

PUBLICATION UPDATE

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Dorsaneo, Texas Litigation Guide

Publication 719 Release 114

September 2014

HIGHLIGHTS

- **Recent Case Law Developments Affecting Procedural and Substantive Topics**
- **New Standard Forms for Expedited Foreclosure Proceedings**
- **Expanded Coverage of Citizens Participation Act**

This release updates *Texas Litigation Guide* with recent Texas Supreme Court and court of appeals cases, federal cases, rule amendments, and other significant developments occurring since Release 113. Some of the significant developments and revisions included in this release are summarized below. The release also contains revised pages updating the subject matter index and a revised table of statutes.

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Pretrial, Trial, and Appellate Practice

Recent U.S. Supreme Court and Texas Decisions on Jurisdiction Over Nonresident Defendants Discussed. Ch. 32, *Personal Jurisdiction and Service on Nonresidents* has been revised and updated to reflect recent case law discussing due process requirements for the assertion of state court jurisdiction over nonresident defendants, including the recent U.S. Supreme Court decision in *Walden v. Fiore*, ___ U.S. ___, 134 S. Ct. 1115, 1122-1124, 188 L. Ed. 2d 12 (2014), which analyzed the “effects” test for asserting case-specific jurisdiction over a nonresident defendant whose tortious conduct has allegedly affected a resident plaintiff (§ 32.04[2][a][iii]). In addition, this release includes discussion of *Curocom Energy LLC v. Shim*, 416 S.W.3d 893, 898 (Tex. App.—Houston [1st Dist.] 2013, no pet.), in which the court of appeals held that being a director and shareholder of a cor-

poration that owns property in Texas is not sufficient to establish personal jurisdiction, absent a veil-piercing claim (§ 32.04[2][b][iv]).

Updated Discussion of Appellate Briefing Best Practices. The discussion of appellate briefing in Ch. 150, *Appellate Proceedings in the Court of Appeals* has been extensively revised and updated to reflect both current best practices in briefing as well as the requirements of the Texas Rules of Appellate Procedure (§ 150.03).

Recent Case Discusses What Constitutes an Appearance for Purposes of Personal Jurisdiction. This release includes a discussion of *In re Tex. Dep't of Family and Protective Services*, 415 S.W.3d 522, 528–529 (Tex. App.—Houston [1st Dist.] 2013, no pet.), in which the court of appeals held that to constitute an answer or appearance, a party must seek judgment or adjudication on some question; although an act may relate to a pending case, it does not constitute a general appearance if it in no way recognizes that the cause is properly pending or that the court has jurisdiction, and if no affirmative action is sought from the court. *See* Ch. 31, *Service on Residents*, § 31.21[1].

Corporate Manager Cannot Represent Corporation. This release includes coverage of *McClane v. New Caney Oaks Apts.*, 416 S.W.3d 115, 120 (Tex. App.—Beaumont 2013, no pet.), in which the court of appeals held that a corporation may not appear through an agent who is not a licensed attorney. *See* Ch. 30, *Commencement of Actions*, § 30.01[1].

Declaratory Judgment Not Moot if Attorney's Fees Claim Remains Pending. This release includes discussion of *Waterway Ranch, LLC v. City of Annetta*, 411 S.W.3d 667, 672 (Tex. App.—Fort Worth 2013, 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 actions pendency, as long as a claim for attorney's fees remains pending. *See* Ch. 45, *Declaratory Relief*, § 45.02[1].

Court Discretion to Award Costs in Declaratory Judgment Action Prevails Over Other Rules Limiting Recovery. The release includes *Petrello v. Prucka*, 415 S.W.3d 420, 432–433 (Tex. App.—Houston [1st Dist.] 2013, no pet.), in which the court of appeals held that when the Declaratory Judgment Act provides for the recovery of costs, other rules limiting the award of costs, such as the Texas Rules of Civil Procedure, do not control. *See* Ch. 45, *Declaratory Relief*, § 45.06[1].

Enforcement of Forum Selection Clauses. Ch. 61, *Venue*, has been updated with discussion of *In re Fisher*, 57 Tex. Sup. J. 281, 2014 Tex. LEXIS 164, at *27–*28 (Tex. Feb. 28, 2014), in which the Texas Supreme Court discussed the meaning of “arising under” for purposes of the statute requiring enforcement of forum selection clauses in cases arising from major transactions (§ 61.02[10]).

Discovery of Bias of an Expert Witness. The discovery chapters have been updated with discussion of *In re Ford Motor Co.*, 57 Tex. Sup. J. 415, 2014 Tex. LEXIS 253, at *3–*4 (Tex. Mar. 28, 2014), in which the Texas Supreme Court discussed the limits that may appropriately be placed on discovery as to the bias or prejudice of expert witnesses. *See* Ch. 90, *Discovery: Scope and Limitations*, § 90.02[3][a]; Ch. 92, *Discovery Related to Experts*, § 92.04.

