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You Take It, You Buy It: Texas Courts Require Condemning Authorities to Compensate Billboard Property Owners for their Interests

By J. Allen Smith and Michael R. Steinmark

After years of Texas condemning authorities and appraisers attempting to treat billboard owners and their interests differently from other property owners and their interests, Texas courts are saying, "Enough is enough." Three recent Court of Appeals decisions are developing a body of law in Texas confirming that the protection of the rights of billboard property owners in condemnation is on par with that afforded to owners of other real property interests.

These opinions collectively hold that a billboard property owner is entitled to just compensation for the loss of income from advertising on a sign because such income is not "business income" but rather income generated from the land. Further, this line of cases establishes that a sign structure is a real estate fixture, and the taking of the structure is thus compensable.

Procedurally, these cases support the exclusion of valuation expert testimony where the expert fails to consider the billboard owner's full interests in valuing the land. Significantly, these decisions have also firmly rejected the arguments repeatedly attempted by condemning authorities that sign structures are not fixtures as a matter of law because they are removable and/or considered personalty by the sign owner for tax purposes or under a ground lease.

In the case of *Harris County Flood Control District v. Roberts*, 2008 WL 878507 (Tex. App.—Houston [14th Dist.] 2008, pet. filed), the Court of Appeals upheld the trial court's award of compensation to the billboard property owner for the taking of its sign structure and related property interests, finding that the billboard structure was a real estate fixture at the time of the taking, and the related lease and property interests should be compensated. The Court refused the condemnor's argument that, as a matter of law, the sign structure was not a fixture and the billboard property owner was, therefore, entitled only to the bonus value of the lease, which had a nominal value.

Further, the Court in *Harris County Flood Control District* rejected the condemnor's argument that the sign structure was not a real estate fixture because the billboard property owner considered it personal property for tax purposes and had the right under the lease to remove it. The Court instead found the evidence sufficient to establish the sign structure as a real estate fixture, making it a compensable interest in condemnation and requiring an award of just compensation to the billboard property owner for the taking of the sign, which the Court found to be properly valued at approximately 1,111 times greater than the value offered by the condemning authority.

Continued on Page 2

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You Take It, You Buy It ... *Continued from Page 1*

In the case of *Harris County v. Clear Channel Outdoor, Inc.*, 2008 WL 1892744 (Tex. App.—Houston [14th Dist.] 2008, no pet. h.), the Court upheld the award of compensation to the billboard property owner for both its leasehold interest and its sign structure. Finding that the Fifth Amendment to the U.S. Constitution requires the government to compensate the billboard property owner for the taking of the billboard structure, the Court rejected the government's argument that the sign structure was not a compensable interest. Specifically, the Court denied the government's arguments that the sign structure was personal property as determined by the billboard property owner's intent as implied by the terms of the lease; that the sign structure was not sufficiently affixed to the real property to become a real estate fixture; and that the only compensation to which the billboard property owner was once again entitled was the bonus value of the lease, which was nominal.

Citing the U.S. Supreme Court's decision in *Almota Farmers Elevator & Warehouse Co. v. U.S.*, 409 U.S. 470 (1973), the Court in *Harris County* found that a condemning authority, such as the government, cannot take advantage of a lease agreement designating an improvement made by lessee as personal property. Further, the condemning authority cannot refuse to compensate for taking business improvements, such as a billboard, by dismissing them as worthless simply because the condemnor does not intend to use them. The Court held that if a business improvement is attached to the real estate, as with a billboard, it must be treated as real estate in determining the total award. The Court thus awarded the billboard property owner the value it requested.

"... the Court of Appeals upheld the trial court's award of compensation to the billboard property owner for the taking of its sign structure and related property interests..."

Finally, in the case of *State v. Central Expressway Sign Associates*, 238 S.W.3d 800 (Tex. App—Dallas 2007, pet. filed), the Court addressed the valuation of a billboard site in the context of a billboard easement. The Court found that in determining the value of the easement, income derived from advertising on the sign was not "business income," but rather income generated by the land which should be properly considered in valuing the sign site. The Court thus upheld the award of just compensation based on an income valuation approach using the advertising income from the billboard face rentals.

