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Dorsaneo, Texas Litigation Guide

Publication 719 Release 105 June 2012

HIGHLIGHTS

RELEASE 105 UPDATES

- This release updates *Texas Litigation Guide* with recent Texas Supreme Court and court of appeals cases, federal legislation, rule amendments, and other significant developments since Release 104. Some of the significant developments incorporated in this release are summarized below.

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Pretrial, Trial, and Appellate Practice

Removal Chapter Revised to Reflect Recent Federal Legislation. Chapter 63, *Removal to Federal Court,* has been extensively revised to incorporate changes to the federal statutes governing jurisdiction and removal brought about by three recent pieces of federal legislation: the Federal Courts Jurisdiction and Venue Clarification Act, the Removal Clarification Act, and the Leahy-Smith America Invents Act. *See* Ch. 63, *Removal to Federal Court.*

Interaction of Medical Malpractice Statute of Limitations with Other Statutes. Chapter 72, *Limitation of Actions,* and Chapter 321, *Medical Malpractice,* have been updated to include discussion of *Mena v. Lenz,* 349 S.W.3d 650, 655 (Tex. App.—Corpus Christi 2011, no pet. h.), in which the Corpus Christi Court of Appeals addressed the conflict between the medical malpractice statute of limitation, Tex. Civ. Prac. & Rem. Code § 74.251(a), and another statute providing that, when an action is dismissed for lack of subject matter jurisdiction, a party may refile the suit in a different court within 60 days, Tex. Civ. Prac. & Rem. Code § 16.064(a). The court concluded that the medical malpractice statute applies "notwithstanding any other

law." *See* §§ 72.04[8], 321.12[6][a].

Evidence Required to Support Award of Unliquidated Damages in Default Judgment. In *Milestone Operating v. ExxonMobil Corp.,* 346 S.W.3d 101, 111 (Tex. App.—Houston [14th Dist.] 2011, pet. filed), the court of appeals held that conclusory affidavits are not sufficient to support an award of unliquidated damages in a default judgment. *See* Ch. 21, *Damages in Contract,* § 21.11[1][d].

Protection of Privileged Documents in Electronic Discovery. A case from the Beaumont Court of Appeals, granting mandamus to vacate a discovery order that did not include sufficient safeguards of the party's privileged information contained in her computer files, has been added to Ch. 99, *Electronic Discovery* [*In re Clark,* 345 S.W.3d 209, 213–214 (Tex. App.—Beaumont 2011, orig. proceeding); *see* § 99.22[3][a][i]].

Declaratory Relief Action Must be Ripe. This release includes discussion *Etan Industries, Inc. v. Lehmann,* ___ S.W.3d ___, 55 Tex. Sup. Ct. J. 219 (Tex. 2011), in which the Texas Supreme Court held that declaratory relief is not warranted unless the claim presents a substantial controversy of immediacy and reality. *See* Ch. 45, *Declaratory Judgments,* § 45.02[1].

Attorney's Fees Claim Makes Declaratory Relief Action Ripe. Included in this release is a discussion of in *Hansen v. JP Morgan Chase Bank, N.A.,* 346 S.W.3d 769, 774–775 (Tex. App.—Dallas 2011, no pet.), in which the court of appeals held that a declaratory judgment action remains a live controversy, even if all requests for substantive declaratory relief become moot during the action's pendency, as long as a claim for attorney's fees remains pending. *See* Ch. 45, *Declaratory Judgments,* § 45.02[1].

Electronic Filing in Supreme Court Discussed. Ch. 151, *Appellate Proceedings in Supreme Court,* has been revised to include the Supreme Court's latest order concerning the requirements for electronic filing of documents with the Court [*see* § 151.04[1][c][iv]].