Scope of “Apex” Doctrine Depositions of High-Ranking Corporate Officers. Ch. 94, *Depositions*, and Ch. 97, *Resisting Dis-*

covery, have been updated with discussion of *In re Titus County*, 412 S.W.3d 28, 35 (Tex. App.—Texarkana 2013, orig. proceeding), in which the court of appeals held that the “apex” doctrine, which protects high-ranking corporate officers against abusive discovery, does not apply to persons who have an individual property interest in the suit (§§ 94.02[4], 97.20[5]).

Conclusory Affidavit of Expert Witness May Be Disregarded on Motion for Summary Judgment. The Texas Supreme Court’s decision in *Elizondo v. Krist*, 415 S.W.3d 259, 264 (Tex. 2013) has been added to Ch. 101, *Summary Judgment*; in this case, the Court reiterated that an expert’s affidavit must set out a reasoned basis on which to evaluate the expert’s opinion, or the affidavit has no probative value (§ 101.07[3]).

New Trial Motions Based on Juror Misconduct Must Show Probable Injury to Moving Party. The Texas Supreme Court decided two cases, *In re Whataburger Rests. LP*, 2014 Tex. LEXIS 303, at *4 (Tex. Apr. 25, 2014) and *In re Health Care Unlimited*, 2014 Tex. LEXIS 305, at *6 (Tex. Apr. 25, 2014), in which the Court applied the rule that juror misconduct will support a motion for new trial only if the misconduct probably caused injury; these cases have been added to Ch. 123, *Jury Deliberations and the Verdict*, § 123.08[2][c], and Ch. 140, *Motions for New Trial*, § 140.01[3][c].

Computation of Postjudgment Interest Following Appeal. In *Long v. Castle Tex. Prod., L.P.*, 57 Tex. Sup. J. 364, 2014 Tex. LEXIS 252, at *9–*11 (Mar. 28, 2014), the Court ruled that when an appellate court reverses and remands, resulting in a new judgment, postjudgment interest accrues only from the date of this final judgment; when the appellate court renders judgment

or could have rendered judgment, postjudgment interest accrues from the date of the trial court’s original, erroneous judgment. Ch. 131, *Judgment*, has been revised to incorporate this ruling (§ 131.05[5][c]).

Perfecting Appeal From Second Judgment Following Motion to Modify. *Brighton v. Koss*, 415 S.W.3d 864, 865 (Tex. 2013), has been added to Ch. 147, *Perfecting and Docketing the Appeal*; the Texas Supreme Court held in that case that when a motion to modify is filed and a second judgment is issued that does not grant all the relief requested in the motion, the motion remains as a viable complaint about the second judgment and extends the appellate timetable after that judgment (§ 147.03[1][c]).

Interlocutory Appeal by Members of the Electronic Media. Ch. 153, *Accelerated Appeals*, now includes discussion of *Service Employees Int’l Union Local 5 v. Professional Janitorial Service of Houston*, 415 S.W.3d 387, 393–402 (Tex. App.—Houston [1st Dist.] 2013, no pet. h.), in which the court of appeals developed a “primary business” test for determining whether an individual or entity qualifies as a member of the electronic media for purposes of the statute providing for interlocutory appeals of orders denying summary judgment that involve free speech issues (§ 153.02[1][b][v]).

Real Estate Litigation

Official Expedited Foreclosure Forms Added; Recent Case Law on Foreclosures Discussed. Ch. 255, *Real Property Security Interests*, has been revised to include the Texas Supreme Court’s recently promulgated official forms for expedited foreclosure proceedings under Civil Procedure Rule 736 [*see* Misc. Docket No. 14-9047 (Feb. 10, 2014)], as well as introductory comments explaining the use of the

forms. The revised chapter also covers recent cases from the Texas Supreme Court and courts of appeals, including:

- The supplemental opinion in *Finance Comm'n of Tex. v. Norwood*, 418 S.W.3d 566 (Tex. 2013), that clarified that prepaid interest paid at closing of a home equity loan constitutes “interest” and not a “fee” subject to the 3% cap on such fees (§ 255.06[5][a]).
- *Sowell v. Int'l Interests, LP*, 416 S.W.3d 593 (Tex. App.—Houston [14th Dist.] 2013, pet. filed), which held that: (1) the statutory recognition of the right of a mortgagee to sue for a deficiency [see Tex. Prop. Code 51.003] does not independently create a cause of action for a deficiency judgment; and (2) an action against a guarantor of the debt for the deficiency may be brought within the two years of the foreclosure sale as permitted by that statute, even if the separate limitations period on the guaranty would otherwise have expired (§ 255.03[6]).
- *In re Dominguez*, 416 S.W.3d 700 (Tex. App.—El Paso 2013, orig. proceeding), which held that the court’s obligation to stay an expedited foreclosure proceeding under Civil Procedure Rule 736.11, and either dismiss it or vacate any order entered is a mandatory, ministerial duty that may be enforced by mandamus (§ 255.06[7]).

