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SETTLEPOU NEWSLETTER

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Nonsubscription in Texas: A Proven Alternative to Worker's Compensation

By Kent D. Williamson and Mark T. Craig

Texas is the only state that allows an option to not purchase workers' compensation coverage, regardless of the number of employees, company size, or type of business. The right to opt out of the workers' compensation system was included in the first Texas Workers' Compensation laws written in 1913 and workers' compensation is still "elective" in Texas today.

Recent statistics show that approximately 35% of Texas employers are nonsubscribers. The first survey to estimate the percentage of nonsubscribers was conducted in 1983 and showed that 44% of all Texas employers were nonsubscribers and nonsubscribing employers employed 20% of the workforce. Since that time, the percentage of employers who have opted out of the Texas Workers' Compensation system has declined, but the percentage of employees employed by nonsubscribers has increased. This is a result of larger employers (employers of 500 or more employees) choosing nonsubscription while smaller employers are not opting out of the workers' compensation system.

There are a variety of reasons why employers choose nonsubscription. The following is a non-exhaustive list of some of those reasons:

- High cost of workers' compensation insurance premiums
- Rising medical costs
- Ability to more effectively manage employee injury claims
- Elimination of fraudulent claims
- Fewer accidents due to an emphasis on safety
- Immediate notice of any on-the-job injuries
- Requirement that employees arbitrate any dispute related to an on-the-job injury.

Nonsubscription, however, does present some unique legal challenges that are different from those faced by employers who are subscribers. While companies that subscribe to workers' compensation insurance can only be sued in limited circumstances, nonsubscribing employers can be sued for any employee injury. While an employee who files suit against a nonsubscriber must establish that the employer was negligent, the nonsubscribing employer does lose certain common law defenses including the negligence of a fellow employee, assumption of the risk, and the contributory negligence of the injured employee. A nonsubscribing employer may still defend on the basis that the employee was intoxicated; was the sole cause of his/her injuries; and that the injury occurred outside the course and/or scope of employment.

As nonsubscription has become more and more popular over the years, insurance companies have developed a broad range of products to insure the risks of nonsubscribers. Over the years, these products have become more comprehensive, offering benefits for medical expenses, disability compensation, and legal liability coverage. The majority of these programs also include binding arbitration agreements. It should also be noted that these plans must comply with the reporting, disclosure, and fiduciary requirements of ERISA.

SettlePou can assist any employers who are nonsubscribers or are considering nonsubscription.

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Senate Bill 18: Important Changes for Texas Landowners in Condemnation

By J. Allen Smith and Michael R. Steinmark


Recently enacted Senate Bill 18 ("**SB 18**") takes effect September 1, 2011, and alters the Texas property, education, government, local government, transportation, and water codes. Among the provisions of SB 18 are new procedures emphasizing the importance of the offer process in condemnation and affording landowners additional rights with respect to property access and repurchase.

Offer Process Emphasized

Texas law has long required condemning authorities to make offers to purchase property before initiating formal condemnation proceedings. Much debate in the Texas Legislature has transpired over the fairness of the offer process to landowners facing a condemnor's exercise of its "super power" to take land for public use. For example, debate has circled around landowners' concerns about receiving "lowball" offers, being unable to truly negotiate with condemnors in the offer process, and being unable to recover any attorneys' fees if condemnors do not negotiate in good faith.

Although SB 18 does not fully assuage all landowner concerns, it does put in place new requirements with a renewed emphasis on the "good faith" offer process. For example, Texas law requires a "bona fide" offer by the condemnor, which SB 18 defines to require, among other things, written initial and final offers delivered by certified mail/return receipt requested, at least 30 days between offers, minimum limits for final offers, and additional time (14 days) for landowners to respond to final offers. In addition, landowners are now entitled to 20 days notice (rather than the prior 11 days) before a condemnation hearing, giving the parties further time for purchase negotiations after a final offer has been made. The new requirements give the offer process more structure, a slightly longer timeline, and more standards for assessing fairness in the amounts of offers and the manner in which offers are made.