These precedents reinforce established property rights of billboard property owners and show that Texas courts will not allow condemning authorities to skirt their legal obligations to pay just compensation for taking billboard property interests in condemnation. Condemning authorities should take note of these appellate decisions in making statutorily mandated pre-condemnation settlement offers in compliance with the recently adopted Texas Landowner's Bill of Rights as prescribed by the Texas Legislature in Texas Government Code § 402.031 and Chapter 21 of the Texas Property Code.

For more information on billboard and other property owners' rights in condemnation, please contact J. Allen Smith (asmith@settlepou.com) or Michael R. Steinmark (msteinmark@settlepou.com) of SettlePou at (214) 520-3300.

Recent Texas Supreme Court Insurance Decisions of Note

By H. Norman Kinzy

Over the past several months, the Texas Supreme Court has been quite active in the tort and insurance fields, handing down several important decisions which are hereinafter detailed.

As always, each case involves different facts, which may be case determinative. Accordingly, the following summaries of cases are law only as to that case, and further review and analysis of the facts and law of other cases must be conducted before relying upon the rules set out hereinafter.

Insurability of Exemplary Damages:

In *Fairfield Insurance Company v. Stephens Martin Paving, LP,* 04-0728, (Tex. 2008), the Texas Supreme Court held that Texas public policy does not prohibit the insuring of, and coverage for, exemplary damages under the specific type of workers' compensation and employer's liability insurance policy which was at issue in that case. In an opinion narrowly limited to the facts of that case; *i.e.*, (1) where a corporation is held liable for conduct of its "vice-principals," (2) where the conduct was done without the participation or knowledge of the officers or shareholders of the corporation, (3) where the insurance contract covered "all sums" and was an arms-length transaction between the insurance company and the corporation, and (4) where the policy distinguished between conduct done by employees and conduct done by the corporate entity, its shareholders and its officers, the Supreme Court held that allowing insurance coverage for exemplary damages under such limited circumstances did not violate the public policy of Texas regarding to the imposition of exemplary damages as punishment for a wrongdoer.

In partial support of its ruling, the Texas Supreme Court noted that the legislature was aware that commercial general liability insurers were also providing insurance coverage for exemplary damages and were making payments for coverage of exemplary damages, and that the legislature had not seen fit to prohibit payments by such insurers for punitive damages, thereby giving a glimpse into what the Texas Supreme Court might ultimately hold if this issue were presented as to CGL policies. Nevertheless, in Texas, the issue of insurability of punitive damages remains an open question as to other forms of insurance policies to be analyzed in light of the aforesaid criteria and applicable Texas statutes setting forth public policy.

Insurer's Right to Reimbursement From Insured – New Opinion Upon Rehearing:

In *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.,* 02-0730 (Tex. 2008), a case involving excess insurance coverage, the Texas Supreme Court withdrew its prior opinion issued May 27, 2005, and adhered to its earlier decision in *Tex. Ass'n of Counties County Gov't Risk Mgmt. Pool v. Matagorda County* on the issue of an insurer's right to reimbursement from an insured. Accordingly, in Texas, even in excess coverage cases where the excess carrier has no duty to defend, an insurer that settles a claim against its insured when coverage is disputed may only seek a reimbursement from the insured (should coverage later be determined not to exist) if the insurer "obtains the insured's clear and unequivocal consent to the settlement and the insurer's right to seek reimbursement." In so holding, the Texas Supreme Court refused to imply a reimbursement obligation on the part of the insured with respect to excess insurors, absent the insured's clear and unequivocal consent to both the settlement and the insurer's right to seek reimbursement.

Lack of Duty of Insuror to Notify an Additional Insured of Available Liability Coverage:

In *National Union Fire Insurance Co. of Pittsburgh, PA v. Crocker*, 06-0868 (Tex. 2008), the plaintiff sued a nursing home and its employee for damages. Although the insurer defended the nursing home, it did not inform the employee that he was an insured, nor did the insuror offer a defense, and the employee though served, neither forwarded suit papers to the insuror, nor requested a defense from either the insuror or his employer.