Arbitration

Arbitration of DTPA Class Action Claims. In *NCP Finance Ltd. Partnership v. Escatiola,* 350 S.W.3d 152, 153–155 (Tex. App.—San Antonio 2011, no pet. h.), the court of appeals held that a defendant is entitled to compel individual arbitration of a plaintiff's purported class action claims for violation of the DTPA, when the parties' arbitration agreement provides that any claim, which it defines as any legal dispute between them, must be decided by an arbitrator and expressly prohibits class certification in arbitration. *See* Ch. 220, *Deceptive Trade Practices,* § 220.03[1][d].

Trustee Not Bound by Settlor's Desire to Arbitrate. This release includes discussion of *Rachal v. Reitz,* 347 S.W.3d 305, 309-312 (Tex. App.—Dallas 2011, pet. filed), in which the court of appeals held that a settlor's intent that disputes regarding the trust be arbitrated did not require the trustee and a beneficiary to arbitrate their dispute. *See* Ch. 44, *Arbitration,* § 44.02[1][b].

Prejudice Required for Arbitration Waiver. Discussion of *Ascendant Anesthesia PLLC v. Abazi,* 348 S.W.3d 454, 461–462 (Tex. App.—Dallas 2011, no pet. h.), is included in this release, in which the court of appeals held that having to file suit and hire counsel does not constitute "prejudice" for purposes of waiver of arbitration rights. *See* Ch. 44, *Arbitration,* § 44.02[3][b].

Mandamus Available When Arbitration Denied. This release is updated with

Austin Commer. Contrs., L.P. v. Carter & Burgess, Inc., 347 S.W.3d 897, 901 (Tex. App.—Dallas 2011, pet. filed), in which the court of appeal held that mandamus relief was available because there was no adequate remedy by appeal when a party was erroneously denied its contracted-for arbitration rights under the FAA. *See* Ch. 44, *Arbitration,* § 44.08[3].

Personal Injury and Tort Litigation

Liability of Employer for Conduct of Off-Duty Employee. Chapter 290, *Negligence,* has been revised to include *Salinas v. Briggs Ranches,* 350 S.W.3d 218, 224–227 (Tex. App.—San Antonio 2011, no pet.), which held that an employer is liable for the on-premises negligence of an off-duty employee only when the employer knows or should know of both the ability to control, and the necessity and opportunity for exercising control over the employee (*see* § 290.32[1][b]).

Criminal Acts Defense. Chapter 290, *Negligence,* and Chapter 292, *Death Actions,* have been revised to include *Arredondo v. Dugger,* 347 S.W.3d 757 (Tex. App.—Dallas 2011, pet. filed), which held that if the criminal conduct defense under Tex. Civ. Prac. & Rem. Code § 93.001 is unavailable due to the absence of a conviction of the crime, the defendant is likewise precluded from relying on the defense of the common law unlawful acts doctrine (*see* §§ 290.20[6][a], 292.02[1]).

Recent Case Law Addresses Issues Regarding Proportionate Responsibility. Chapter 291, *Proportionate Responsibility; Contribution and Indemnity,* has been revised to incorporate recent case law developments, including:

- *Flack v. Hanke,* 334 S.W.3d 251 (Tex. App.—San Antonio 2010, pet. denied), which held that when the designation of responsible third parties and their joinder as defendants complied with all statutory requirements, the trial court had no discretion to refuse joinder even if the plaintiff and the original defendant manipulated the proceedings to "wash out" potential limitations defenses. The court also held that a designee has no standing to object its own designation; moreover, after its joinder as a defendant, it may not object to designation, but instead must move for dismissal or summary judgment like any other defendant (*see* § 291.03[2][b]).
- *Martin K. Eby Constr. Co. v. LAN/STV,* 350 S.W.3d 675 (Tex. App.—Dallas 2011, pet. filed), which held that when both parties submitted evidence of a prior settlement with a third party as part of its "damages model," the settlement is presumably reflected in the jury's verdict, and the defendant is not entitled to any settlement credit (*see* § 291.03[3][c]).

