BIG-FIRM EXPERTISE COUPLED WITH
SMALL-FIRM ATTENTION℠

SettlePou Newsletter

SettlePou
ATTORNEYS ▪ COUNSELORS

3333 LEE PARKWAY, EIGHTH FLOOR, DALLAS, TEXAS 75219
TEL: (214) 520-3300, FAX: (214) 526-4145
WWW.SETTLEPOU.COM

Volume 7, Issue 3 **2010**

SettlePou Welcomes New Attorneys

For more than 30 years, SettlePou has provided a unique brand of big-firm expertise coupled with small-firm attention to our clients through highly skilled, service-focused attorneys. SettlePou has strategically grown to over 30 attorneys with a qualified support staff. The firm has attracted top talent by cultivating a superlative work environment, being recognized by *The Dallas Morning News* in 2009 as one of its Top 100 Places to Work. Continuing in that tradition, SettlePou is proud to announce the addition of two attorneys: Kent D. Williamson and Mark T. Craig.

Mr. Williamson joined SettlePou's Insurance Defense Section, as a shareholder, on June 16, 2010. Mr. Williamson's experience is primarily in the defense of "non-subscriber" employers who voluntarily opt out of the Texas Workers' Compensation Insurance Program. Mr. Williamson attended undergraduate school at Texas Tech University and the University of Texas-Dallas. He graduated from the University of Tulsa College of Law in 1990.

Kent D. Williamson

Mark T. Craig

Mr. Craig also joined the Insurance Defense Section on June 16, 2010. Mr. Craig also practices in defense of non-subscriber employers, as well as premises liability claims and business/commercial litigation. Mr. Craig is a native of Dallas, Texas. He received his undergraduate degree from Southern Methodist University in 1995 and graduated from St. Mary's University School of Law in 2000.

Mr. Williamson and Mr. Craig defend non-subscriber employers in both traditional third-party lawsuits and lawsuits involving alleged ERISA violations. In addition, both Mr. Williamson and Mr. Craig represent clients in employment disputes, premises liability, and commercial vehicle and general insurance defense litigation.

For more information, contact Kent D. Williamson (kdwilliamson@settlepou.com) or Mark T. Craig (mcraig@settlepou.com) of SettlePou at (214) 520-3300.

Attorneys:

- Bradford E. Adatto
- Brian Baker
- Michael S. Byrd
- Scott J. Conrad
- Mark T. Craig
- Marsha L. Dekan
- J. Garth Fennegan
- Don Gwin
- Kerry M. Southerland
- 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'Dens
- Jeremy Overbey
- Jeffrey J. Porter
- Robert L. Pou III
- Justin M. Puckett
- Jay D. Reyero
- Thomas Scannell
- John D. "Jay" Settle
- J. Allen Smith
- James M. Stanford
- Michael R. Steinmark
- Steven M. Thomas
- Daniel P. Tobin
- Cliff A. Wade
- Kent D. Williamson

The Internet and Personal Jurisdiction: When Can a Non-resident be Sued in Texas Courts Based on Its Website?

By Michael R. Steinmark

Whether as a source of information, a marketplace, or something in between, a business's website can be one of its most valuable assets. While websites endow businesses with invaluable marketing and sales benefits, many businesses are unaware of the jurisdictional consequences of their Internet presence.

Even when a business is not organized under Texas law, does not maintain an office in Texas, has never sent a representative to Texas, or has never even had a telephone conversation with someone in Texas, that business may still be subject to personal jurisdiction in Texas courts based solely on its web presence. Merely maintaining a website that may be accessed in Texas, however, does not necessarily serve by itself as grounds for personal jurisdiction.

To determine jurisdiction based solely on Internet presence, Texas courts will assess where the particular website falls along a spectrum of interactivity. In this regard, Texas courts have identified three primary types of websites: commercially active, passive, and interactive.

Commercially Active Websites

At one end of the Internet jurisdiction spectrum are parties with "commercially active" websites. These websites are clearly used to transact business over the Internet. Commercially active websites incorporate e-commerce functionality, allowing parties residing outside of Texas to enter into contracts with Texas residents in transactions involving the knowing and repeated transmission of computer files over the Internet, allowing purchase orders to be placed on the website and processed automatically.

