

**BIG-FIRM EXPERTISE COUPLED WITH  
SMALL-FIRM ATTENTION**

# SETTLEPOU NEWSLETTER

**SETTLEPOU**  
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## Introducing Business Counsel Services — Your Outside In-House Counsel

By Michael S. Byrd



SettlePou is excited to introduce the newest section of the firm, namely, the Business Counsel Services Section. For those clients who have been receiving these services for several years, they know that the services provided within this Section are not new. Rather, the creation of the Business Counsel Services Section is a direct response to the positive feedback and high demand for these services from the firm's clients.

The Business Counsel Services Section serves as outside counsel for small to mid-sized private businesses.

Though private businesses of this size experience a broad range of legal needs in their ongoing business, it simply is not cost effective to hire in-house counsel. The Section works closely with chief executive officers, chief financial officers, human resources officers, office managers and other management level officers of a business to assist in identifying and addressing legal issues in the same manner as a traditional in-house attorney.

The Business Counsel Services Section fills this role with experience in a wide array of market sectors and with experience in most of the business legal issues that a private company faces. For legal issues that cannot be handled within SettlePou, the firm will facilitate locating appropriate counsel outside the firm to handle the specific issues at hand. Additionally, our firm has a strong referral network of accountants, insurance agents, lenders, money managers, valuation experts, and

mergers and acquisitions brokers.

Within the Business Counsel Services Section, there are two practice groups: Private Business and Health Law.

### Private Business Group.

The private business group has significant experience in serving as outside counsel for clients in many types of private businesses, including clients in the real estate sector, banking industry, technology sector, home building market, internet companies, professional service companies and start up companies. Our services include business entity planning, corporate governance issues, contracts, mergers, acquisitions and divestitures, intellectual property, employment and human resources issues, e-commerce /internet, real estate, and dispute resolution. The group also advises clients addressing the relationships of multiple owners through buy/sell agreements, voting agreements,

*Continued, Page 2*

### Attorneys:

- SAYURI BELTRAN
- MATT BETHANCOURT
- MICHAEL S. BYRD
- SCOTT J. CONRAD
- MARSHA L. DEKAN
- J. GARTH FENNEGAN
- DON GWIN
- BARRY D. JOHNSON
- KATHERINE L. KILLINGSWORTH
- NORMAN H. KINZY
- BRADLEY E. MCLAIN
- MICHAEL P. MENTON
- CARL W. MORGAN
- JEFF MOSTELLER
- DAVID M. O'DENS
- JEFFREY J. PORTER
- ROBERT L. POU III
- SHARON REULER
- JOHN D. "Jay" SETTLE
- NANCY ANN SHAW
- J. ALLEN SMITH
- JAMES M. STANFORD
- CLAY M. TAYLOR
- STEVEN M. THOMAS
- DANIEL P. TOBIN
- CLIFF A. WADE
- JASON A. WEST
- C. RUSSELL WOODY

**Meet Your Lawyers:**



Cliff A. Wade

Areas of Practice:  
Commercial Bankruptcy, SBA Liquidation, Asset Recovery, Lender Liability, Loan Workouts & Restructuring, Financial Institution Litigation, Business Litigation, and Appellate Law

**Cliff A. Wade**

**Hometown:** *Belton, Texas*

**College:** *Texas Christian University*

**Law School:** *Southern Methodist University, Dedman School of Law*

**Family:** *Wife, Ashley and daughter, Natalie*

**Personal Favorites:**

- **Food:** *My burger with Ashley's fried potatoes and onions*
- **Drink:** *Miller Lite in the can*
- **Hobby:** *Once was golf, now is spending time with family*
- **TV Show:** *Seinfeld*

- **Old Movie:** *Animal House*
- **Recent Movie:** *Meet the Fockers*
- **Book:** *How to Make Money in Stocks — William J. O'Neil*
- **Music:** *Country*
- **Vacation:** *Colorado/Rocky Mountains*
- **Sport:** *Golf*
- **Sports Team:** *TCU Horned Frogs*

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

*Integrity with client, courts, other lawyers, opposing parties and all others we come into contact with in our profession.*

Cliff Wade is a member of SettlePou's Creditor's Rights practice. Mr. Wade's practice focuses on representation of creditors in commercial bankruptcy, litigation and asset recovery. His practice includes workouts, foreclosures, and liquidations; representing creditors in reorganization and liquidation bankruptcy cases (e.g., pursuing relief from automatic stay, prohibiting and negotiating the use of cash collateral, and negotiating for proper treatment in plans of reorganization); defending creditors in adversary proceedings concerning avoidance claims filed by trustees; filing lawsuits in state court to pursue collection on behalf of creditors; conducting post-judgment discovery and collection; and prosecuting and defending appeals in both State and Federal Courts.