Medical Malpractice Chapter Reflects Recent Case Law. Chapter 321, *Medical Malpractice,* has been revised to incorporate numerous significant recent case law developments, including:

- A split of authority over whether a criminal act perpetrated by a health care provider is a health care liability claim under Chapter 74 of the Civil Practice and Remedies Code. The Texas Supreme Court has granted a petition for review to decide that issue in *Wasserman v. Gugel,* ___ S.W.3d ___, 2010 Tex. App. LEXIS 3749 (Tex. App.—Houston [14th Dist.] May 20, 2010, pet. granted) (*see*

§ 321.02[2]).

- *Zanchi v. Lane,* 349 S.W.3d 97 (Tex. App.—Texarkana 2011, pet. filed), which created a split of authority by holding that the mere naming of a health care provider as a defendant in the petition is sufficient to make that defendant a "party" for the purposes of Tex. Civ. Prac. & Rem. Code § 74.351, so that service of the required expert report at any time after the petition is filed is sufficient, even if it precedes service of citation on that defendant (*see* § 321.15[1][a][ii]).
- *TTHR, L.P. v. Coffman,* 338 S.W.3d 103 (Tex. App.—Fort Worth 2011, no pet.), which held that: (1) although Tex. Civ. Prac. & Rem. Code § 74.001(a)(2) defining "claimant" refers to "bodily injury," an allegation of a privacy violation from a hospital's improper release of a lab report is covered despite the lack of any physical injury; and (2) the claim is a health care liability claim because the wrongful release of medical information constitutes a departure from accepted standards of professional or administrative services directly related to health care (*see* § 321.02[2], [7], [8]).
- *Strobel v. Marlow,* 341 S.W.3d 470 (Tex. App.—Dallas 2011, no pet.), holding that a licensed prosthetist who provides and fits an artificial limb for an amputee is a health care provider, and the claims against the individual are health care liability claims (*see* § 321.02[3][a]).

Jurisdiction Over Legal Malpractice Claims Involving Patents. Chapter 322, *Professional Malpractice,* has been revised to incorporate *Minton v. Gunn,* 55 Tex. Sup. Ct. J. 196 (Tex. 2011), in which the Texas Supreme Court held that a state law legal malpractice claim that arises from prior patent litigation is within exclusive federal jurisdiction when the claim requires the resolution of a substantial question of federal patent law (*see* § 322.02[1][c]).

Recent Cases Involving Malpractice Claims Against Design Professionals Incorporated. Chapter 322, *Professional Malpractice*, has also been revised to reflect numerous recent significant cases involving malpractice actions against design professionals, including:

- *Black + Vernooy Architects v. Smith,* 346 S.W.3d 877 (Tex. App.—Austin 2011, pet. filed), which held that the architects of a home do not owe any common law duty of care to guests of the homeowners (*see* § 322.01[2][c]).
- *Nangia v. Taylor,* 338 S.W.3d 768 (Tex. App.—Beaumont 2011, no pet.), which held that regardless of when the original petition was filed, when a claim against a design professional is first asserted after Sept. 1, 2009, the current version of the certificate of merit requirement of Tex. Civ. Prac. & Rem. Code § 150.002 applies. This case conflicts with *S&P Consulting Eng'rs, PLLC v. Baker,* 334 S.W.3d 390 (Tex. App.—Austin 2011, no pet.), which held that the date of filing of the original petition controls, so that new or amended pleadings stating additional claims do not make the more recent version of the statute applicable. The latter case also overruled *Consolidated Reinforcement, L.P. v. Carothers Ex-*

ecutive Homes, Ltd., 271 S.W.3d 887 (Tex. App.—Austin 2008, no pet.), and held that the pre-2009 version of the statute requires a certificate of merit not only in negligence actions, but in any action arising out of the provision of professional services (*see* § 322.04[2][d]).

- *Hardy v. Matter,* 350 S.W.3d 329 (Tex. App.—San Antonio 2011, pet. dism'd), which held that the certificate of merit statute requires only that the author be qualified, not that those qualifications be established in the affidavit itself, so a court may look to supplemental affidavits or other materials to determine the author's qualifications (*see* § 322.04[2][d]).

