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HIGHLIGHTS

- This release updates *Texas Litigation Guide* with recent Texas Supreme Court and court of appeals cases, federal cases, rule amendments, and other significant developments since Releases 105 and 106. Some of the significant developments incorporated in this release are summarized below.

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Pretrial, Trial, and Appellate Practice

Texas Supreme Court Considers Issues Relating to Class Action Standing and Jurisdiction. In *Heckman v. Williamson County*, 55 Tex. Sup. Ct. J. 803 (Tex.

2012), the Texas Supreme Court held that a named plaintiff need not have standing on each and every one of the class's claims in order to satisfy the standing requirement. So long as an individual named plaintiff has standing on some claim, the plaintiff has standing to pursue class certification as to that claim. In addition, the Court carved out an exception to the general mootness rule for cases in which the class as a whole retains a live claim against the defendant, but the individual members of the class are always changing due to the inherently short-lived nature of the claim. *See* Ch. 13, *Class Actions*, § 13.03[2].

Procedure for Contesting Lack of Dominant Jurisdiction. This release includes coverage of *In re Puig*, 351 S.W.3d 301, 306 (Tex. 2011), in which the Texas Supreme Court held that the proper method for contesting a court's lack of dominant jurisdiction is the filing of a plea in abatement, not a plea to the jurisdiction. *See* Ch. 2, *Jurisdiction of Texas Courts*, § 2.01[6].

Compensation of Guardian Ad Litem Limited to Matters Related to Suit for

Which Guardian Appointed. This release incorporates coverage of *Ford Motor Co. v. Garcia*, 363 S.W.3d 573, 580–582 (Tex. 2012), in which the Texas Supreme Court held that a guardian ad litem is not entitled to recover fees for work performed beyond the specified task for which he or she was assigned. See Ch. 12, *Pleading the Parties*, § 12.03[5][c].

Sanctions Barring Defendant From Damages Hearing Deemed Excessive. In *Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 2012 Tex. LEXIS 509, **9–25 (Tex. 2012), the Texas Supreme Court held that where the trial court struck the defendant’s answer and rendered a default judgment for discovery abuse, the Texas Supreme Court held that a sanctions order barring the defendant from contesting the plaintiff’s damages was excessive. See Ch. 14, *Sanctions for Improper Pleading*, § 14.03[5].

Effect of Defects in Summary Judgment Affidavits. Ch. 101, *Summary Judgment*, has been revised to include *Mansions in the Forest, L.P. v. Montgomery County*, 365 S.W.3d 314, 316 (Tex. 2012), in which the Texas Supreme Court discussed the use of jurats with respect to affidavits, and clarified that defects may be waived if not raised in the trial court. See § 101.05[1][d][iii][E].

Withdrawal of Deemed Admissions. Ch. 96, *Requests for Admission*, has been updated in light of *Marino v. King*, 355 S.W.3d 629, 632–633 (Tex. 2011), in which the Texas Supreme Court held that deemed admissions that act as “death penalty” sanctions implicate the same due process concerns as other case-ending discovery sanctions, so that good cause for their withdrawal exists unless there is evidence of “flagrant bad faith or callous disregard for the rules.” See §§ 96.01[2], 96.06[2].

Revised Discussion of Fraudulent Concealment as Tolling Statute of Limitations. A Texas Supreme Court case discussing the fraudulent concealment doctrine, which under certain circumstances tolls the running of the limitations period [*Shell Oil Co. v. Ross*, 356 S.W.3d 924, 927 (Tex. 2011)], has been added to Ch. 72, *Limitation of Actions*. See § 72.04[1][a].

Recent Appellate Rule Amendments Incorporated. This release incorporates recent 2012 amendments to the Texas Rules of Appellate Procedure, which clarify the contents of notices of appeal and other procedures in certain family law proceedings involving indigent appellants. In addition, the release reflects amended Tex. R. App. P. 25.1(f), under which responsibility for filing a copy of the notice of appeal with the court of appeals has shifted from the appellant to the trial court clerk. See Ch. 145, *Overview of the Appellate Process*; Ch. 147, *Perfecting and Docketing the Appeal*, and Ch. 149, *The Appellate Record*.