**Business Counsel Services** *continued from page 1*

SETTLEPOU'S BUSINESS COUNSEL SERVICES SERVES AS OUTSIDE COUNSEL FOR SMALL TO MID-SIZED PRIVATE BUSINESSES.

and other agreements that set forth the parameters for entry and exit from the entity. For more information relating to the private business group, please visit [www.settlepou.com](http://www.settlepou.com).

Health Law Group.  
The health law group has developed an extensive practice representing physician

practices and other physician-owned businesses. The group assists with traditional business issues such as contracts, employment issues, and corporate governance issues, and with specific issues facing physicians such as business entity planning, asset protection, fraud and abuse laws, credentialing,

and HIPAA. For more information relating to the health law group, please visit [www.settlepou.com](http://www.settlepou.com).

\*\*If you are interested in learning more about these services, please contact Michael S. Byrd at (214) 520-3300 or [www.settlepou.com](http://www.settlepou.com).

## Is Your Loan Guaranteed?

By David M. O'Dens

### INTRODUCTION

Lenders are often placed in a difficult situation when a commercial borrower files bankruptcy. Certainly, most lenders will ensure that there is adequate collateral for the loan. However, sometimes the collateral may not be of a character that warrants repossession or foreclosure. In addition, collection under the rules of bankruptcy, although necessary to preserve a lender's rights, can result in significant unrecoverable legal fees and the accrual of interest which cannot be charged to a bankrupt debtor. However, when a lender has secured a guaranty of the loan, collection against guarantors for the full amount owed under the note, including all reasonable legal fees and interest that accrues after the bankruptcy filing can be another avenue of recovery.

### PURSuing THE GUARANTOR FOR COLLECTION

A lender may proceed against a guarantor for the full amount due on a note even though a bankruptcy has limited or discharged the liability of a borrower. For example, Bank loans money to ABC Corp., and John Doe, president of ABC Corp., guarantees the loan. Subsequently, ABC Corp. defaults on the loan and files for bankruptcy. As a result of the bankruptcy, ABC Corp. may significantly reduce the

debt, and may not ultimately be responsible to Bank for liabilities that accrue after the bankruptcy is filed including, for example, interest, late charges, appraisal fees and attorney's fees. However, as a guarantor, John Doe does not benefit from ABC's avoidance of these liabilities. While some bankruptcy courts have enjoined pursuit of lender's collection against guarantors when the guarantors are principals of the debtor and vital to its operations, this remains the exception to the rule. Thus, as a general rule, assuming a well-crafted guaranty, Bank is free to proceed against John Doe for collection of the full balance due under the Note, including all reasonable legal fees and interest that accrues after the bankruptcy filing.

### WHAT CAN A LENDER RECOVER FROM A GUARANTOR?

Generally, a guarantor's liability on a debt is measured by the borrower's liability unless the instrument expressly sets forth otherwise. Many guarantees have a limited scope and merely bind the guarantor to pay any and all indebtedness which the *borrower* "may now or at any time hereafter owe." Generally speaking, courts have held that this limiting language restricts a lender from obtaining post-bankruptcy filing interest and attorney's fees from the guarantor because the lender could not obtain the same

from the borrower.

On the other hand, a well-crafted guaranty may allow a lender to recover from the guarantor the full amount owed under the note, including interest and attorney's fees associated with the borrower's bankruptcy. Contrary to the limited guaranty discussed above, an unconditional or "unlimited" guaranty may protect a lender's right to recover these post-bankruptcy filing interest and fees. Courts have indicated that language which provides for guarantor liability on *all* indebtedness under the note even if the borrower's obligation "ceases to exist by operation of law" (*e.g.*, because of bankruptcy) can allow a lender to recover from the guarantor. However, each guaranty is unique and will contain specific language with respect to the extent of guarantor liability.