Recent Case Law Affecting Government Tort Claims Analyzed. Chapter 293, *Claims Against Governmental Entities,* has been revised to incorporate many recent significant case law developments, including:

- *Texas Tech Univ. Health Sci. Ctr. v. Williams,* 344 S.W.3d 508 (Tex. App.—El Paso 2011, no pet.), which held that the 30-day period for a claimant to substitute a governmental entity for its employee under the election of remedies provision of Tex. Civ. Prac. & Rem. Code § 101.106(f) cannot be extended by the parties under Tex. R. Civ. P. 11 or any other authority (*see* § 293.16[3][a][iv]).
- *Redden v. Denton County,* 335 S.W.3d 743 (Tex. App.—Fort Worth 2011, no pet.), which discusses the continuing vitality of *Salcedo v. El Paso Hosp. Dist.,* 659 S.W.2d 30 (Tex. 1983), and adopts the majority position that a claimant's injury must be inflicted by the use of the medical equipment itself to fall within the waiver of the Tort Claims Act, and that any allegation that information derived from the equipment was misused is an error in diagnosis or other medical judgment that is not actionable (*see* § 293.10[5][d]).
- *Gwen Ross & Phoenix II, Inc. v. Linebarger, Goggan, Blair & Sampson, L.L.P.,* 333 S.W.3d 736 (Tex. App.—Houston [1st Dist.] 2010, no pet.), which held that a law firm hired by a taxing unit to collect taxes was a paid agent of the unit and was therefore an "employee" under the Tort Claims Act and immune under Tex. Civ. Prac. & Rem. Code § 101.055(1) (*see* §§ 293.10[3][b], 293.12[3]).
- *Cen Tex Childcare, Inc. v. Johnson,* 339 S.W.3d 734 (Tex. App.—Fort Worth 2011, no pet.), which held that when a contract between a government unit and a worker expressly provides that the latter is an independent contractor, not an employee, the contractual provision controls and precludes the worker from claiming status as an employee (*see* §§ 293.10[3][b], 293.16[3][a][v]).

Interlocutory Appeals by Book Authors and Publishers Permitted in Defamation Cases. Chapter 333, *Libel and Slander,* has been revised to include *Main v. Royall,* 348 S.W.3d 381 (Tex. App.—Dallas 2011, no pet.), which held that Tex. Civ. Prac. & Rem. Code § 51.014(a)(6) permitting an interlocutory appeal of the refusal to dismiss by a member of the "print media" includes not only newspapers, magazines, and other periodicals, but also

book authors and publishers (*see* § 333.11[4][c]).

Limits on Commercial Property Owner's Liability for Injuries to Contractors and Subcontractors Are Not Affirmative Defenses. Chapter 310, *Premises Liability,* has been revised to include *Gorman v. Meng,* 335 S.W.3d 797 (Tex. App.—Dallas 2011, no pet.), which held that the limitations of a commercial property owner's liability under Chapter 95 of the Civil Practice and Remedies Code (liability for claims by contractors or subcontractors making improvements to property for injuries from unsafe condition of property) are not an affirmative defense that must be raised by the owner; instead, they are substantive rules of liability that must be applied whenever it is shown that the statute is applicable (*see* § 310.02[3][d]).

Workers' Compensation and Insurance Litigation

Insurer's Duty to Defend May Be Negated by Extrinsic Evidence That Named Defendant is Not Covered by Policy. Chapter 341, *Liability Insurance,* has been revised to include *Weingarten Realty Mgmt. Co. v. Liberty Mut. Fire Ins. Co.,* 343 S.W.3d 859 (Tex. App.—Houston [14th Dist.] 2011, pet. denied), which recognized an exception to the "eight corners" rule by holding that an insurer may negate the duty to defend by extrinsic evidence that conclusively establishes that a named defendant is a stranger to the policy, and could not be entitled to a defense under any set of facts (*see* § 341.04[3][b]).