Transactions with Texans that have actually been consummated through a website in sufficient quantity over a sufficiently long period of time are a factor that a Texas court may consider in determining whether the site is commercially active and whether the court can exercise jurisdiction over the non-resident defendant. Texas courts have held that commercially active websites will by themselves support a Texas court's exercise of personal jurisdiction over the party operating the site.

Passive Websites

At the other end of the spectrum are parties with purely "passive" websites. These websites merely provide information to interested parties. They exist exclusively for basic identification purposes, and do not incorporate any interactive components—not even the ability to e-mail the party operating the site. Contact with Texas residents through the operation of passive websites has been considered incidental rather than purposeful by Texas courts. Accordingly, while there may be exceptions, passive websites generally tend to be insufficient on their own to give rise to personal jurisdiction in Texas.

Interactive Websites

In between commercially active websites and passive websites are "interactive" websites, a broad and nebulous category of sites facilitating the exchange of information between the user and the party operating the site. When a website does not clearly fit into either the commercially active category or the passive category, Texas courts consider a number of factors in evaluating the degree of interactivity between the parties via the site and the effect of that interactivity on personal jurisdiction. Generally, the more commercially interactive the site, the more likely it is to subject the party operating the site to personal jurisdiction in Texas.

For more information, contact Michael R. Steinmark (msteinmark@settlepou.com) J. Allen Smith (asmith@settlepou.com), or H. Norman Kinzy (nkinzy@settlepou.com) of SettlePou at (214) 520-3300.

Meet Your Legal Support Team:

Kendra Lang

Position:
Office Services

Hometown:
Dallas, Texas

Family:
Daughter, Teandra, nine years old

Personal Favorites

Food:
Seafood, Soul Food, Fat Backs, Collard greens, etc.

Drink:
Lemon water

Hobby:
Praying and playing video games

TV Show:
Platinum Weddings

Old Movie:
Boyz in the Hood

Recent Movie:
Toy Story 3

Book:
It varies. Bible is #1 choice.

Music:
Depends on the mood I'm in.

Vacation:
Relaxing on the beach.

Sport:
Basketball

Sports Team:
Miami Heat

Kendra Lang has been with SettlePou for 2 years. In her spare time, she enjoys spending time with family and friends, playing softball, and watching the Miami Heat!

Kendra Lang

Kendra Lang is the Office Services Clerk for SettlePou.

Meet Your Lawyers:

Brian H. Baker

Hometown:
Knoxville, TN

College:
Washington and Lee University

Law School:
SMU - Dedman School of Law

Family:
Wife, Heather and son, Jack (8 months old)

Personal Favorites

Food:
Anything cooked on my grill.

Drink:
Cheerwine

Hobby:
Soccer, writing, movies

TV Show:
The Office, SportsCenter and Lie to Me

Old Movie:
The Sting

Recent Movie:
The Prestige

Book:
The Great Gatsby

Music:
The Old 97's, Wilco, Spoon

Vacation:
Visiting friends and family

Sport:
To play, soccer.
To watch, football.

Sports Team:
New York Giants

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

A good lawyer needs to be the driving force behind his clients' matters, always being proactive to address all issues in the most effective, efficient and expedient manner possible. Of course, to do so, the lawyer also needs to have full understanding of the legal and business issues in question, and utilize creativity to accomplish the best possible result for his client. Finally, as every client's circumstances are different, a good lawyer must listen to his client to understand the goals which determine the best result for that client.

Brian H. Baker

Areas of Practice: Acquisitions and Divestitures; Business Entity Creation; Property Management and Leasing; Commercial Property Development; and Commercial Lending

Homeowners Associations' Foreclosure of Assessment Liens — An Ounce of Prevention…

By Scott J. Conrad and Jeffrey J. Porter

The Homeowners Association – appreciated by many, reviled by some. When a homeowner makes the investment for the purchase of a house, generally the desire is that the house and neighborhood selected will not deteriorate, be it aesthetically or monetarily. The primary purpose of the Homeowners Association ("HOA") is for such upkeep, maintenance and preservation of a neighborhood. News reports about HOAs often do not reflect their beneficial attributes, particularly when foreclosure of a person's home is involved.

