepou.com) or Jeff Mosteller (jmosteller@settlepou.com) of SettlePou at (214) 520-3300.

Update on Recent Insurance Law

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 workers' compensation extra-contractual claims and lifetime benefits, the interpretation of "all risk" policies and toxic torts.

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.

Workers' Compensation Insurance - Extra-Contractual Claims:

In *Texas Mutual Insurance Company vs. Ruttiger*, 08-0751 (Tex. 2011), the Texas Supreme Court examined earlier case law in light of Texas' current workers' compensation statutory scheme, and held that an injured worker has no claim under the Insurance Code against a workers' compensation insurer for unfair claim settlement practices. However, the court also ruled that claims

under the Insurance Code may be made by a plaintiff against an insurer for misrepresenting provisions of an insurer's policy of workers' compensation insurance. Finally the court sent the case back to the intermediate court of appeals to determine whether or not the currently existing common law remedy for breach of the covenant of good faith and fair dealing ("bad faith") against a workers' compensation insurer should be overruled in light of the current workers' compensation statutory scheme.

"All Risks" Insurance Policy - Effect of Manuscript Deletions from Policy Form:

In *The Houston Exploration Company and Offshore Specialty Fabricators, Inc., v. Wellington Underwriting Agencies, Ltd.*, 08-0890 (Tex. 2011), the Texas Supreme Court dealt with a London market "all risk" property damage insurance policy, wherein the parties thereto had manually stricken through, and thereby deleted, several provisions of the policy which would have otherwise provided coverage for certain items, e.g., coverage for certain "weather stand-by charges" in connection with damage to an offshore drilling platform. In rejecting the insured's claims for coverage, the Texas Supreme Court held that deletions in a printed form agreement are indicative of the parties' intent, and that such changes in a printed form must be accorded special weight in construing the instrument. For those reasons the court concluded that the manual deletion

of the policy paragraph in dispute effected the removal of coverage for "weather stand-by charges" from the policy.

Pharmaceuticals - Products Liability - Toxic Torts -

Causation:

In *Merck & Co., Inc. v Garza*, 09-0073 (Tex. 2011), the Texas Supreme Court discussed the evidence required to prove causation in products liability cases arising from pharmaceuticals in general and Vioxx in particular. The Supreme Court revisited its decision in *Merrill Dow Pharmaceuticals, Inc., v Haver*, adhered to that decision, and held that properly designed and executed epidemiological studies may be part of the evidence supporting causation in a toxic tort case, but such studies must be analyzed closely by the court and such studies should show that there is at least a "doubling of the risk" between a pharmaceutical product and the claimed injury in order to satisfy Texas' "no evidence standard of review" as well as the plaintiff's burden of proof that the product in question "more likely than not" caused the injury. A discussion of all aspects of this causation ruling is beyond the scope of this case note, but the court discusses in detail the required analysis of epidemiological studies which is required to validate such studies as proof of medical causation.

Workers' Compensation - Lifetime Income Benefits - Loss of Enumerated "Body Parts":

In *Insurance Company of the State*

of *Pennsylvania v Muro*, 09-0340 (Tex. 2011), the Texas Supreme Court dealt with whether an award of lifetime income benefits could be made to an employee for loss of use of certain statutorily enumerated body part(s), where the loss of one's ability to use the enumerated body part(s) was not caused by physical loss to the specified body part itself, but is due to injury to a non-enumerated "body part." In this case, the plaintiff claimed that injuries to her non-enumerated hips prevented her from walking normally, thereby effecting a loss of the use of her statutorily enumerated feet, entitling her to lifetime benefits for loss of her feet. In reversing an award for the plaintiff, the Supreme Court noted expert trial testimony that the plaintiff's feet were "functioning fine" and "normal functioning" when taken alone. Thus, the Supreme Court denied lifetime compensability, and stated that although "the injury to the statutory body part may be direct or indirect, ... the injury must extend to and impair the statutory body part itself to ... allow lifetime benefits."

For more information, 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.



*In appreciation of our relationship
during this past year,
we extend our very best wishes for a
Happy Holiday Season*

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