Continued on Page 4

Recent Texas Supreme Court Insurance Decisions of Note ...*Continued from page 3*

The Supreme Court held that, upon the facts presented, insurers owe "no duty to provide an unsought, uninvited, unrequested, unsolicited defense," and declined to impose an extra-contractual duty on liability insurors that would force them to keep track of potential litigants who may or may not be additional insureds, may or may not be entitled to coverage, and may or may not expect a defense to a claim. Thus, insurors need not provide coverage to additional insureds who never seek it, and an insurer has no duty to either inform an additional insured of available coverage or to voluntarily undertake a defense for the additional insured. Moreover, the insurer's actual knowledge of such a situation does not establish a lack of prejudice as a matter of law, where the additional insured provides late notice of a claim for coverage. Put simply, there is no duty to provide a defense absent a request for coverage, despite the fact that the insuror knows of the suit against the additional insured and the additional insured is ignorant of the terms of the insuror's policy which would otherwise provide coverage for the additional insured.

Insuror's Use Of Staff Attorneys:

In *Unauthorized Practice Of Law Committee v. American Home Assurance Company, Inc., et al.*, 04-0138 (Tex. 2008), the Supreme Court held that "an insuror may use staff attorneys to defend a claim against an insured if the insuror's interests are congruent, but not otherwise," and stated that "their interests are congruent when they are aligned in defeating the claim and there is no conflict of interest between the insuror and the insured." In the course of the opinion, the Supreme Court noted that where insuror acquires confidential information that it cannot be permitted to use against its insured, or where an insuror attempts to compromise a staff attorney's independent, professional judgment, or in some other way the interests of the insuror and the insured diverge, then staff attorneys may not be used to defend the claim. Where staff attorneys are proper, however, their use does not constitute the unauthorized practice of law by an insuror.

Uninsured Motorist Coverage Does Not Extend To Damages Caused By Impact Of A Vehicle's Component Parts:

In *Nationwide Insurance Company v. Elchehemi,* 06-0106 (Tex. 2008), the Supreme Court held that where an axle-wheel assembly separated from an unidentified semi-trailer truck and crashed into the insured's automobile causing damage, there was no coverage under the insured's uninsured motorist coverage for the reason that a vehicle's separated component, such as an axle-wheel assembly, does not constitute a "motor vehicle" under the Texas uninsured motorist statute, and thus does not constitute the "actual physical contact" with a motor vehicle required by the statute for coverage to exist.

Product Liability – Duty of Manufacturer to Defend or Indemnify Innocent Sellers:

In *Owens & Minor, Inc. v. Ansell Health Products, Inc.,* 06-0322 (Tex. 2008), the Supreme Court concluded that a manufacturer that offers to defend or indemnify a distributor for claims relating to a sale or alleged sale of that specific manufacturer's product fulfills its obligation under Texas' product liability statute. In other words, an indemnifying manufacturer must hold harmless an innocent seller "only for the portion of the defense associated with that manufacturer's own products."

Product Liability – Federal Preemption of Design Defect Claims:

In *Bic Pen Corporation v. Carter*, 05-0835 (Tex. 2008), the Supreme Court held that Texas statutory and common law was preempted by Federal design regulations relating to cigarette lighters and that where a product design was approved by the Federal Consumer Product Safety Commission, a plaintiff's design defect claim must be dismissed. However, the Court remanded the case for consideration of whether "a manufacturing defect" existed, since such manufacturing defects are not preempted by Federal design regulations.

Products Liability - Auctioneers:

In *New Texas Auto Auction Services, L.P. v Gomez*, 06-0550 (Tex. 2008), the Supreme Court held that product liability law requires only those who place products in the stream of commerce to stand behind them; it does not require everyone who facilitates the stream of commerce to do the same. Accordingly, auctioneers who usually are neither buyers nor sellers, but agents for both, are not liable in strict liability, despite the fact that they are engaged in sales.