This was certainly the case in the recent local articles on the foreclosure of the Dallas-area home of one Texas soldier while he was on active duty. While all of the specific facts of this case are unknown at this time, there can be no argument that the situation is more than unfortunate. For both homeowners and HOAs, avoiding unpleasant scenarios, like this one, starts with understanding the processes, pitfalls, and protections of assessments and HOA foreclosure of assessment liens, particularly on a servicemember's home.

Creation of Assessment Lien

The Texas Supreme Court has addressed HOA assessment liens in *Inwood N. Homeowners' Assoc. v. Harris*, 736 S.W.2d 632 (Tex. 1987). Generally, assessments, their corresponding liens, and foreclosure thereof, are an inherent characteristic of the property right – the only method by which other owners won't be forced to pay more than their fair share or be forced to accept reduced services. In *Inwood*, the Texas Supreme Court recited that the creation of a contractual HOA lien is accomplished when the developer records a declaration of covenants, conditions & restrictions ("CC&Rs") in the county where the land is located.

The CC&Rs run with the land and are binding on all parties acquiring rights to any property in the subdivision. Typically included in the CC&Rs are covenants—*i.e.*, promises—by the homeowners to pay the annual, special, or other stated assessments as specified in the CC&Rs. Additionally, the CC&Rs often state that these assessments are a charge on the land and shall be secured with a contractual lien upon the lot against which such assessments or charges are made which may be foreclosed. The *Inwood* Court recognized the harshness of foreclosure, especially when a relatively small amount of money is owed compared to the value of a home. Texas law, however, requires enforcement of agreements entered into concerning the payment of assessments. Whether developing a neighborhood or governing an existing one, it is paramount to have CC&Rs drafted which provide for the necessary assessments to sustain a neighborhood that also explain the utilization and procedural aspects of such assessments for use and understanding by the residents.

Steps to Foreclosure

Texas Property Code §51.001, *et seq.* addresses the non-judicial foreclosure process in Texas. First, unless there is an agreement that states otherwise, an HOA must serve a homeowner in default with written notice by certified mail stating that the homeowner is in default under the CC&Rs assessment lien provisions and give the debtor at least 20 days to cure the default before notice of sale can be given. Service by certified mail is complete when notice is deposited in the U.S. mail, postage prepaid and addressed to the homeowner at his last known address.

Second, a notice of sale must be provided to the homeowner at least 21 days before the date of the sale, and it must include a statement of the earliest time at which the sale will begin. This notice includes: (1) posting at the courthouse door of each county in which the property is located a written notice designating the county in which the property will be sold; (2) filing in the county clerk's office of each county in which the property is located a copy of the notice posted on the courthouse door; and (3) serving written notice of the sale by certified mail on each debtor who, according the HOA's records, is obligated to pay the debt.

Finally, the sale must occur on the first Tuesday of the month within any three-hour period between 10:00 a.m. and 4:00 p.m. at the county courthouse in any county where the house is located, unless otherwise stated by the county. One item to remember is Texas Property Code §209.009 mandates that an HOA cannot foreclose an assessment lien if the debt securing the lien consists solely of (1) fines assessed by the HOA, or (2) attorney's fees incurred by the HOA solely associated with fines assessed by the HOA.

Notice to Homeowner after Foreclosure Sale

Texas Property Code §§209.010 and 209.011 require certain post-foreclosure actions by the HOA of non-condominium property. No later than 30 days after the foreclosure sale, the HOA must send the homeowner and each lienholder of record written notice stating the date and time the sale occurred and informing the homeowner and lienholders of the right to redeem the property. Such notice must be sent by certified mail, return receipt requested, to the homeowner, each lienholder of record, and each transferee or assignee of a deed of trust that has notified the HOA of such assignment or transfer. No later than 30 days after sending the notice, the HOA must record an affidavit in the real property records of the county, stating the date the notice was sent and a legal description of the lot.

Continued on Page 5

Homeowners Associations' Foreclosure of Assessment Liens — An Ounce of Prevention… *Continued from Page 4*

If desired or necessary, the HOA or other person who buys occupied property at foreclosure sale must commence and prosecute a forcible entry and detainer action to recover possession of the property.