Recent Cases Interpreting Workers' Compensation Law. Chapter 340, *Workers' Compensation,* has been revised to incorporate recent case law developments, including:

- *Region XIX Serv. Ctr. v. Banda,* 343 S.W.3d 480 (Tex. App.—El Paso 2011, pet. filed), which held that although a worker's compensation claimant must present expert medical testimony as to the extent of an injury and its permanence, the ultimate issue of whether that level of impairment constitutes the "loss" of use of the particular body part under Tex. Lab. Code § 408.161 is within the knowledge and understanding of jurors, so expert testimony as to that issue is not required (*see* § 340.10[5]).
- *Tex. Dep't of Aging & Disability Servs. v. Beltran,* 350 S.W.3d 410 (Tex. App.—El Paso 2011, pet. filed), which held that the decision in *Kerrville State Hosp. v. Fernandez,* 28 S.W.3d 1 (Tex. 2000) remains good law, and a state agency does not have sovereign immunity from suit under the Anti-Retaliation Law (*see* § 340.42).

Scope of "Prompt Payment" Claims Against Health Insurers. Chapter 344, *Life, Health, and Accident Insurance,* has been revised to include *Christus Health Gulf Coast v. Aetna, Inc.,* 347 S.W.3d 726 (Tex. App.—Houston [14th Dist.] 2011, pet. filed), which held that because the statute requiring insurers to promptly pay doctors and other health care providers "in accordance with the contract" [Tex. Ins. Code §§ 843.338, 1301.103], privity of contract is a necessary element of a prompt payment claim (*see* § 344.05[2]).

Business and Commercial Litigation

Credit Disclosure Chapter Revised and Updated. Chapter 233, *Credit Disclosures,* has been extensively revised and updated to reflect recent federal legislation, amendments to Regulation Z, and case law

relating to federal disclosure laws.

Fee Recovery Requires Damages. This release includes a discussion of *Garza v. Villarreal,* 345 S.W.3d 473, 484 (Tex. App.—San Antonio 2011, pet. denied), in which the court of appeal held that a party to a contract may recover attorney's fees only when damages have been recovered. *See* Ch. 22, *Attorney's Fees,* § 22.20[1][a].

Value of Services Need Not Be Proved Prior to Filing Quantum Meruit Claim. In *Concept Gen. Contr. v. Asbestos Maintenance,* 346 S.W.3d 172, 187-188 (Tex. App.—Amarillo 2011, pet. denied), the court of appeals held that a plaintiff is not required to establish the value of the services it provided before filing suit and to substantiate that value in a manner acceptable to the benefited party or else be estopped from asserting a quantum meruit claim. *See* Ch. 21, *Damages in Contract,* § 21.03[1].

Requirements for Award of Consequential Damages for Breach of Loan Commitment Agreement. In *Basic Capital Mgmt. v. Dynex Commercial,* 348 S.W.3d 894, 903 (Tex. 2011), the Texas Supreme Court held that for a lender to be liable for consequential damages resulting from its breach of a loan commitment, it must have known, when the commitment was made, the nature of the borrower's intended use of the loan proceeds, but it need not have known the details of the intended venture. *See* Ch. 21, *Damages in Contract,* § 21.11[2][b][ii].

Credit Card Debt May be Recovered in Action on Open Account. In *Capital One Bank (USA), N.A. v. Conti,* 345 S.W.3d 490, 491-492 (Tex. App.—San Antonio 2011, no pet. h.), the court of appeals held that an action to collect a credit card debt may be brought as an action on an "open account." Such a debt may be considered an open account because, under a credit card agreement, the terms of repayment remain subject to modification and the parties exchange credits and debits until either party settles the balance and closes the account. *See* Ch. 210, *Sales,* § 210.100[1][f].

Requirements for Proof of Waiver of Breach of Contract. In *RM Crowe Prop. Servs. v. Strategic Energy,* 348 S.W.3d 444, 449 (Tex. App.—Dallas 2011, no pet. h.), the court of appeals held that without an admission of waiver by the plaintiff, it is generally difficult to prove waiver as a matter of law as an affirmative defense to a breach of contract claim. The defendant must produce conclusive evidence that the plaintiff unequivocally manifested its intent to no longer assert its claim, and this is a particularly onerous burden. *See* Ch. 210A, *Contracts,* § 210A.110[1][e].