Continued on Page 5

Recent Texas Supreme Court Insurance Decisions of Note ... *Continued from Page 4*

Texas Dram Shop Act:
In *20801, Inc. v. Parker, 06-0574* (Tex. 2008), the Supreme Court dealt with the "safe harbor" provisions of the Texas Dram Shop Act which provide that employers are not liable for the acts of their employees in selling alcoholic beverages to intoxicated persons, provided that: (1) the employer requires its employee to attend certain training classes, (2) the employee actually attended those classes, and (3) the employer did not "directly or indirectly encourage" the employee to violate the law. In regard to the third requirement, the Supreme Court held that a plaintiff has the burden of proof to establish "direct or indirect encouragement" and that the plaintiff's burden in that respect may be satisfied, at the minimum, by evidence of negligence on the part of the provider. The Court further held that a provider/employer would be liable for the acts, including the negligence of the provider/employer's vice principals and managers."

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

Understanding How the Development of the Barnett Shale May Affect Real Estate Transactions in North Texas

By Jeffrey J. Porter and Brian Baker

Buying real property can be compared to walking through a mine field, requiring a purchaser to avoid the hidden dangers. Now, a new challenge has arisen in the form of the Barnett Shale. The Barnett Shale is a subterranean geological formation estimated to cover an approximately 5,000 square mile area of land in North Texas counties. While the Barnett Shale has an estimated 30 trillion cubic feet of natural gas resources, it was not until recently that much of its potential began to be realized due to recent advances in the technology of horizontal drilling.

The recent boom in drilling has created issues for real estate transactions in the North Texas area, given the unique nature of Texas mineral rights, which may be severed from the surface rights. One party may own the land and improvements and another, the rights to the oil and gas located beneath that land. Sometimes, many parties will own the mineral rights. This is particularly problematic because, in Texas, the mineral estate is dominant over the surface estate. In other words, if the owner of the oil and gas rights wants to explore for gas on the property, the surface owner can do little to prevent a gas well from being drilled on his land. Any owner of a mineral interest, no matter how small a percentage that party owns, may encumber the property with a mineral lease.

Title companies have reacted to the recent boom by seeking to protect themselves from potential owner policy claims. The insurer will either place a blanket exception to title (covering any and all issues related to mineral interests) or adjust the description of the insured estate to exclude the mineral estate. Generally, the language used will cover "fee simple, save and except any and all rights, titles, and interest previously reserved, conveyed or created with respect to oil, gas, or other minerals in and under the land." Either of these exceptions should be unacceptable to buyers, given the potential adverse affects of onsite drilling activities.

A recent bulletin by the Texas Department of Insurance has called these practices into question. On April 10, 2008, the Commissioner of the Texas Department of Insurance issued Bulletin #B-0013-08 entitled "Coverage of Mineral Estate" which requires that any special exception to minerals must include a reference to a recorded instrument. This requirement would invalidate the blanket exception discussed above. The bulletin also requires that the insured estate in a title commitment must be the same as that conveyed to the selling party. Therefore, reducing the estate by excluding minerals would be impermissible.

Continued on Page 7

Meet Your Legal Support Team:

Nyjer Reese

Position:
Legal Secretary

Hometown:
Dallas, Texas

Family:
Nya, Amadeus, Keke and Tiffani

Personal Favorites

Food:
Mexican, Chinese and Southern Fried Chicken

Drink:
Orange Soda

Hobby:
Youth Sports

TV Show:
Sanford & Son, Good Times and Justice League Unlimited

Old Movie:
The Color Purple

Recent Movie:
American Gangster

Book:
The Power of One by Bryce Courtenay

Music:
Jazz, Blues, R&B

Vacation:
Miami

Sport:
Basketball and Football

Sports Team:
Dallas Cowboys and Little League Buccaneers (Son's Football Team)

Nyjer Reese has been with SettlePou for seven years. In his spare time, he enjoys cooking, especially grilling. His specialty is barbeque chicken.