\*\*For more information, contact David M. O'Dens at (214) 520-3300 or [www.settlepou.com](http://www.settlepou.com).



David M. O'Dens

Areas of Practice:  
Commercial Bankruptcy, Asset Recovery, Lender Liability, SBA Liquidation, Real Estate Litigation, Title Insurance, Appellate Law, Labor, and Employment Law

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LIABILITY OF A  
BORROWER.



H. Norman Kinzy

Areas of Practice:  
Aviation, First Party Insurance  
Claims, Insurance Coverage Litigation,  
Insurance Subrogation, Third  
Party Liability Claims, and Business  
Litigation

## Insurance - Reservation of Rights - Conflicts of Interest Between Insuror and Insured

By H. Norman Kinzy

In the recent Texas Supreme Court case of *Northern County Mutual Insurance Co. v. Davalos*, 47 Tx.Sup.Ct. Journal 786 (Tex. July 2, 2004), the Supreme Court dealt with what types of conduct by an Insuror will create such a conflict between the interest of the Insuror and the Insured as to cause Insuror to lose the right to control the defense of the Insured in a third-party liability claim. This matter did not involve a

coverage defense, but rather, actions that the Insuror wished to take in conducting the defense, and, in particular, dealt with choice of venue. Despite the fact that the Insured wanted the venue held in a different county than did the Insuror, the Supreme Court held that the Insuror's insistence on venue did not create such a conflict as to require the Insuror to give up its contractual right to conduct the defense. The court discussed, however, a

number of "conflicts of interest" that might justify an Insured's refusal of an Insuror's offered defense, even where no reservation of rights has been issued by the Insuror.

The Court was also presented with, but did not decide, whether Article 21.55, Texas Prompt Payment of Claims Act, applies to the claim of an Insured where a liability Insuror has failed promptly to accept or reject its Insured's defense.

## Ethics Opinion — Auditor's Review of Insurance Counsel's Bill

By H. Norman Kinzy

Ethics Opinion No. 552, August 2004, issued by the Professional Ethics Committee for the State Bar of Texas has ruled that the delivery of a lawyer's fee statement or invoice, which is confidential

information, to a third party auditor, without the informed consent of the Insured client, violates Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct. Likewise, the payment of a percentage of the lawyer's fee

by the lawyer to a third party auditor acting for the insurance company constitutes prohibited fee splitting in violation of Rule 5.04 of the Texas Disciplinary Rules of Professional Conduct.



John D. "Jay" Settle

**Meet Your Lawyers:**

**Hometown:** Dallas, Texas

**College:** Texas Tech

**Law School:** Texas Tech

**Family:** Wife, Karen and sons, Trey and Blake

**Personal Favorites:**

- **Food:** Trout
- **Drink:** Merlot
- **Hobby:** Golf and Fishing

### John D. "Jay" Settle

- **TV Show:** *West Wing*
- **Old Movie:** *Zulu*
- **Recent Movie:** *Finding Neverland*
- **Book:** *His Excellency; April 1865*
- **Music:** *Jazz and 60's*
- **Vacation:** *Mountains*
- **Sport:** *Golf*
- **Sports Team:** *Dallas Mavericks*

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

*Listening to clients' real needs and providing that service at a fair price.*

Jay Settle is a founder of SettlePou and is a member of SettlePou's Real Estate Transactions practice.

## What Constitutes “Public Use” in an Eminent Domain Setting?

By Scott J. Conrad and Katherine L. Killingsworth

Recent decisions have affected what is considered to be a “public use,” a requirement for a condemning authority when private property is sought through eminent domain. Such a “taking” requires the payment of compensation to the property owner pursuant to the 5th Amendment of the United States Constitution and Article I, Section 17 of the Texas Constitution. Presently an inconsistency exists among the jurisdictions around the United States of what constitutes “public use.” As a result, the U.S. Supreme Court has granted certiorari to a case from Connecticut, *Kelo v. City of New London*<sup>1</sup>, that will more than likely resolve this inconsistency. The decision should be reached by the end of June, 2005.