To further emphasize the importance of the offer process, the Texas Legislature has now given landowners the right to recover some attorneys' fees in condemnation lawsuits, albeit under only limited circumstances. For example, if a court determines that a condemnor did not make a bona fide purchase offer conforming with all of the new statutory requirements, the court is required to abate the condemnation suit, order the condemnor to make a bona fide offer, and order the condemnor to pay reasonable attorneys' fees and other professional fees (*e.g.,* appraiser fees) that the landowner has incurred up to that point in the condemnation proceedings. Attorneys' fees are also now recoverable for compelling a condemnor to produce various documentation, such as appraisals, that the condemnor is required to provide to the landowner in the offer process.

These new limited rights to recover attorneys' fees do not go as far as the law in some other states, where a successful landowner can recover all attorneys' fees in a condemnation case. Likewise, SB 18 may not protect landowners from final offers based on "lowball" appraisals. But the new law does afford landowners in Texas more protection than they previously had and should hopefully incentivize condemnors to heed the Texas Legislature's clear call for the offer process to be carried out more fairly to landowners.

Property Access and Repurchase

In addition to emphasizing the offer process, SB 18 also puts in place new protections for landowners' access to their property. For example, in partial takings cases where the landowner will continue to own a remainder tract, SB 18 requires a landowner be paid for damage to the remainder where there is a "material impairment" to access between the landowner's property and adjoining public roads.

SB 18 also impacts landowners' ability to repurchase property a condemnor has previously taken. While a repurchase right previously existed, SB 18 adopts additional circumstances under which the right to repurchase may be exercised. At the same time, however, SB 18 imposes a short, 1-year statute of limitations to exercise the repurchase right once it arises, which can be triggered by actions the landowner has to take. The new law thus broadens landowners' repurchase rights in certain respects, but at the same time imposes burdens on landowners when seeking to exercise their rights.

Although the above-discussed changes to Texas condemnation law and others under SB 18 are a step in the right direction, there is still more to reform in Texas condemnation law for private landowners. In addition, private landowners should be careful navigating the new law in order to protect their rights.

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Meet Your Legal Support Team:

Shannon Taylor

Position:
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Family:
Daughter, Michelle "Mick" Taylor (16) and son, Thomas "TJ" Taylor (14)

Personal Favorites

Food:
Anything except bell peppers and coleslaw
Drink:
Sweet tea
Hobby:
Kids chauffer

TV Show:
Castle, Glee, Rookie Blue and Gray's Anatomy

Old Movie:
Gone with the Wind

Recent Movie:
Burlesque

Book:
Anything by Patricia Cornwell

Music:
Rascal Flatts and Nickelback

Vacation:
Bora-Bora

Sport:
Soccer

Sports Team:
Dallas Cowboys and Dallas Mavericks

Shannon Taylor served in the U.S. Navy from 1989 to 1993 and worked with rescue submarines. She has lived in California, Oregon and Washington, but she always returned home to Texas. Her hobbies include playing co-ed soccer and softball, as well as coaching adult and youth soccer teams. Her daughter, Michelle, is a junior in high school and plays varsity soccer. Her son, TJ, is a freshman in high school and participates in Ju-Jitsu.

Shannon Taylor

Shannon Taylor is a Section Clerk for SettlePou's Lending Department.

Meet Your Lawyers:

Thomas C. Scannell

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Drink:
Budweiser

Hobby:
Golf
TV Show:
SportsCenter

Old Movie:
A Few Good Men

Recent Movie:
The Hangover

Book:
The Bible

Music:
Rock and country

Vacation:
Georgetown, Grand Cayman

Sport:
Pro baseball and college football
Sports Team:
Texas Rangers and Texas Tech Red Raiders

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

Diligence, responsiveness, sound logic, good practical sense and patience.

Thomas C. Scannell

Areas of Practice: Workouts, Lender Liability, Bankruptcy, Commercial Foreclosures, Creditors Rights Litigation and SBA/USDA Loans

Update on Recent Insurance Law Decisions

By H. Norman Kinzy

There have been a number of recent court decisions and at least one statutory enactment which are of significance to the practice of insurance law. These include cases dealing with policy appraisal clauses, arbitration agreements, duties of contractors, and healthcare claims, inter alia.