Scope of Texas Supreme Court Jurisdiction Over Review of Interlocutory Orders. This release includes coverage of *Heckman v. Williamson County*, 55 Tex. Sup. Ct. J. 803 (Tex. 2012), in which the Texas Supreme Court held that it lacks jurisdiction over an appeal from an interlocutory order, but does have jurisdiction when the court of appeals’ decision conflicts with prior decisions of the Court. See Ch. 2, *Jurisdiction of Texas Courts*, § 2.01[1][b][i].

Personal Injury and Tort Litigation

Definition of Health Care Liability Claim. Ch. 321, *Medical Malpractice*, has been revised to expand and reorganize the discussion of what constitutes a health care liability claim (HCLC) under Chapter 74 of

the Civil Practices and Remedies Code. The revised discussion also includes *Texas W. Oaks Hosp. v. Williams*, 55 Tex. Sup. Ct. J. 1033 (Tex. 2012), which applied the statutory definition in Tex. Civ. Prac. & Rem. Code § 74.001(a)(13), and held that a claim of a departure from accepted standards of safety in any health care context states an HCLC regardless of whether the claim is “directly related to health care.” The Court also held that the statutory definition of “claimant” in Tex. Civ. Prac. & Rem. Code § 74.001(a)(2) does not require that the person be a patient. *See* § 321.02[2], [8].

Application of Learned Intermediary Doctrine in Products Liability Cases. Ch. 320, *Products Liability*, has been revised to include *Centocor, Inc. v. Hamilton*, 55 Tex. S. Ct. J. 774 (Tex. 2012), in which the Texas Supreme Court held that: (1) the “learned intermediary” doctrine applies to product liability actions relating to prescription drugs; (2) there is no direct-to-consumer marketing exception to the doctrine; (3) the doctrine is not an affirmative defense, but is instead a common law rule that simultaneously relieves the manufacturer of any obligation to warn an end user, and limits that obligation to the prescribing physician only; and (4) the duty to warn runs only to the prescribing doctor, not to treating or consulting physicians. *See* § 320.03[5][f].

Government Entity Immune From Liability for “Nonuse” of Property. Ch. 293, *Claims Against Governmental Entities*, has been revised to include the Texas Supreme Court’s decision in *City of N. Richland Hills v. Laura*, 55 Tex. Sup. Ct. J. 1095 (Tex. 2012), which held that the failure to use a defibrillator to attempt to revive a heart patient concerns a nonuse of that property, and is therefore not actionable under the Tort Claims Act, even if the

plaintiff alleges that the defendant was negligent in using some other property in lieu of the defibrillator. *See* § 293.10[5][e].

Texas Supreme Court Case on Causation in Negligence Actions Discussed. Ch. 290, *Negligence*, and Ch. 321, *Medical Malpractice*, have been revised to include *Thota v. Young*, 55 Tex. Sup. Ct. J. 671 (Tex. 2012), which held that because new and independent cause pertains only to the proximate cause element of a negligence claim, any error in instructing the jury on that issue is harmless when the jury separately exonerates the defendant of any negligence, and the record supports that finding. *See* §§ 290.03[4][b], 321.08.

Other Recent Supreme Court Cases on Negligence. Ch. 290, *Negligence*, has also been revised to include:

- *Wansey v. Hole*, 55 Tex. Sup. Ct. J. 1093 (Tex. 2012) (per curiam), which held that an employer cannot be liable for negligent hiring, supervision, or retention unless the employee’s negligence caused harm to the plaintiff, or the employee otherwise committed an actionable tort against the plaintiff. *See* § 290.32[1][b][ii][B].
- *El Paso Mktg., L.P. v. Wolf Hollow I, L.P.*, 55 Tex. Sup. Ct. J. 877 (Tex. 2012), which held that a claim by a power plant that its fuel supplier permitted interruptions and delivered substandard product depended entirely on the supplier’s contractual obligations, so the claim sounded in contract only, and a negligence claim was unavailable. *See* § 290.02[3][c][ii].
- *Traxler v. Entergy Gulf States, Inc.*, 55 Tex. Sup. Ct. J. 431 (Tex. 2012), which held that the statutory requirement that power lines

be constructed at least 22 feet above the surface of any road or railroad track [Tex. Util. Code § 181.045(b)], applies to all power lines, and the failure of a utility to comply is negligence per se. *See* § 290.30[1][a].