The premier decision that spawned the divergent rulings was *Poletown Neighborhood Council v. Detroit*<sup>2</sup>, a 1981 Michigan Supreme Court decision. In *Poletown*, homes, churches, and businesses were taken and destroyed for the “public purpose” of economic development by the City of Detroit. The purpose was to allow General Motors to build a new assembly plant and to allegedly create 6000 new jobs for the city. The Michigan Supreme Court held that such a purpose was “public use.”

Twenty years later in July of 2004, in *County of Wayne v.*

*Hathcock*<sup>3</sup>, the Michigan Supreme Court unanimously overruled *Poletown*. The County of Wayne brought an action to condemn land to build a business and technology park. Again, the proposed condemnation promised to promote economic development by creating approximately 30,000 new jobs and \$350 million in tax revenue. The court found no facts of independent public significance, such as the need to promote health and safety, that would justify the condemnation<sup>4</sup>. Accordingly, the court overruled the *Poletown* concept that alleviating unemployment and revitalizing the economy are “public uses.”<sup>5</sup>

Finally, earlier this year in *Kelo*<sup>6</sup>, the Connecticut Supreme Court reached a decision contrary to *County of Wayne*. The City of New London’s proposed condemnation was to replace a residential and commercial area with an industrial park and office space. The proposed development promised to increase the city’s tax revenue and improve the local economy. The court concluded, “development plans that... will promote municipal economic development by creating new jobs, increasing tax and other revenues, and otherwise revitalizing distressed urban areas” are valid public uses.<sup>7</sup> The *Kelo* ruling was granted certiorari by the U. S. Supreme Court on September 28, 2004, hopefully to resolve these judicial inconsistencies.

In Texas, in conjunction with Article I, Section 17 of the Texas Constitution, Texas courts have interpreted “public use” to mean that property can only be taken when the public obtains a definite right or use in the business to which the property is devoted.<sup>8</sup> Clearing slum and blighted areas is an example of one such use.<sup>9</sup> A decision in *Kelo* by the U. S. Supreme Court may have implications in North Texas in the near future as the Dallas Cowboys’ planned stadium to be built in Arlington will more than likely require the use of eminent domain powers to acquire the necessary land.

The guidance of the U. S. Supreme Court as to what constitutes “public use” is a decision that will hopefully will clarify a condemning authority’s requirement of “public use” when seeking to take an owner’s property. We will be following closely the *Kelo* decision and posting updates regularly. In the interim, please feel free to contact Scott J. Conrad at [sconrad@settlepou.com](mailto:sconrad@settlepou.com) if you have any questions or comments.



Scott J. Conrad

Areas of Practice:  
Business Litigation, Condemnation Law, Financial Institution Litigation, Real Estate Litigation, ADR & Litigation Mediation, and Appellate Law

TEXAS COURTS HAVE INTERPRETED “PUBLIC USE” TO MEAN THAT PROPERTY CAN ONLY BE TAKEN WHEN THE PUBLIC OBTAINS A DEFINITE RIGHT OR USE IN THE BUSINESS TO WHICH THE PROPERTY IS DEVOTED.

<sup>1</sup>*Kelo v. New London*, 268 Conn. 1, 843 A.2d 500 (2004).

<sup>2</sup>*Poletown Neigh. Council v. City of Detroit*, 410 Mich. 616, 304 N. W.2d 455 (1981).

<sup>3</sup>*County of Wayne v. Hathcock*, 471 Mich. 445, 684 N.W.2d 765 (2004).

<sup>4</sup>*Id.* at 477.

<sup>5</sup>*Id.* at 482.

<sup>6</sup>*Kelo*, 268 Conn. 1, 843 A.2d 500 (2004).

<sup>7</sup>*Id.* At 531.

<sup>8</sup>*City of Arlington v. Goldust Twins Realty, Inc.*, 41 F.3d 960, 965 (5th Cir. 1994).

<sup>9</sup>*Davis v. City of Lubbock*, 160 Tex. 38, 326 S.W.2d 699, (1959).

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