Homeowner's Right of Redemption after Foreclosure

Texas Property Code §209.011 also provides redemption rights following an HOA foreclosure of non-condominium property. The affected homeowner or any lienholder of record can redeem the property from the foreclosure-sale purchaser no later than the 180th day after the HOA mails written notice of the sale. A lienholder cannot redeem the property before 90 days after the date notice was sent, and only if the owner has not previously redeemed.

Generally, redemption will require payment to the HOA of all unpaid assessments as well as fees and costs incurred by the HOA for the foreclosure. If the property was purchased by a third party, redemption will also require the payment of the purchase price to the third party purchaser. If the property is redeemed, the purchaser must immediately execute and deliver to the redeeming party a deed transferring the property to the lot owner.

The purchaser at the foreclosure sale, or any person to whom he transferred the property, can presume conclusively that the homeowner or lienholder did not redeem the property unless the homeowner or lienholder files in the real property records of the county (1) a deed from the purchaser of the property at the foreclosure sale; or (2) an affidavit that states the property that has been redeemed, contains a legal description of the property, and includes the name and mailing address of the person who redeemed the property. Should the redemption period expire without redemption being properly executed, the HOA or third-party foreclosure purchaser is required to record an affidavit in the real property records of the county in which the property is located stating that the homeowner or a lienholder did not redeem the property during the redemption period.

Servicemembers Civil Relief Act

The Servicemembers Civil Relief Act ("SCRA"), 50 U.S.C.S. Appx. §501, *et seq*., provides protection in scenarios like those described above for members of our armed forces. The purpose of the SCRA is to (1) provide for, strengthen, and expedite national defense through protection to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the nation; and (2) to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.

Under §533 of the SCRA, foreclosure of property for breach of an obligation is not valid if made during, or within 9 months after, the period of the servicemember's military service. Exceptions are a sale, foreclosure, or seizure which is made upon a court order granted before such sale, foreclosure, or seizure with a return made and approved by the court; or a sale, foreclosure, or seizure that is made pursuant to an agreement. This 9 month period only applies between July 30, 2008, and December 31, 2010. On January 1, 2011, the statute returns to pre-amendment language, which still provides protection, but only 90 days instead of 9 months after the servicemember's military service.

Violation of the SCRA is a misdemeanor punishable by fines and/or imprisonment for not more than 1 year if a person knowingly makes or causes to be made a sale, foreclosure, or seizure of prohibited property, or knowingly attempts to do so. Section 533 of the SCRA applies to obligations on real or personal property owned by a servicemember that (1) originated before the period of the servicemember's military service and for which the servicemember is still obligated; and (2) is secured by a mortgage, deed of trust, or other security in the nature of a mortgage. Typically, foreclosing entities will make a determination on the military status, if any, of their debtor to ascertain the applicability of the SCRA. One website to locate such information is https://www.dmdc.osd.mil/appj/scra/scraHome.do.

Texas Law

Effective June 19, 2009, Texas passed H.B. 3857, which was codified as Texas Property Code § 51.015, titled *Sale of Certain Property Owned by Member of the Military*. This section generally follows the SCRA and should be consulted during any HOA foreclosure occurring after the effective date addressed above.

Foreclosure is typically an effort of last resort for HOAs to collect their assessments. There are risks and responsibilities for both sides involved in any foreclosure, and it is always advisable to have the assistance of experienced counsel to navigate the detailed and nuanced process. Likewise, when preparing or revising the CC&Rs for your community, it is always advisable to consult with an experienced attorney so efforts can be taken to minimize the perils involved with enforcing assessment liens.

For more information, contact Scott J. Conrad (sconrad@settlepou.com) or Jeffrey J. Porter (jporter@settlepou.com) of SettlePou at (214) 520-3300. We appreciate the significant contribution to this article by Laura E. Grossman.

Red Flag Rules – Update on Impact to Health Care Industry

By Michael S. Byrd and Bradford E. Adatto

On December 4, 2003, the Fair and Accurate Credit Transactions Act of 2003 was signed into law. As part of this Act, in November 2007, the Federal Trade Commission ("**FTC**") created the Red Flag Rules ("**Rules**") to combat prevailing identity theft issues. Ultimately this resulted in the FTC applying financial institution and creditor regulations to a physician's practice to combat identity theft within the health care industry.