Nyjer Reese

Nyjer Reese is a Legal Secretary for SettlePou's Real Estate Group.

Meet Your Lawyers:

David M. O'Dens

Hometown:
Taunton, Massachusetts

College:
University of Texas - El Paso

Law School:
Oklahoma City University School of Law

Family:
Wife, Dayna; and son, Zach

Personal Favorites

Food:
Filet Mignon

Drink:
Cabernet Sauvignon

Hobby:
Golf

TV Show:
Boston Legal

Old Movie:
Inherit the Wind

Recent Movie:
Charlie Wilson's War

Book:
The Longest Winter by Alex Kershaw

Music:
Smooth Jazz

Vacation:
Beach with a Bar

Sport:
Professional Football

Sports Team:
Kansas City Chiefs

(Some of us are old enough to remember the Dallas Texans.)

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

The ability to effectively listen, understand the client's needs and objectives, communicate well, and to work with time constraints. And in all endeavors, always maintain a sense of humor.

David M. O'Dens
Chair of Creditors Rights Section

Areas of Practice:
Lender Liability, Financial Institution Litigation, Bankruptcy, Real Estate Litigation and Appellate Law

Understanding How the Development of the Barnett Shale May Affect Real Estate Transactions in North Texas … *Continued from Page 5*

While this bulletin appears to solve both problems purchasers face when working with a title company's exceptions to minerals, it must be noted that a bulletin does not carry the authoritative weight of a statute. Many title companies have been resistant to the bulletin and have not adjusted their practices to conform to its guidelines. It may require stronger action on the part of the Texas Department of Insurance to force title companies to insure the mineral estate.

Even if a purchaser is able to obtain an acceptable title policy, a mineral interest holder may still place a lease, and potentially a gas well, on the purchaser's property. Purchasers must be careful to identify every party holding either a mineral interest or a mineral leasehold interest in the property, as they have the capability to disrupt development of the property with drilling activities. Once a purchaser has identified each such interest holders, the purchaser must obtain waivers sufficient to remove the risk of drilling or exploration on the property. The waivers are documents that prohibit mineral interest holders from granting leases with dominant surface rights and that prevent leasehold interest holders from drilling on the property.

"Even if a purchaser is able to obtain an acceptable title policy, though, a mineral interest holder may still place a lease, and potentially a gas well, on the purchaser's property."

For more information, contact Jeffrey J. Porter, chair of the real estate section at jporter@settlepou.com or (214) 520-3300.

Asset Protection Planning

By Michael S. Byrd and Bradford E. Adatto

The Business Counsel Services Section of SettlePou is pleased to continue its three-part physicians' series covering the following topics:
Attack on malpractice damage law caps (See SettlePou Newsletter Volume 4, Issue 3); (2) increasing the physician's professional protection; and, (3) increasing the physician's personal protection.

Part 2 - Increasing the Physician's Professional Protection.
The words "asset protection planning" has been thrown around so often that the actual meaning may have been diluted. This article is designed to detail the "What," "Why," "Who," "When," "How" and "Where" of asset protection plans. It will also provide information on exempt and non-exempt assets. Finally, it will detail the professional protections that can be provided to physicians.

What

What is asset protection planning? Proper asset protection planning is the orderly organization and structure of one's assets and affairs (business and personal) in advance of potential liability, risk, judgment or other creditors' claims to protect resources. Figuring out techniques that protect your assets is an extremely important and personal process.

Why

Why would someone develop an asset protection plan? (1) To deter potential creditors from going after your assets; (2) to frustrate the collection process making it difficult or impossible for future creditors to grab hold of your assets or collect judgments against you; and (3) to form an estate plan (as will be detailed in the next article).

Who

Who really needs asset protection planning? Most people think that asset protection plans are for extremely wealthy individuals. Asset protection plans are not just for the extremely wealthy individuals, but are for persons who have exposed assets and conduct activities that could create catastrophic liability. Based on judgment creditors' rights, a person with more than $60,000 in net non-exempt assets should consider implementing an asset protection plan.