Contract Misrepresentations as Basis for DTPA Liability. In *Drury Southwest v. Louis Ledeaux #1,* 350 S.W.3d 287, 291 (Tex. App.—San Antonio 2011, no pet. h.), the court of appeals held that although the mere failure to perform a contractual obligation cannot form the basis of a claim under the Deceptive Trade Practices Act (DTPA), a misrepresentation made during contract negotiations may form the basis for such a claim if the defendant misrepresents a material fact about the goods or services sold to the plaintiff. *See* Ch. 220, *Deceptive Trade Practices,* § 220.02[1][d].

Survival of DTPA Claim. In *Texas Farm Bureau Mut. Ins. Co. v. Rogers,* 351 S.W.3d 103, 106–107 (Tex. App.—San Antonio 2011, no pet. h.), the San Antonio Court of Appeals held that a DTPA claim does not survive the original consumer's death and cannot be pursued by the consumer's estate or by individual beneficiaries of that estate who are not themselves

"consumers." *See* Ch. 220, *Deceptive Trade Practices,* § 220.03[1][a][i].

Discharge of Negotiable Instrument Must Be Intentional. In *Manley v. Wachovia Small Business Capital,* 349 S.W.3d 233, 237–238 (Tex. App.—Dallas 2011, pet. filed), the court of appeals held that Tex. Bus. & Com. Code § 3.604 does not allow for the unintentional discharge of the obligation of a party to a negotiable instrument. The statute requires intentional and voluntary conduct to accomplish a discharge of the obligation, which has led courts to conclude that unintentionally or mistakenly marking a note "paid" (or the equivalent) does not discharge the legal obligation to pay the debt. *See* Ch. 230, *Negotiable Instruments,* § 230.09[4].

Employment Litigation

Prerequisite for Filing TCHRA Suit Against County. In a case of first impression, *Forge v. Nueces County,* 350 S.W.3d 740, 745–746 (Tex. App.—Corpus Christi 2011, no pet. h.), the Corpus Christi Court of Appeals has held that a county employee is not required to present a claim to the county under Tex. Local Gov't Code § 89.004(a) before filing suit against the county under the Texas Commission on Human Rights Act (TCHRA). The administrative exhaustion prerequisite to filing suit under the TCHRA is the exclusive notice provision with which a plaintiff must comply. *See* Ch. 203A, *Employment Litigation,* § 203A.21[3][a].

Age Discrimination Claim under TCHRA. In *Hernandez v. Grey Wolf Drilling, L.P.,* 350 S.W.3d 281, 285 (Tex. App.—San Antonio 2011, no pet. h.)., the court of appeals rejected the employer's contention that the trial court should evaluate the employee's pretext claim of age discrimination under the TCHRA using the "but for" test articulated by the U.S. Supreme Court in *Gross v FBL Financial Services, Inc.,* rather than the *McDonnell Douglas* framework. It concluded that *Gross* did not apply because the TCHRA contains the "motivating factor", which the majority in Gross acknowledged was critically absent from the ADEA, and no court has extended *Gross* to a pretext claim, largely because *Gross* explicitly left open the question of whether the *McDonnell Douglas* framework is still the appropriate framework for evaluating pretext claims brought under the ADEA. *See* Ch. 203A, *Employment Litigation,* § 203A.21[4][b][v].

Sovereign Immunity Waived Up to Amount of Damages Cap in TCHRA Action. In *Texas Com'n on Human Rights v. Morrison,* 346 S.W.3d 838, 850 (Tex. App.—Austin 2011, pet. filed), the court of appeals held that a governmental employer's sovereign immunity in an action under the TCHRA is waived as to compensatory damages in an amount up to, but not greater than, the damages cap set forth in that Act. The immunity from liability provided for by the damages cap is an affirmative defense, rather than a matter of jurisdiction, and therefore a governmental employer must plead it or else this defense is waived. *See* Ch. 203A, *Employment Litigation,* § 203A.21[7][a].