As 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.

Statutory Tort Reform: Broad "Loser Pays" proposal not adopted:

Texas has just enacted, for cases filed on or after September 1, 2011, Revised Senate, House Bill 274, and despite consideration of a broad "loser pays" rule (which would have required a general requirement that losing litigants pay their opponent's fees), such a rule was not adopted by Texas. However, a new procedure for a motion to dismiss applicable to cases "that have no basis in law or fact" will be promulgated by our Supreme Court, and this new rule will provide for awarding of costs and attorney's fees to the prevailing party.

Appraisal Clauses in Insurance Policies:

Insurance policy appraisal clauses were the subject of *In re: Universal Underwriters of Texas Insurance Company*, 10-0238 (Tex. 2011). The Texas Supreme Court held that to establish a waiver of one party's rights under an appraisal clause, the opposing party must show that (1) an "impasse" was reached in settlement negotiations, and (2) that the failure to timely demand appraisal caused prejudice to the opposing party. The Supreme Court further stated that if a party senses that an impasse has been reached, that party should pursue appraisal before resorting to the courts.

Tort Duties of General Contractor to Motorist:

In *Allen Keller Company v. Foreman*, 09-0955 (Tex. 2011), our Supreme Court dealt with whether a general contractor owed a duty to a motorist who was killed as a result of an allegedly dangerous condition created by the contractor's work on a Texas highway. The court held that since the general contractor was working under a contract that required strict adherence to the terms of the contract and since the contractor had no discretion to vary from the contract's terms, the contractor had no duty to rectify the dangerous condition. Moreover, since the premises were not under the general contractor's control at the time of the accident and since the condition was known by the property owner, the general contractor owed no duty to warn either the public or the property owner.

Arbitration under Texas General Arbitration Act:

In *NAFTA Traders, Inc., v. Quinn,* 08-0613 (Tex. 2011), the Texas Supreme Court held that allowable arbitration practices under the Texas General Arbitration Act ("TAA") differ from arbitration under the Federal Arbitration Act ("FAA"), and that the parties to an arbitration agreement governed by the TAA may by contractual agreement supplement the provisions of the TAA to limit the authority of the arbitrator and to allow for expanded judicial review of an arbitration award by Texas Courts of Appeals for reversible error under state rules of law. The Court held that the FAA does not pre-empt enforcement of such contractual agreements under the TAA, but cautioned that a reviewing appeals court must have a sufficient record of the arbitral proceedings, and that appellate complaints must have been preserved just as if the arbitration award were a trial court judgment on appeal. Conversely, the Court ruled that arbitration parties cannot agree under the TAA to a different standard of judicial review than a Texas appellate court would employ in a judicial proceeding involving the same subject matter.

Healthcare Liability Claims - Slip and Fall:

In *Harris Methodist Fort Worth v. Ollie*, 09-0025 (Tex. 2011), our Supreme Court addressed a claim arising from a patient's slip and fall on a wet bathroom floor in a hospital during the patient's post-operative confinement, and held that damages flowing from such a slip and fall constitutes a healthcare liability claim under the Texas Medical Liability Act which requires a plaintiff to serve an expert report in accordance with the Texas Medical Liability Act. Since the plaintiff had not served an expert report, the Supreme Court held that the plaintiff's claim should be dismissed.

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Healthcare Liability Claims - Brown Recluse Spider Bite:

In *Omaha Healthcare Center, LLC v. Johnson*, 08-0231 (Tex. 2011), the Supreme Court dealt with injuries to a patient in a nursing home who was bitten by a poisonous brown recluse spider and died. The court ruled that a failure of a nursing home to have an adequate pest control program is a safety issue directly related to healthcare. Since the plaintiff was therefore required under the Texas Medical Liability Act to timely serve a statutory expert report, but did not do so, the Supreme Court held that plaintiff's decedent's claim for damages arising from death by spider bite must be dismissed.

