

PUBLICATION UPDATE

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DORSANEO, TEXAS LITIGATION GUIDE

Publication 719

Release 152

March 2024

HIGHLIGHTS

- Chapters 270 and 270A were combined, into a completely rewritten ch. 270 which covers litigation arising from contracts for the erection, repair, and construction of improvements to real property. The focus of the chapter is on actions for damages between owners and contractors. The chapter also embraces suits by or against third parties, including subcontractors and sureties. In addition, the chapter discusses the procedural rights and obligations of parties to a residential construction defect dispute under the Residential Construction Liability Act, including drafting guides for both homeowners and contractors, as well as forms for notices of defect, requests for inspection, petitions and allegations by homeowners, and response forms for contractors. *See*

Ch. 270, *Improvement Contracts*.

This release updates Texas Litigation Guide with recent legislation as well as Texas Supreme Court and court of appeals decisions and federal cases. Many of the significant developments in this release are summarized below.

ALTERNATIVE DISPUTE RESOLUTION

- **Scope of Arbitration Clauses.** In *Moncrief v. Moncrief*, 672 S.W.3d 156, 165 (Tex. App.—Fort Worth 2023, pet. filed), the court of appeals held that issues regarding the validity of the contract containing an arbitration clause are generally decided by the arbitrator, whereas issues regarding the validity of the arbitration clauses them-

selves are decided by the trial court. See Ch. 44, *Arbitration*, § 44.02[2].

PRETRIAL, TRIAL, AND APPELLATE PRACTICE

- **Discovery Period—Family Code Suits.** In suits governed by the Family Code: the discovery period begins when the suit is filed and continues until 180 days after the date the first request for discovery of any kind is served on a party [Tex. R. Civ. P. 190.2(b) (applicable with respect to actions filed on or after Sept. 1, 2023)]. See Ch. 90, *Discovery: Scope and Limitations*, § 90.03[2].
- **Discovery Period—Non-Family Code Suits.** All discovery must be conducted during the discovery period, which begins in suits not governed by the Family Code, when the first initial disclosures are due, and continues until the earlier of 30 days before the date set for trial or nine months after the first initial disclosures are due. In suits governed by the Family Code, the discovery period begins when the suit is filed and continues until 30 days before the date set for trial [Tex. R. Civ. P. 190.3(b)(1)]. See Ch. 90, *Discovery: Scope and Limitations*, § 90.03[3].
- **Requests for Disclosure—Family Code Suits.** Although requests for disclosure have generally been replaced by the required disclosure procedure, 2023 amendments to the Family Code and the Rules of Civil Procedure provide for the use of requests for disclosure in suits governed by the Family Code [see Tex. Fam. Code § 301.001 (provisions are applicable only with respect to actions filed on or after Sept. 1, 2023)]. Unless otherwise ordered by the court, a responding party must provide the requested disclosures as to testifying experts not later than the later of (1) the 30th day after
- **Discovery Related to Experts—Family Code Suits.** Although requests for disclosure have generally been replaced by the required disclosure procedure in other contexts, 2023 amendments to the Family Code and the Rules of Civil Procedure provide for the use of requests for disclosure in suits governed by the Family Code [see Tex. Fam. Code § 301.001 et seq. (provisions are applicable only with respect to actions filed on or after Sept. 1, 2023)].

the date the request is served; or (2) with respect to an expert testifying for a party seeking affirmative relief, the 90th day before the end of the discovery period; or (3) with respect to an expert not testifying for a party seeking affirmative relief, the 60th day before the end of the discovery period [Tex. Fam. Code § 301.102; Tex. R. Civ. P. 195a.2]. See Ch. 92, *Discovery Related to Experts*, § 92.03[7].

- **Appeals—Withdrawal of Counsel.** If an attorney other than lead counsel will no longer represent a party, but lead counsel will continue to represent the party, the non-lead counsel may withdraw by filing a nonrepresentation notice. It is not necessary to seek leave to withdraw. The notice should state that non-lead counsel will no longer represent the client and identify counsel who will continue to represent the party [Tex. R. App. P. 6.4(c)]. See Ch. 150, *Appellate Proceedings in Court of Appeals*, § 150.02[7][f].

ADMINISTRATIVE LAW

- **Administrative Law—Doctrine of Primary Jurisdiction.** In *CPS Energy v. Elec. Reliability Council of Tex.*, 671 S.W.3d 605, 617–618 (Tex. 2023), the Texas Supreme Court stated that a statute may grant an agency exclusive jurisdiction either expressly or by

establishing a “pervasive regulatory scheme” that indicates that the Legislature intended for the regulatory process to be the exclusive means of remedying the problem to which the regulation is addressed. See Ch. 423, *Judicial Review of Contested Cases*, § 423.202[3].

BUSINESS AND COMMERCIAL LAW

- **Employment Termination After Testing or Investigation.** In *Houston Area Safety Council, Inc. v. Mendez*, 671 S.W.3d 580, 587 (Tex. 2023), the Texas Supreme Court held that an independent laboratory did not have a legal duty to an employee whose specimens were tested to exercise reasonable care when conducting those tests. See Ch. 203A, *Employment Litigation*, § 203A.06[1][c].
- **Measuring Contract Time Periods.** In *Apache Corp. v. Apollo Exploration, LLC*, 670 S.W.3d 319, 321 (Tex. 2023), the Texas Supreme Court held that the stated time in a contract period excludes the specified date; a period measured in years “from” or “after” a measuring date ends on the anniversary of the measuring date, not on the day before the anniversary. See Ch. 210A, *Contracts*, § 210A.40[5][a].

FAMILY LAW

- **Void Marriage.** A suit to

declare a marriage void may be brought by anyone, at any time, directly or collaterally [Allebach v. Gollub, 668 S.W.3d 458, 461–463 (Tex. App.—Houston [14th Dist.] 2023, pet. denied)]. See Ch. 361, *Annulment*, § 361.02[5].

- **Attorney’s Fees.** A trial court may award attorney’s fees even if there is no community estate to divide [In Interest of A.P.N., 655 S.W.3d 55, 58 (Tex. App.—Dallas 2022, no pet.)]. See Ch. 362, *Divorce*, § 362.12[1][c][i].
- **Modification of Conservatorship.** The type of evidence a nonparent must adduce to rebut the fit-parent presumption in a suit to modify conservatorship is discussed in Ch. 373, *Modification of SAPCR Orders*, § 373.04[2][b].
- **Termination of Parental Rights.** The Texas Supreme Court explains the meaning of “the child’s removal from the parent” in Subsection (O) of Family Code Section 161.001 [In Interest of A.A., 670 S.W.3d 520, 526–28 (Tex. 2023)]. See Ch. 381,

Termination of Parental Rights, § 381.02[14][b].

REAL ESTATE LITIGATION

- **New chapter.** Chapters 270 and 270A were combined, into a completely rewritten ch. 270 which covers litigation arising from contracts for the erection, repair, and construction of improvements to real property. The focus of the chapter is on actions for damages between owners and contractors. The chapter also embraces suits by or against third parties, including subcontractors and sureties. In addition, the chapter discusses the procedural rights and obligations of parties to a residential construction defect dispute under the Residential Construction Liability Act, including drafting guides for both homeowners and contractors, as well as forms for notices of defect, requests for inspection, petitions and allegations by homeowners, and response forms for contractors. See Ch. 270, *Improvement Contracts*.

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Publication 719 Release 152

March 2024

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