Damages in Defamation Cases. Ch. 333, *Libel and Slander*, has been revised to include *Salinas v. Salinas*, 55 Tex. S. Ct. J. 627 (Tex. 2012) (per curiam), which held that if the plaintiff in a defamation per se case does not request nominal damages, and the jury instead finds that there was no loss of reputation or mental anguish, the jury's finding precludes an award of general damages. *See* §§ 333.03[1][a], 333.30[2].

Application of Agency Principles in Motor Vehicle Accident Cases. Ch. 302, *Liability of Owners and Others*, has been revised to include *Arvizu v. Estate of Puckett*, 55 Tex. Sup. Ct. J. 550 (Tex. 2012) (per curiam), which held that a driver's negligence may be imputed to a third party that has a principal/agent relationship with the driver's employer, because the agency relationship establishes the principal's right of control, and therefore does not conflict with the employer's right of control. *See* § 302.01[3].

Meaning of "Actual Innocence" Under Wrongful Imprisonment Act. Ch. 331, *False Imprisonment*, has been revised to include *In re Allen*, 55 Tex. S. Ct. J. 723 (Tex. 2012), which applied the Wrongful Imprisonment Act and held that the term "actual innocence" has the same meaning as the term of art in habeas corpus jurisprudence, so that either of the two types of actual innocence claims are sufficient to obtain compensation under the Act. *See* § 331.08[3][b].

Workers' Compensation and Insurance Litigation

Workers' Compensation Carriers Not Liable for Common Law Bad Faith and for Certain Insurance Code Violations. Ch. 340, *Workers' Compensation*, and Ch. 345, *Unfair Insurance Practices*, have been revised to include the Texas Supreme Court's new opinion on rehearing in *Texas Mut. Ins. Co. v. Ruttiger*, 55 Tex. Sup. Ct. J. 912 (Tex. 2012), which alleged violations of both the Insurance Code and the common law duty of good faith and fair dealing in the handling of a claim for workers' compensation benefits. The Court held that the Workers' Compensation Act's "provisions for dispute resolution and remedies for failing to comply with those provisions in the workers' compensation context are exclusive" of conflicting provisions of the Insurance Code, so that claims for unfair settlement practices in violation of Insurance Code Section 541.060 or Section 542.003 are not available. In addition, the Court overruled its previous decision in *Aranda v. Insurance Co. of N. Am.*, 748 S.W.2d 210 (Tex. 1988), and eliminated the common law duty of good faith and fair dealing in the worker's compensation context. *See* §§ 340.43, 345.03[3][b], 345.15[3], [4].

Limits on Jury and Trial Court Discretion in Review of Workers' Compensation Benefit Decisions. Ch. 340, *Workers' Compensation*, has been revised to include *American Zurich Ins. Co. v. Samudio*, 55 Tex. Sup. Ct. J. 1028 (Tex. 2012), in which the Texas Supreme Court held that when all of the impairment ratings offered in the administrative process before the Division are invalid, the trial court or jury cannot adopt any of them, and remand to the Division for further proceedings is required. The Court further held that the

absence of a valid impairment rating does not affect the trial court's jurisdiction. *See* § 340.30[4][c].

Scope of Liability Coverage Policies. Ch. 341, *Liability Insurance*, has been revised to include *Evanston Ins. Co. v. Legacy of Life*, 55 Tex. Sup. Ct. J. 1102 (Tex. 2012), which held that: (1) a policy covering "personal injury" requires a physical manifestation of sickness or disease, and claims of mere emotional injury or mental anguish are not covered, and (2) a policy covering "property damage" did not include a claim of loss of a deceased relative's tissues because a dead body is not the property of the next of kin; instead survivors have a very limited "quasi-property" right to possession of the body for burial, cremation, or other appropriate disposition. *See* § 341.09[1].

Business and Commercial Litigation

Recovery of Attorney's Fees Permitted Only When Party Recovers Damages on Main Claim. This release updates the publication to include *Ashford Partners, Ltd. v. ECO Res., Inc.*, 55 Tex. Sup. Ct. J. 603 (Tex. 2012), in which the Texas Supreme Court held that to qualify for fees under Tex. Civ. Prac. & Rem. Code § 38.001(8), a litigant must prevail on a breach of contract claim and recover damages. *See* Ch. 22, *Attorney's Fees*, § 22.20[1][a].