This article is intended to provide a summary of the Rules and an update on the status of the enforcement of the Rules. Our previous article in the SettlePou Newsletter, August 2009, Volume 6, Issue 3, provides a more in-depth look into the Rules.

<u>Summary of the Rules</u>

The Rules require financial institutions or creditors that offer or maintain one or more covered accounts to develop and implement written identity theft prevention programs.

A creditor is defined as any person who regularly extends, renews, or continues credit, including businesses that regularly defer payment for services or provide services and bill customers later. As you can see, this expansive definition can cover health care providers who engage in practices such as (1) regularly billing patients after the completion of service, including for the remainder of medical fees not reimbursed by insurance; (2) regularly allowing patients to set up payment plans after services have been rendered; and (3) assisting patients in getting credit from other sources. Covered accounts can be: (1) accounts that creditors offer or maintain-primarily for personal, family or household purposes-that involve or are designed to permit multiple payments or transactions (*i.e.*, patient billing accounts); and (2) any other account that a creditor offers or maintains for which there is a reasonably foreseeable risk to customers or to the safety and soundness of the creditor from identity theft (*i.e.*, patient records). It is because of these broad definitions that health care providers may become subject to the Rules.

Once a health care provider falls within the scope of the Rules, they are required to establish programs that detect, prevent, and mitigate identity theft. Our previous article further examines the fundamentals to establishing a prevention program.

Entities that fail to comply with the Rules may be fined $2,500 per violation; however, the scope of "violation" is unclear and so it is uncertain how this fine will be applied. In addition, it is possible that entities will be required to comply with consent decrees or settlement agreements for future monitoring by and reporting to the FTC.

<u>Status of the Rules</u>

The Rules have been in effect since January 1, 2008 and had an original compliance date of November 1, 2008. However, as may not be too surprising, this compliance date has subsequently been delayed numerous times, including twice since our previous article (three times if you count the delay issued immediately prior to publishing the Newsletter). Currently, the new compliance date is December 31, 2010. The American Medical Association ("AMA") is continuing to voice its objections to the FTC regarding the Rules' applicability to health care providers. However, the FTC remains steadfast that the delays are not in response to these protests and doctors are subject to the Rules.

<u>Conclusion</u>

Once again, given the numerous state and federal law requirements already burdening health care providers, providers are likely to have existing policies that can be utilized as the foundation of a program that will satisfy the Rules. Health care providers should consult with legal counsel to monitor the discussion surrounding the Rules and review their policies and procedures to update them accordingly.

For more information, contact Michael S. Byrd (mbyrd@settlepou.com) or Bradford E. Adatto (badatto@settlepou.com) of SettlePou at (214) 520-3300. We appreciate the significant contribution to this article by attorney Jay D. Reyero of SettlePou.

Update on Recent Insurance Law Decisions

By H. Norman Kinzy

As you can see from the above introductions of Kent Williamson and Mark Craig, our insurance practice is expanding and we are pleased to have Kent and Mark's expertise available to the division.

That said, there have been a number of recent court decisions which are of significance to the practice of insurance law. These include cases dealing with the CGL contractual liability exclusion, exemplary damages, subrogation rights in a settlement contract, and mold coverage, among others.

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.

CGL – Contractual Liability Exclusion:

In *Gilbert Texas Construction, LP v. Underwriters at Lloyds, London*, 08-0246 (TX 2010), the Texas Supreme Court continued to refine its earlier 2007 *Lamar Homes* decision and dealt with the scope of the ISO form CGL policy exclusion for contractual liability. Drawing on the plain language of the exclusion, our Supreme Court held that the language of the exclusion applies without qualification to exclude coverage for all liabilities assumed by contract except for two situations:

1) policy - defined types of contracts, including an "insured contract," *e.g.,* indemnity agreements by which the insured assumes another's tort liability; and

2) situations in which the insured's liability for damages would exist absent the contract, *i.e.,* situations in which the insured's liability for damages does not depend solely on obligations assumed in a contract.