Insurance Company - Premium Pricing Factors:

In *Ojo v. Farmers Group, Inc.*, 10-0245 (Tex. 2011), our Supreme Court held that Texas law prohibits insurance companies from using race-based credit scoring, *per se*, to price insurance policies and premiums, but Texas permits insurers to use race-neutral credit scoring even if such use has a racially disparate impact.

Products Liability - Manufacturing Defect - Expert Testimony:

In *Bic Pen Corporation v. Carter*, 09-0039 (Tex. 2011), the Texas Supreme Court dealt with evidentiary issues arising from alleged manufacturing defects, and held that evidence which showed only (1) that a component of a product deviated from a manufacturing specification, (2) that an accident occurred, and (3) that the deficient part was involved in the accident, does not constitute sufficient evidence to support a causation finding. Rather, expert testimony is generally required in a manufacturing defect case to prove that the specific manufacturing defect caused the accident.

"In Omaha Healthcare Center LLC v. Johnson, 08-0231 (Tex. 2011), the Supreme Court dealt with injuries to a patient in a nursing home who was bitten by a poisonous brown recluse spider and died. The court ruled that a failure of a nursing home to have an adequate pest control program is a safety issue directly related to healthcare.

Admissible Evidence of Medical Expenses is Limited to Amount "Actually Paid or Incurred":

In *Haygood v. Escabedo*, 09-0377 (Tex. 2011), our Supreme Court dealt with Texas Civil Prac. and Rem. Code, section 41.0105, which limits recovery of medical or healthcare expenses to the amount "actually paid or incurred by or on behalf of the claimant." The Supreme Court made clear that (1) the undiscounted portion of medical bills which a medical healthcare provider has no right to collect from a plaintiff, because of law or contract, is not recoverable by the plaintiff from a third party defendant, and (2) that evidence of such full and undiscounted amount of medical expenses is irrelevant to a determination of a plaintiff's recoverable damages and is not admissible at trial. In other words, only the "net" or discounted portion of medical charges which a healthcare provider is in fact entitled to collect (*e.g.,* from Medicare or from an healthcare insurer) should be admitted before the jury in a third party liability trial. The Supreme Court stated that "since a claimant is not entitled to recover medical charges that a provider is not entitled to be paid, evidence of such charges is irrelevant to the issue of damages."

Business Auto Policy - Coverage Arising from "Use" of Vehicle - Communicable Disease:

In *Lancer Insurance Company v. Garcia Holiday Tours*, 10-0096 (Tex. 2011), the Supreme Court held that the transmission of a communicable disease, such as tuberculosis, by the driver of a tour bus to passengers on the bus, was not such a claim which "resulted from" the "use" of the bus, since the bus provided only the "situs" of the injury and was not a cause of the transmission of the disease. In reaching its decision, the Supreme Court held that there is no appreciable - or legal - difference between policies which use "arising from" language and policies which use "resulting from" language, within the context of this case. Hence, no coverage existed under the business auto policy for claims based upon negligent infection of passengers.

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Groundbreaking Decision on Non-Compete Agreements

By James M. Stanford and Michael S. Byrd

Non-compete agreements traditionally have been disfavored but, under certain circumstances, have been enforceable in Texas. In follow up to rulings in recent years that lighten the burden for employers to enforce non-competes, the Texas Supreme Court has reached another important decision that strengthens the ability of employers to enforce non-competes. In *Marsh USA Inc. et al. v. Cook*, Case No. 09-0558 (Tex. June 24, 2011), the Court held that a non-compete covenant contained in a stock option plan was enforceable. The Court reasoned that stock options are sufficient consideration for a non-compete because they give rise to the employer's interest in protecting the "goodwill" of its business.

This holding is a significant departure from past holdings where courts for many years viewed that providing financial consideration was not sufficient for a non-compete agreement. Only the provision of confidential information, trade secrets, special training, and/or other proprietary information supporting a company's goodwill was sufficient consideration. In *Marsh*, the Court established a new test that will pave the way to additional avenues for employers to take in seeking to protect the goodwill of their businesses.

For more information, including questions regarding this recent ruling or non-competes in general, contact Michael S. Byrd (mbyrd@settlepou.com) or James M. Stanford (jstanford@settlepou.com) of SettlePou at (214) 520-3300.