Contractual Attorney's Fees After Nonsuit. In *Epps v. Fowler*, 351 S.W.3d 862, 868–870 (Tex. 2011), the Texas Supreme Court held that a defendant is a "prevailing party," with respect to contractual language entitling a prevailing party to attorney's fees, when the plaintiff nonsuits the case with prejudice. A defendant may be the prevailing party when a plaintiff nonsuits without prejudice if the court determines on the defendant's motion that the nonsuit was taken to avoid an unfavorable

ruling on the merits. *See* Ch. 21, *Damages in Contract*, § 21.20[1].

Requirements for Valid Contract Analyzed. In *City of Houston v. Williams*, 353 S.W.3d 128, 137, 143 (Tex. 2011), the Texas Supreme Court held that no particular words are required to create a contract. The fact that the document in question does not contain the word "contract" in its text does not preclude it from having contractual effect. In order to qualify as a contract, the document must evidence the parties' intent to be bound. *See* Ch. 210A, *Contracts*, § 210A.01[1].

Requirements for Fraudulent Inducement. In *Bohmsack v. Varco L.P.*, 668 F.3d 262, 278 (5th Cir. [Tex.] 2012), the Fifth Circuit held that false statements that build a plaintiff's trust during negotiations, but that are not a material factor in the plaintiff's decision to enter into a contract, cannot form the basis for a fraudulent inducement claim. *See* Ch. 210A, *Contracts*, § 210A.04[3][c][i].

Effect of Informal Agreement. In *Principal Life Ins. v. Revalen Development*, 358 S.W.3d 451, 455 (Tex. App.—Dallas 2012, pet. filed), the Dallas court of appeals held that the fact that parties intend for an informal agreement to be reduced to a more formal writing will not necessarily prevent present, binding obligations from arising. If they have definitely agreed to undertake specified obligations, they have concluded the contract, even though the contemplated formal writing is never drawn up and executed. *See* Ch. 210A, *Contracts*, § 210A.05[2][b].

In Pari Delicto Defense to Contract. In *Geis v. Colina Del Rio, LP*, 362 S.W.3d 100, 106, 108 (Tex. App.—San Antonio 2011, pet. denied), the San Antonio court of appeals held that the defense of in pari delicto requires a court, as a general rule, to

decline to enforce an illegal contract when the contracting parties are equally blame-worthy. Parties are not in *pari delicto* when one party had access to facts indicating that the contract was illegal but the party enforcing the contract did not, or when the contract violates a statute that applies to only one of the contracting parties. *See* Ch. 210A, *Contracts*, § 210A.05[3][c][i].

Third-Party Beneficiary Status. In *Sharyland Water Supply v. City of Alton*, 354 S.W.3d 407, 420–421 (Tex. 2011), the Texas Supreme Court held that a water supply corporation was not a third-party beneficiary of contracts for construction of residential sewer lines between the city and its contractors, when the contracts made no reference to the corporation and indicated no intention to confer a benefit on the corporation. *See* Ch. 210A, *Contracts*, § 210A.06[5][b][ii].

Contract Construction. This release includes discussion of recent Texas Supreme Court cases discussing principles of contract construction, including:

- *Anglo-Dutch Petroleum v. Greenberg Peden*, 352 S.W.3d 445, 451 (Tex. 2011), in which the Court held that understanding the context in which an agreement was made is essential in determining the parties' intent as expressed in the agreement, but it is the parties' expressed intent that the court must determine. Extrinsic evidence cannot be used to show that the parties could have meant or probably meant something other than what their written agreement stated. *See* Ch. 210A, *Contracts*, § 210A.20[1][b].
- *Houston Explor. v. Wellington Underwriting*, 352 S.W.3d 462, 470–472 (Tex. 2011), in which the

Court held that deletions the parties made in a printed form agreement are indicative of the parties' intent and must be considered in construing the other provisions. The law has long recognized that changes in a printed form must be accorded special weight in construing a contract. *See* Ch. 210A, *Contracts*, § 210A.29[2].