Exemplary Damages – Standards for Review on Appeal:

In *Bennett v. Reynolds*, 08-0074 (Tex. 2010), the Supreme Court clarified the standards for reviewing exemplary damage awards in Texas in view of the increasingly strict due-process scrutiny mandated by recent United States Supreme Court decisions.

This case involved the wrongful conversion and sale of 13 cattle for $5,327.00, a sum which the court found to constitute "substantial" injury to the plaintiff justifying imposition of exemplary damages, and which the civil jury also found to constitute theft.

Awards for exemplary damages based upon either gross negligence and for statutorily defined "malice" are subject to Texas statutory "caps," except when felonies such as theft and/or other enumerated crimes are found to exist, in which case an award of exemplary damages is not subject to the statutory "caps." However, the Court noted that even absent a "cap," such awards are nonetheless constrained by due process rulings of the United States Supreme Court which normally will require a "single digit" ratio between the amounts of exemplary damages and actual damages.

Following on, our Supreme Court utilized language which leads one to the conclusion that even ratios of exemplary damages to actual damages as low as 4 to 1 will, absent extraordinary circumstances, be difficult to sustain on appeal.

Further our Supreme Court admonished Texas courts when awarding or reviewing exemplary damage awards to rigorously apply the three-part *Gore/Campbell* test requiring detailed factual analysis into (1) the degree of reprehensibility of a defendant's conduct, (2) the disparity between actual or potential harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and civil sanctions and criminal penalties legislatively authorized or imposed in comparable factual situations.

The Texas Supreme Court thus reversed the two instant judgments for exemplary damages which were 47 times actual damages as to one defendant and 188 times actual damages as to another defendant and remanded those judgments for remittitur proceedings.

Subrogation – "Made Whole" Doctrine- Allocation of Settlement Proceeds:

Elaborating on its 2007 *Fortis Benefits v. Cantu* decision, the Supreme Court dealt with subrogation rights versus allocation of settlement dollars in *Texas Health Insurance Risk Pool v. Sigmundik*, 09-0772 (Tex. 2010).

Continued on Page 8

Update on Recent Insurance Law Decisions… Continued from Page 7

Reiterating its earlier decision in *Fortis Benefits*, the Supreme Court noted that a *contractual* right to subrogation prevails over the "made whole" limitation applicable to *equitable* subrogation rights, and held that where a case was settled, a trial court abused its discretion when it allocated settlement monies between wrongful death claimants and their decedent's estate/subrogor in such fashion as to cut out any recovery by a subrogee asserting a contractual lien to subrogation. Although a trial court is free to exercise some discretion in dividing the settlement funds, it is thus an abuse of discretion for a trial court to award the contractually-based-lien subrogee nothing from the settlement.

In Personam Jurisdiction – Specific Jurisdiction:

In *Zinc Nacional, S.A. v. Bouche Trucking, Inc.*, 09-0734 (Tex. 2010), the Supreme Court dealt with the question of whether a non-resident defendant has minimum contacts with Texas for purposes of establishing specific jurisdiction (as opposed to general jurisdiction) by using a third party trucking service to transport its goods through Texas to an out-of-state customer, and concluded that the mere fact that goods have traveled into a state, without more, does not establish the minimum contacts necessary to subject a manufacturer to personal jurisdiction within the state insofar as specific jurisdiction is concerned. Accordingly, the court remanded the case to the Court of Appeals to determine whether general jurisdiction was appropriate.

Premises Liability – Slip and Fall Caused by Ice:

In *Scott and White Memorial Hospital v. Fair*, 08-0970 (Tex. 2010), the Supreme Court dealt with a premises liability case involving a fall which occurred on ice as a result of a winter storm. The court held that naturally occurring ice which accumulates without the assistance or involvement of unnatural contact is not an unreasonably dangerous condition sufficient to support a premises liability claim, even where a premises owner utilized chemical deicers, which caused the ice to melt, but allowed the water to thereafter re-freeze naturally.

Homeowner's Policy – Coverage for Mold:

In *State Farm Lloyds v. Page*, 08-0799 (Tex. 2010), the Supreme Court interpreted provisions of the Texas Standard Homeowner's Policy Form B, and held that coverages contained therein (1) afford coverage for mold damage to personal property caused by plumbing leaks, but (2) that the policy does not cover mold damage to the dwelling itself caused by those same leaks.