Venue in Whistleblower Action. In *In re Tarrant County,* 345 S.W.3d 784, 785–786 (Tex. App.—Dallas 2011, no pet. h.), the court of appeals held that the venue provision of the Whistleblower Act, which states that a public employee of a local government entity "may" sue in a district court of the county where the cause of action arises or in a district court of any county in the same geographic area that has established with the county where the cause of action arises a council of governments or other regional commission, is a permissive

venue provision. Local government units, other than counties, are subject to this permissive venue provision. *See* Ch. 203A, *Employment Litigation,* § 203A.22[1][c][v].

Real Estate Litigation

Recent Significant Cases Relating to Eminent Domain Proceedings. Chapter 261, *Condemnation,* has been revised to incorporate recent case law developments, including:

- *City of Dallas v. Stewart,* 55 Tex. Sup. Ct. J. 271 (Tex. 2012), holding that the decision of a city's urban standards board that an abandoned residence was a nuisance did not preclude an inverse condemnation suit for demolition of the structure because whether the condition constitutes a nuisance that may be abated without compensation is ultimately a question for the judiciary (*see* §§ 261.01[3][e], 261.03[1], [2]).
- *Patel v. City of Everman,* 55 Tex. Sup. Ct. J. 287 (Tex. 2012), which clarified the rule in *Stewart,* and held that if the landowner fails to pursue all avenues of administrative and judicial review, then the city's nuisance determination acts as collateral estoppel in any subsequent claim for inverse condemnation (*see* §§ 261.01[3][e], 261.03[1], [2]).
- *In re Riley,* 339 S.W.3d 216 (Tex. App.—Waco 2011, orig. proceeding), which held that an eminent domain case "involves" an issue of title and requires a transfer to the district court under Tex. Prop. Code § 21.002 no matter how the issue is raised, including by a plea to the jurisdiction, and there is no requirement that the issue form the basis of a claim for affirmative relief (*see* § 261.02[1]).
- *El Dorado Land Co., L.P. v. City of McKinney,* 349 S.W.3d 215, 217–218 (Tex. App.—Dallas 2011, pet. filed), which held that a plaintiff's allegation that contract rights were taken by a government entity is insufficient to support a claim for inverse condemnation, even if the contract at issue concerns an interest in property (*see* § 261.03[1]).

Deeds and Conveyances Chapter Updated. Chapter 254, *Deeds and Conveyances,* has been revised to incorporate recent case law developments, including:

- *Noble Mortg. & Invs. LLC v. D&M Vision Invs., LLC,* 340 S.W.3d 65 (Tex. App.—Houston [1st Dist.] 2011, no pet.), which held that the notation of an execution sale on a court's docket is not a "recording" under Property Code Section 13.002, and therefore does not defeat bona fide purchaser status (*see* § 254.07).
- *In re Cohen,* 340 S.W.3d 889 (Tex. App.—Houston [1st Dist.] 2011, orig. proceeding), which held that mandamus is available to reinstate a notice of lis pendens improperly expunged under the criteria of Tex. Prop. Code § 12.0071 (*see* § 254.100[1]).

Suit for Refund of Overpaid Taxes Subject to Sovereign Immunity. Chapter 260, **Real Property Tax Suits,** has been revised to include *Lewisville Indep. Sch. Dist. v. CH Townhomes, Inc.,* 346 S.W.3d 21, 23–26 (Tex. App.—Fort Worth 2011, pet. denied), which held that although Tex. Tax Code § 31.11 requires a refund of

overpaid taxes, nothing in that provision or in any other statute waives a taxing unit's governmental immunity for its refusal to make the refund (*see* § 260.04[1][a]).