Defendant's Recovery of Fees in DTPA Action. In *Arlington Home, Inc. v. Peak Envtl. Consultants, Inc.*, 361 S.W.3d 773, 784 (Tex. App.—Houston [14th Dist.] 2012, pet. filed), the Fourteenth District court of appeals held that a defendant is required to segregate its fees incurred in prosecuting its breach of contract claim from fees incurred in defending against the plaintiff's DTPA claims, when these fees are not recoverable because the defendant has not shown that these claims were groundless, brought in bad faith, or brought for the purposes of harassment. Segregation is not required, however, when the fees were for services that advanced both the breach of contract and the DTPA claims. *See* Ch. 220, *Deceptive Trade Practices*, § 220.06[2][d][iv].

Actions Under Telephone Consumer Protection Act. In *Mims v. Arrow Fin. Servs. LLC*, ___ U.S. ___, 132 S. Ct. 740, 747, 181 L. Ed. 2d 881 (2012), the U.S. Supreme Court held that federal and state courts have concurrent jurisdiction over private suits arising under the TCPA. *See* Ch. 220A, *Improper Business Practices*, § 220A.21[7][d].

Bank's Liability for Wrongful Payment of General Deposit. In *FDIC v. Lenk*, 361 S.W.3d 602, 607 (Tex. 2012), the Texas Supreme Court held that while a bank's wrongful payment of a general deposit does not breach the deposit agree-

ment, a bank's refusal to pay the deposited funds to the rightful account holder does breach that agreement. Given the debtor-creditor relationship between a bank and a depositor and the corresponding requirement that the bank must repay any deposits to the depositor, a breach action for such a refusal includes funds that the bank wrongfully paid out. *See* Ch. 235, *Bank Deposits and Collections*, § 235.02[2][a].

Conversion Claim Against Bank. In *Jones v. Wells Fargo Bank, N.A.*, 666 F.3d 955, 963–965 (5th Cir. [Tex.] 2012), the Fifth Circuit held that a securities group's failure to notify the bank of the conversion of a cashier's check under the terms of the account agreement did not preclude a court-appointed receiver from making a conversion claim against the bank for its acceptance of the cashier's check for deposit into an account other than that of the named payee without a proper endorsement, when the securities group could not have discovered the missing endorsement through a review of its statement, because a cashier's check is drawn on the bank, not on a customer's account. *See* Ch. 235, *Bank Deposits and Collections*, § 235.31[1][b][iii].

Employment Litigation

Availability of Exemplary Damages in Wrongful Termination Action. Ch. 20, *Damages in Tort*, has been revised to include *Safeshred, Inc. v. Martinez*, 55 Tex. Sup. Ct. J. 827 (Tex. 2012), which held that because the employment-at-will doctrine presumes the absence of a contract, the *Sabine Pilot* exception permitting a claim for wrongful termination due to the failure to perform illegal act sounds in tort, not contract, and exemplary damages are available subject to the limitations of Civil Practice and Remedies Code Chapter 41. *See* § 20.01[2].

Statute of Limitations in Sabine Pilot Action. In *Riddle v. Dyncorp. Intern. Inc.*, 666 F.3d 940, 943 (5th Cir. [Tex.] 2012), the Fifth Circuit held that a cause of action for wrongful discharge for refusing to commit an illegal act is governed by the two-year statute of limitations for personal injuries set forth in Tex. Civ. Prac. & Rem. Code § 16.003. *See* Ch. 203A, *Employment Litigation*, § 203A.24[1].

Jury Trial Waiver as Condition of Employment. In *In re Frank Motor Co.*, 361 S.W.3d 628, 631–632 (Tex. 2012), the Texas Supreme Court held that an employer's threat to exercise its legal right to terminate an at-will employee if the employee does not sign a jury trial waiver cannot amount to coercion that invalidates the waiver. *See* Ch. 203, *Employer-Employee Relations*, § 203.06[1].

Liability Under Fair Labor Standards Act. In *Gray v. Powers*, 673 F.3d 352, 355–356 (5th Cir. [Tex.] 2012), the Fifth Circuit held that officers and shareholders of a corporation may be liable as FLSA employers, but only when there is proof that they have exerted actual operational control from which a fact finder could infer the power to hire and fire. Merely being an officer or shareholder does not subject an individual to FLSA liability. *See* Ch. 203, *Employer-Employee Relations*, § 203.22[1][b][ii].