Continued on Page 8

Asset Protection Planning ... *Continued from Page 7*

An example of a catastrophic event which could affect a physician is a malpractice claim in which a young professional is injured and can never work again. As explained in our last newsletter, the new Texas malpractice damage caps only non-economic damages, but economic damages are not capped. Such a catastrophic event would cause the economic damages to fall outside of the scope of the protection of the malpractice damage caps and most likely the physician's insurance limits. This could leave the physician obligated to pay the remainder of a potentially large judgment.

When

When is it the proper time to begin asset protection planning? The best time to begin is now, but definitely before a claim is filed or made; otherwise, it may be considered a "fraudulent transfer." A fraudulent transfer may occur when a person transfers property, in effect, to stop legitimate creditors from taking assets in order to satisfy a legitimate debt. Asset protection planning is not a means of defrauding creditors or even evading taxes. It's a means to figure out and apply a series of lawful techniques that protect your assets from claims of future creditors.

How

How does one go about developing an asset protection plan? The physician should sit down with his or her professionals and conduct a risk assessment. This risk assessment will determine the likelihood and extent of the exposure, the activities that could create liability, the nature and extent of the physician's assets (exempt vs. non-exempt assets), the family situation for future estate planning, and the personal wishes of that particular person. It is important when a physician is developing an asset protection plan to coordinate multiple professionals to ensure a solid plan. A good asset protection plan is like a custom-built chair. It has four solid legs and a sturdy back, but it still must be comfortable for you to sit in. At the end of the day, an asset protection plan must fit your needs. The professionals who should be a part of designing your plan are your CPA, financial planner, insurance agent and attorney. Each one of these individuals is a key ingredient in establishing your personal plan (or handcrafted chair).

"When is it the proper time to begin asset protection planning? The best time to begin is now, but definitely before a claim is filed or made; otherwise it may be considered a "fraudulent transfer."

Where

Where do these assets go? The non-exempt assets can be properly moved and placed into structured trusts or other entities.

Protection of Assets – Exempt vs. Non-exempt

The first level of protection an asset receives is being deemed by the Government to be an exempt asset. There are five main categories of exempt assets: (1) homestead exemption; (2) personal property exemption; (3) annuities; (4) life insurance and (5) retirement benefits. Generally, anything that falls outside of these exempt asset categories is considered a non-exempt asset and is subject to the claims of creditors. The homestead exemption is considered judgment proof. But it is important to note that you can have only one home qualify for the homestead exemption.

"How does one go about developing an asset protection plan? The physician should sit down with his or her professionals and conduct a risk assessment."

Professional Protection

For an individual there are certain levels of protection that can provide some type of asset protection. (1) The Government - The first level of protection comes from the Government. For physicians, the protection is Tort Reform. The malpractice caps limit non-economic damages and wrongful death. (2) General/Professional Insurance - The next level of protection is to be properly insured. The problem with relying strictly on insurance is that it might not cover all possible risks; it might be insufficient; or your claim might be denied and/or the exclusions in the policy do not cover the activity.

Continued on Page 9

Asset Protection Planning *... Continued from Page 8*

(3) Corporate Structures - The third level of professional protection is corporate structures. Corporate structures allow you to move non-exempt assets into entities establishing certain levels of protections that an individual would not be able to receive. The main drawback is a potential loss of control after assets are moved. Depending on the need, the corporate structure could be a professional association, professional limited liability company or other types of affiliated entities.

Planning to protect one's assets is important in light of the many risks in practicing medicine. Proper coordination, proactive planning and implementation can go a long way to achieve the desired results. In our next newsletter, we will present the final installment of our three-part series, Physician's Personal Protection. This article will address the personal protection plans available to individuals. In addition, it will address estate planning aspects that can be incorporated into an asset protection plan.

If you would like to learn more about asset protection planning, please feel free to contact Michael S. Byrd (mbyrd@settlepou.com) or Bradford E. Adatto (badatto@settlepou.com) at (214) 520-3300.