Termination of Sale Based on Failure to Provide Statutory Notice. Chapter 252, *Real Estate Sales Contracts,* has been revised to include *Forney 921 Lot Dev. Partners I, L.P. v. Paul Taylor Homes, Ltd.,* 349 S.W.3d 258 (Tex. App.—Dallas 2011, pet. filed), which held that if a purchaser signs a sales agreement containing an acknowledgement that the notice required by Tex. Water Code § 49.452 was provided, the purchaser is estopped from terminating the sales agreement based on the absence of notice or its alleged inadequacies (*see* § 252.12).

Recent Mechanic's Liens Cases Added. Chapter 271, *Mechanic's and Materialmen's Liens,* has been revised to incorporate recent case law developments, including:

- *Pineridge Assocs., L.P. v. Ridgepine, LLC,* 337 S.W.3d 461 (Tex. App.—Fort Worth 2011, no pet.), which held that although foreclosure of a superior lien extinguishes a mechanic's lien, it does not result in discharge "of record" because Tex. Prop. Code § 53.157 provides the exclusive means by which a mechanic's lien may be discharged "of record" (*see* § 271.02[10][d]).
- *Morrell Masonry Supply, Inc. v. Loeb,* 349 S.W.3d 664 (Tex. App.—Houston [14th Dist.] 2011, no pet.), which held that a mechanic's lien as to homestead property was void when the affidavit claiming the lien did not contain the verbatim statements required by Tex. Prop. Code § 53.254 (*see* § 271.02[8][c]).

Waiver of Process Defects in Eviction Proceeding. Chapter 282, *Landlord and Tenant,* has been revised to include *Brown v. Apex Realty,* 349 S.W.3d 162 (Tex. App.—Dallas 2011, no pet.), which held that when a tenant appeals a justice court's eviction judgment to the county court, any defect in process or in service of process in the justice court is waived (*see* § 282.41[6][a]).

Family Law Proceedings

Standing of Caregivers in SAPCR Actions. Ch. 370, *SAPCR Procedures,* has been revised to include coverage of the disagreement among the courts of appeals as to the meaning of the statutory "actual control" language of the provision giving standing to persons who have had "actual care, custody, and control" of a child for at least six months. *See* § 370.02[1][d][iii].

Probate Proceedings

Testamentary Incapacity and Undue Influence. In *In re Estate of Lynch,* 350 S.W.3d 130, 135 (Tex. App.—San Antonio 2011, no pet. h.), the court of appeals held that testamentary incapacity and undue influence are not necessarily mutually exclusive. In fact, incapacity may be a factor in the existence of undue influence, and an expert is not precluded from giving an opinion on both questions. *See* Ch. 392, *Admitting Wills to Probate,* § 392.07[3][a].

Scope of Right to Bring Suit to Recover Estate Property. In *In re Estate of Preston,* 346 S.W.3d 137, 162–163 (Tex. App.—Fort Worth 2011, no pet. h.), the court of appeals held that although the executor or administrator of a decedent's estate generally has the exclusive right to bring suit for the recovery of property belonging to the estate, an exception to this general rule applies when it appears that the

executor or administrator will not or cannot act, or that the executor's or administrator's interest is antagonistic to that of the heirs desiring to sue. In such a case, an heir may maintain a suit to recover property belonging to the estate while the administration is pending. *See* Ch. 400, *Managing the Estate,* § 400.01[2].

Attorney's Fees

Fees May Be Proven Without Billing Records. This release updates Ch. 22, *Attorney's Fees,* to include *RM Crowe Prop. Servs. Co., L.P. v. Strategic Energy, L.L.C.,* 348 S.W.3d 444, 452 (Tex. App.—Dallas 2011, no pet. h.), in which the court of appeals held that billing records need not be introduced in order to recover attorney's fees [*see* § 22.41].

Administrative Law

Administrative Rules Subject to Challenge. Included in this release is *Texas Department of Transportation v. Sefzik,* 355 S.W.3d 618, 55 Tex. Sup. Ct. J. 42 (Tex. 2011), in which the Texas Supreme Court held that Tex. Gov't Code § 2001.038 was applicable only to challenge an administrative rule, not a statute. *See* Ch. 421, *Administrative Rules,* § 421.05[2][c].

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