Racial Hostile Work Environment Claim. In *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 652–654 (5th Cir. [Tex.] 2012), the Fifth Circuit held that to establish a hostile work environment claim, the plaintiff must personally experience racial harassment. The court may consider evidence of discrimination against other employees in the plaintiff's racial group, but may not consider proof of events that were directed to persons of a different

racial group, unless a sufficient correlation is made between the kind of discrimination claimed by the plaintiff and that directed at members of this other group. *See* Ch. 203A, *Employment Litigation*, § 203A.04[3].

Proving Employment Discrimination Based on Disparate Discipline. In *Baker Hughes Oilfield v. Williams*, 360 S.W.3d 15, 27 (Tex. App.—Houston [1st Dist.] 2011, pet. denied), the First District court of appeals held that to prove employment discrimination based on disparate discipline, the misconduct of the disciplined and the undisciplined employees must be of comparable seriousness. The situations and the employees' conduct must be "nearly identical." *See* Ch. 203A, *Employment Litigation*, § 203A.21[4][a].

Good Faith Belief in Whistleblower Action. In *Mullins v. Dallas Independent School Dist.*, 357 S.W.3d 182, 189–190 (Tex. App.—Dallas 2012, pet. filed), the Dallas court of appeals concluded that a maintenance employee of a school district did not have a good faith belief that the district's office of professional responsibility had the authority to investigate alleged criminal violations of the Clean Air Act, involving allegations that employees were forced to work in asbestos hazard areas without required protective equipment or training. The office made clear on its website that its investigatory duties involved only the detection of waste, fraud, and abuse within the district, and the office's director of compliance had informed the employee by email of these limited duties. *See* Ch. 203A, *Employment Litigation*, § 203A.22[1][b][iv].

Third-Party Beneficiaries of Collective Bargaining Agreement. In *City of Houston v. Williams*, 353 S.W.3d 128, 146 (Tex. 2011), the Texas Supreme Court held that firefighters were third-party beneficiaries of

collective bargaining agreements between the city and the union, and the firefighters therefore had standing to enforce these agreements, which reflected an intent to benefit the firefighters as third parties by stating that one purpose of the agreements was to provide certain wages, hours, and conditions of employment and by directly guaranteeing benefits to the firefighters in particular in terms of salary and termination payments, overtime pay, and vacation leave. *See* Ch. 202, *Labor Unions*, § 202.01[2][d][ii].

Public Employee's Substantive Due Process Claim. In *Lewis v. University of Texas Medical Branch*, 665 F.3d 625, 630 (5th Cir. [Tex.] 2011), the Fifth Circuit held that to prevail on a claim based on substantive due process in the public employment context, the plaintiff must show a property interest or right in the employment and that the public employer's termination of that interest was arbitrary or capricious. Substantive due process bars arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them. *See* Ch. 203A, *Employment Litigation*, § 203A.27.

Real Estate Litigation

Termination of Easements for Public Beach Access. Ch. 280, *Adjoining Landowners*, and Ch. 281, *Easements*, have been revised to include the Texas Supreme Court's new opinion on rehearing in *Severance v. Patterson*, 55 Tex. Sup. Ct. J. 501 (Tex. 2012), which held that the Open Beaches Act provides a mechanism to define and enforce public beach easements that already exist, and is not an independent source of creation of such an easement. The Court therefore held that when the coastline is suddenly altered by storms, a preexisting public beach easement is terminated and does not "roll" to affect previously unburdened property. *See* §§ 280.01[1][e],

281.05[3], 281.06[3].

Landowner's Right of Access to Groundwater. Ch. 280, *Adjoining Landowners*, and Ch. 261, *Condemnation*, have been revised to include *Edwards Aquifer Auth. v. McDaniel*, 55 Tex. S. Ct. J. 343 (Tex. 2012), in which the Texas Supreme Court held that (1) groundwater in place belongs to the landowner, though the rule of capture precludes a claim for drainage, and (2) when regulations imposed by a water district or authority substantially burden the owner's access to or use of groundwater, that is a taking of property that requires compensation. *See* §§ 261.03[2], 280.11[2].

