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*Passion. Preparation. Persistence.*

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## THE BASSETT BULLETIN™

### WHAT IS A NON-SUBSCRIBER?

The term “non-subscriber” is commonly used to identify businesses that do not subscribe to workers’ compensation in Texas. On the other hand, Texas employers who do elect to purchase workers’ compensation insurance are referred to as “subscribers.”

Texas is the only state where the majority of Texas businesses can elect to non-subscribe. This option has been available since 1913 when the Texas Legislature passed the Texas Workers’ Compensation Act. However, there were not many employers who were interested in this option, or even knew about it, until around the mid 1980’s when workers’ compensation costs in Texas escalated to some of the highest in the nation.

In 2006, approximately 37% of Texas businesses operated as non-subscribers (Biennial Report of the Texas Department of Insurance to the 80th Legislature, December 2006). These employers can be found in almost every segment of today’s business community and range in size from one employee up to thousands. Employers also range from “Mom and Pop” shops to Fortune 500 Companies.

### WHY DOES AN EMPLOYER BECOME A NON-SUBSCRIBER?

There are many reasons why an employer decides to opt out from subscribing to workers’ compensation. Some of the main reasons are that the premiums are too high with traditional workers’ compensation insurance or they are fed up with fraud and the way medical claims are being handled.

In addition, non-subscribers like the fact that they can work with health care professionals to develop medical delivery programs that provide quality care at a reasonable cost. Non-subscribers can also customize their occupational injury benefit plan to improve the ability to manage injury-related costs.

### AN OVERVIEW OF NON-SUBSCRIBER NEGLIGENCE CASE LAW

In order to understand the law in non-subscriber cases, it is important to understand how general negligence cases are handled. In normal negligence cases, those established by common law (law established by prior case decisions rather than by statute), a Plaintiff has to establish the elements of negligence. Those elements consist of the following:

- (1) A duty on the part of the Defendant;
- (2) A breach of that duty by a Defendant;
- (3) The breach of that duty by the Defendant was the proximate cause of the Plaintiff’s injury; and

- (4) The Plaintiff sustained damages. *See, El Chino Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987).

For the Defendant, in general negligence cases, defenses involve: (1) affirmative defenses and (2) inferential rebuttals.

Affirmative defenses are additional questions sent to the fact finder, with the benefit of the answer going to the Defendant. An affirmative defense works to limit or excuse a Defendant's liability, even if the Plaintiff's claim is proven, based on facts outside those claimed by the Plaintiff. The Defendant carries the burden of proof on affirmative defenses. One of the most common affirmative defenses in negligence cases is "contributory negligence." This is where the Defendant alleges that the Plaintiff's actions contributed, or caused, in whole or part, the Plaintiff's damages.

The other defense, an inferential rebuttal, does not call for a separate question to be answered by the fact finder, but is contained in an instruction to the fact finder. It allows a Defendant to submit a specific instruction to the fact finder. One example of an inferential rebuttal instruction is that an occurrence occurred caused solely by an "Act of God." For example, if a jury believed that an "Act of God" (or another inferential rebuttal defense) has been proved, it simply finds against the Plaintiff. It disproves proximate causation by the Defendant and results in a defense verdict.

## HOW DOES A NON-SUBSCRIBER CASE DIFFER FROM A GENERAL NEGLIGENCE CASE?

Under the Texas Labor Code, subscribers to workers' compensation are exempt from negligence claims by their employees (except for gross negligence which causes death). This means that if an employee gets injured on a job, and the employer subscribes to workers' compensation, the employee's exclusive remedy is to pursue a workers' compensation claim against his employer, not a lawsuit against this employer. This is called the exclusive remedy clause under the Texas Labor Code. Texas Labor Code §408.001(a).

Non-subscribers, on the other hand, do not get the immunity from being sued provided by the exclusive remedy clause of the Texas Labor Code. The result is that the non-subscriber is subject to the general common law of negligence. Texas Labor Code §406.033(d); *Werner vs. Colwell*, 909 S.W.2d 866, 868 (Tex.1995). This means the non-subscriber can be sued by his/her employee.

However, the non-subscriber does not have all the rights that a Defendant has in a general negligence case. The Texas Labor Code modifies the common law by eliminating specific affirmative defenses the non-subscriber can allege. Those are:

1. Contributory negligence,
2. Assumption of the risk, and
3. Negligence of a fellow servant.

So what does this mean? This means that a non-subscriber cannot introduce evidence at trial that: (1) the Plaintiff's action contributed or caused, in whole or part, the Plaintiff's damages; (2) that the Plaintiff assumed the risk of injury or death; or (3) that the Plaintiff's injury or death was caused by the negligence of a fellow employee. Texas Labor Code §406.033.

On the other hand, §406.033 of the Labor Code does permit two affirmative defenses for non-subscribers:

1. Intentional self injury (the employee intended to bring about his/her injury); and
2. Intoxication.

## SO WHERE DOES THAT LEAVE THE NON-SUBSCRIBER?

As a result, after disregarding the affirmative defenses eliminated by the Labor Code, the legal defenses remaining for non-subscribers are:

1. Direct disproof of the elements of the Plaintiff's prima facie negligence case,
2. Reliance on principles given in special jury instructions, called inferential rebuttals,
3. The use of affirmative defenses explicitly permitted under the Texas Labor Code, and
4. The use of affirmative defenses not addressed by the Code, but allowed to non-subscribers.

Now that you know what defenses are available to a non-subscriber, how can you effectively use them at trial to defend your case?

Stay tuned to our next issue when we discuss "Defending a Non-Subscriber case."

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