Sexual Harassment:

In *Waffle House, Inc.* v. *Williams*, 07-0205 (Tex. 2010), the Supreme Court dealt with claims for sexual harassment under (1) common law theories of negligent supervision and retention of the harassing employee, and (2) the Texas Commission on Human Rights Act (TCHRA). The court resolved the case by holding that TCHRA is a legislative anti-harassment remedy which is preemptive of the common law when the complained-of negligence is entwined with the complained-of sexual harassment. Thus, where the gravamen of a plaintiff's case is TCHRA-covered harassment, the Act forecloses recovery of any common law theory predicated on the same underlying sexual-harassment facts, in part because TCHRA provides different standards of liability, limitations periods, administrative review procedures, elements, defenses, and remedies than those involved in a common law negligence claim.

Noting that there is no common law tort for sexual harassment in Texas, the court also held that a common law claim for negligence in the supervision and retention of an offending employee cannot stand absent the employee having committed a common law tort. Since sexual harassment is not a recognized common law tort in Texas, a common-law negligent supervision and retention claim based on sexual harassment also failed.

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.

Do You Own What You Believe You Have Paid For?

Custom Software, Other Work Products and Copyright Ownership

By James M. Stanford

A startup company with an e-commerce platform as its sole intended business engine retains a software developer to develop the company's online platform and related functionalities. The parties have a friendly and informal relationship and never enter into a written agreement detailing the terms of the arrangement.

The developer creates and enhances the platform for a couple years until their relationship sours because the company has outgrown the capabilities of the developer. Believing that the company owns what it retained and paid the developer to create, the company notifies the developer of its desire to move on and requests the source code to the platform.

The developer responds that she never intended for the company to own her work product, but instead the company has only a limited license to the platform. The company contacts its legal counsel and is shocked to learn that it may not own "its" e-commerce platform and may be facing a costly legal battle.

Like the example above, some companies find out too late that the tens of thousands of dollars, or more, that they have spent for a software developer to create a customized software solution, which they thought they owned, in fact is owned by the software developer. While the company may have acquired some sort of license to use the software program, the developer retained ownership of the copyright because the parties either did not address copyright ownership in their written agreement, or they didn't have a written agreement in the first place.

Unfortunately, this situation occurs more often than it should, often when the software is a critical element or even the dominant business engine for the company. The situation plays out in many other areas as well when one party is creating copyright material or other works for another party, including, for example, architectural drawings, photographs, films, or literary works.

The general rule under copyright law is that the author of the work owns the copyright. In the context of software, the software developer or the person writing the computer code would be the author. Ownership of the copyright is paramount as the owner will have the exclusive right, among other things, to distribute, reproduce, and create derivative works from the original work.

For both the client and the software developer, having a written agreement in place clearly setting forth the terms of ownership of the copyright prior to beginning development is of critical importance. The Copyright Act of 1976 is the federal law that addresses the subject.

While generally the author or creator of a work is the owner of the copyright in the work, the Copyright Act provides an exception. This exception is known as the "work made" for hire doctrine.

Under the Copyright Act, a "work made for hire" is defined as:

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work; as a part of a motion picture or other audiovisual work; as a translation; as a supplementary work; as a compilation; as an instructional text; as a test; as answer material for a test; or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a "work made for hire" (17 U.S.C. § 101).

Software, however, notably does not fall into any of the categories described in part (2) above. Accordingly, if you engage a software developer to create a custom software program for you, your written agreement with the developer will need to contain provisions assigning the copyright to you, if your intent is to own the software.

Often the developer may also be creating instructional manuals or other materials related to the software that could qualify as a work made for hire. The best option is thus to ensure your agreement has both the appropriate "work made for hire" clause and backup assignment provisions to cover all types of works you are commissioning from the developer.

When it comes to third party creation of copyright material, as with almost any arrangement, the importance of getting a written agreement in place which clearly sets forth the parties' intent, duties, and obligations, as well as the terms of the arrangement, cannot be overstated.

For more information, contact James M. Stanford (jstanford@settlepou.com) of SettlePou at (214) 520-3300.