Recent Supreme Court Cases on Eminent Domain. Ch. 261, *Condemnation*, has also been revised to include the Texas Supreme Court's recent decisions in

- *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas*, 55 Tex. Sup. Ct. J. 380 (Tex. 2012), which held in a new opinion on rehearing that: (1) when a purported utility or common carrier exercises the power of eminent domain, the entity must establish that it meets the statutory requirements as a utility or common carrier if that status is disputed by the condemnee; and (2) a permit from the state that issued as a matter of course is evidence of the entity's status, but it is not conclusive when challenged. *See* § 261.01[3][b].
- *Oncor Elec. Delivery Co. v. Dallas Area Rapid Transit*, 369 S.W.3d 845 (Tex. 2012), which declined to consider whether Tex. Util. Code § 181.004 providing that the property of a "person" may be condemned applies to

governmental units because the more specific provision of Tex. Util. Code § 37.053(d) waived any governmental immunity of a transportation authority from a condemnation action. *See* § 261.01[3][b].

Scope of Remedies in Construction Dispute. Ch. 270, *Construction Contracts*, has been revised to include *McGinty v. Hennen*, 55 Tex. Sup. Ct. J. 1090 (Tex. 2012) (per curiam), which concerned an owner's remedies for a contractor's breach and held that: (1) remedial damages were unavailable because the owner presented no evidence that the cost of completion or repair was reasonable; and (2) difference in value damages were unavailable because the owner's evidence related to valuation at the time of the trial, rather than at the completion of the construction. *See* § 270.21[4].

Family Law Proceedings

Child Support Enforcement. Ch. 372, *Enforcement of SAPCR Orders*, has been revised to clarify that income withholding orders and child support liens are available until all current child support and child support arrearages have been completely paid. These remedies are never time-barred. *See* §§ 372.03[3A], 372.06[2A].

Appeals in Parent-Child Relationship Termination Cases. Ch. 381, *Termination of Parent-Child Relationship*, has been updated to reflect recent changes to the procedural rules governing accelerated appeals in termination cases. The chapter also covers the new presumption that a parent who is indigent at the trial level continues to be indigent for the duration of the suit and any subsequent appeal. *See* § 381.10[1].

Time Limit for Attack on Parent-Child Relationship Termination Order. This release includes discussion of *In In-*

terest of E.R., 2012 Tex. LEXIS 582 (July 6, 2012)], in which the Texas Supreme Court held that the statutory six-month time limit for attacking a termination order applies only if the parent has been properly served with citation. *See* Ch. 381, *Termination of Parent-Child Relationship*, § 381.10[2].

Probate Proceedings

Probate Court Jurisdiction. In *In re Robinson*, 358 S.W.3d 351, 351–352 (Tex. App.—Dallas 2011, no pet. h.), the Dallas court of appeals held that a probate court has jurisdiction over an application for probate of a will as a muniment of title, even though the application was filed and docketed in the same cause number as a prior application for determination of heirship in which the court had entered judgment. Because this application made a claim for affirmative relief in the probate court, it was in effect an independent lawsuit and, thus, the probate court had discretion to exercise jurisdiction over it. *See* Ch. 392, *Admitting Wills to Probate*, § 392.02[1][c].

Testamentary Capacity of Testator Under Guardianship. In *Evans v. Allen*, 358 S.W.3d 358, 367–368 (Tex. App.—Houston [1st Dist.] 2011, no pet. h.), the First District court of appeals held that the fact that a testator was under a guardianship when the will was executed creates a presumption that the testator lacked testamentary capacity, but this presumption is not conclusive. It may be rebutted by evidence that the testator had testamentary capacity on the day he or she executed the will. *See* Ch. 392, *Admitting Wills to Probate*, § 392.07[3][g].

Construing Bequest of Personal Property. In *In re Estate of Anderegg*, 360 S.W.3d 677, 680 (Tex. App.—El Paso 2012, no pet. h.), the court of appeals held

that a will provision leaving “all stocks, bonds, annuities, etc.” to a specified beneficiary encompassed the testator’s lump sum death benefit and income tax refund, because all of the specific assets given to this beneficiary were relatively liquid financial assets, and the death benefit and tax refund fell into this category. *See* Ch. 394, *Will Construction*, § 394.04[3][b][i].

Application of Anti-Lapse Statute. In *Lacis v. Lacis*, 355 S.W.3d 727, 733–736 (Tex. App.—Houston [1st Dist.] 2011, pet. dism’d), the First District court of appeals found that a will sufficiently expressed the testator’s intent that the anti-lapse statute would not apply if the testator’s children predeceased him, by stating that the residuary estate would include “all property in which I may have any interest (including lapsed gifts) . . .” and by not stating what should occur to the specific devises to the children should they predecease him. *See* Ch. 394, *Will Construction*, § 394.06[3][b].

Scope of Declaratory Judgment Action to Construe Will. In *In re O’Quinn*, 355 S.W.3d 857, 865 (Tex. App.—Houston [1st Dist.] 2011, no pet. h.), the First District court of appeals held that the plain language of Tex. Civ. Prac. & Rem. Code § 37.005(3) allows a devisee to seek a declaration of rights or legal relations to determine “any question arising in the administration” of an estate. The statutory language does not include any limitations on the type of questions on which an interested party may seek a declaration by the court. *See* Ch. 394, *Will Construction*, § 394.08[1].

Statute of Limitations for Bringing Declaratory Judgment Action. In *In re Estate of Denman*, 362 S.W.3d 134, 143–144 (Tex. App.—San Antonio 2011, no pet. h.), the San Antonio court of appeals held that because there is no statutory

limitations period in the Texas Probate Code for bringing a will construction action, the four-year residual statute of limitations in the Texas Civil Practice and Remedies Code applies. *See* Ch. 394, *Will Construction*, § 394.08[1].

No Fiduciary Duty Owed to Estate's Creditors. In *Mohseni v. Hartman*, 363 S.W.3d 652, 658 (Tex. App.—Houston [1st Dist.] 2011, no pet. h.), the First District court of appeals held that an independent executor does not hold the estate property in trust for the benefit of the estate's creditors and therefore does not owe them a fiduciary duty absent any specific undertaking to manage the creditors' interests in the

case of a bankrupt estate. *See* Ch. 400, *Managing the Estate*, § 400.01[2].

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<input type="checkbox"/>	2-49	2-49 thru 2-50.1
<input type="checkbox"/>	4-1 thru 4-9	4-1 thru 4-10.5
<input type="checkbox"/>	4-31 thru 4-34.1	4-31 thru 4-33
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<input type="checkbox"/>	11-43	11-43 thru 11-44.1
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VOLUME 2

Revision

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<input type="checkbox"/>	20-77	20-77 thru 20-78.1
<input type="checkbox"/>	21-3	21-3 thru 21-4.1
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<input type="checkbox"/>	32-127 thru 32-133	32-127 thru 32-133

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VOLUME 3

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<input type="checkbox"/>	42-27 thru 42-29	42-27 thru 42-29
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<input type="checkbox"/>	45-83 thru 45-85	45-83 thru 45-85

VOLUME 5

Revision

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<input type="checkbox"/>	72-89 thru 72-99	72-89 thru 72-99

VOLUME 6

Revision

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<input type="checkbox"/>	96-21 thru 96-23	96-21 thru 96-23

VOLUME 7

Revision

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<input type="checkbox"/>	113-123 thru 113-129	113-123 thru 113-127

VOLUME 8

Revision

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<input type="checkbox"/>	122-101 thru 122-103	122-101 thru 122-103

VOLUME 9

Revision

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VOLUME 10

Revision

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Revision

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VOLUME 13

Revision

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Revision

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VOLUME 15

Revision

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<input type="checkbox"/>	232-121 thru 232-123	232-121 thru 232-123

VOLUME 16

Revision

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<input type="checkbox"/>	240-119 thru 240-123	240-119 thru 240-123
<input type="checkbox"/>	242-35 thru 242-40.1	242-35 thru 242-40.3

VOLUME 17

Revision

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<input type="checkbox"/>	252-26.1 thru 252-26.5	252-26.1 thru 252-26.5
<input type="checkbox"/>	252-69 thru 252-70.4(1)	252-69 thru 252-70.4(1)

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VOLUME 18

Revision

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Revision

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VOLUME 21

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VOLUME 22

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<input type="checkbox"/>	371A-49 thru 371A-52.3.	371A-49 thru 371A-52.3

VOLUME 23

Revision

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<input type="checkbox"/>	381-139 thru 381-149	381-139 thru 381-155
<input type="checkbox"/>	382-23	382-23 thru 382-24.1

VOLUME 24

Revision

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