Expanded Coverage of Lis Pendens and Motions to Expunge or Cancel. Ch. 254, *Deeds and Conveyances*, has been revised to expand the coverage of lis pendens, including new forms for motions to cancel or expunge a previously filed notice of lis pendens. The revised discussion also

includes the recent decision in *In re Moody Nat'l Kirby Houston S, LLC*, 412 S.W.3d 570 (Tex. App.—Houston [1st Dist.] 2013, orig. proceeding), which held that when final judgment has been entered, so that a party may obtain relief by appeal, mandamus is not available to challenge the refusal to expunge a notice of lis pendens (§§ 254.100–254.102).

Recent Court of Appeals Cases Discuss Mechanic’s Lien Issues. Ch. 271, *Mechanic’s Liens*, has been revised to include recent cases from the Texas courts of appeals, including:

- *Trinity Drywall Sys. v. TOKA Gen. Contrs., Ltd.*, 416 S.W.3d 201 (Tex. App.—El Paso 2013, pet. filed), which held that when the sham contract statute applies [see Tex. Prop. Code § 53.026], the subcontractor is deemed to be an original contractor for all purposes, and may therefore claim a constitutional mechanic’s lien without complying with the statutory requirements for obtaining such a lien (§§ 271.01[2], [4][c]).
- *Lyda Swinerton Builders, Inc. v. Cathay Bank*, 409 S.W.3d 221 (Tex. App.—Houston [14th Dist.] 2013, pet. filed), which held that: (1) an unconditional release of a mechanic’s lien does not preclude subsequent reassertion of a lien claim, but it must relate to different services and be directed at different property; and (2) a lien affidavit that contains the required information is sufficient even if it states that it “amends” a prior lien that has been released (§ 271.02[2][c], [10]).

Discussion of Recent Cases on Property Tax Litigation. Ch. 260, Real Prop-

erty Tax Suits, has been revised to include recent cases from the Texas courts of appeals, including:

- *Waters at Northern Hills, LLC v. Bexar Appraisal Dist.*, 414 S.W.3d 897 (Tex. App.—San Antonio 2013, pet. filed), which held that although the complete absence of any notice is a denial of due process and voids any change in the appraisal rolls under Tax Code Section 41.11(c), late notice may be challenged by protest, so a denial of an exemption is not void merely because the taxing unit provided late notice (§§ 260.02[1][a], 260.04[2][b]).
- *Lyda Swinerton Builders, Inc. v. Cathay Bank*, 409 S.W.3d 221 (Tex. App.—Houston [14th Dist.] 2013, pet. filed), which held that the tax lien transfer statute [see Tex. Tax Code § 32.06] is merely a supplemental remedy to the doctrines of contractual or equitable subrogation, so that if a person pays the amount due to discharge a tax lien, the person can be equitably subrogated to the taxing authority's lien priority regardless of the failure to comply with the transfer statutes (§ 260.03[1][b]).

Personal Injury and Tort Litigation

Expanded Coverage of Citizens Participation Act, Including New Forms. Ch. 333, *Libel and Slander*, has been revised to include expanded coverage of Chapter 27 of the Civil Practices and Remedies Code, also known as the Citizens Participation Act, which permits a defendant to move for dismissal and an award of attorney's fees and costs in defamation cases and other claims that relate to the constitutional rights of free speech, petition, or association. This

enhanced discussion includes more details and recent cases on the applicability and operation of the Act, as well as procedural guides and forms for use in either moving for or opposing dismissal (§§ 333.42, 333.53, 333.120–333.122).

Recent Cases Address Product Liability Issues. Ch. 320, *Products Liability*, has been revised to include recent cases from the Texas Supreme Court and courts of appeals, including *Kia Motors Corp. v. Ruiz*, 57 Tex. Sup. Ct. J. 375 (Tex. 2014), in which the Texas Supreme Court held that: (1) the statutory presumption of no defect from compliance with federal regulations [see Tex. Civ. Prac. & Rem. Code § 82.008(a)] is inapplicable when the regulation does not govern the product risk that caused the harm; (2) a design defect plaintiff need not definitively establish that the product failure at issue was not the result of a manufacturing defect; and (3) the trial court's admission of a spreadsheet of warranty claims was prejudicial when the vast majority of those claims were unrelated to the particular product failure at issue (§§ 320.03[4], 320.04[1], 320.09[7]). The chapter also includes discussion of *Seifried v. Hygenic Corp.*, 410 S.W.3d 427 (Tex. App.—Houston [1st Dist.] 2013, no pet.), which held that a seller of resistance bands bought in bulk by a hospital and used by physical therapists in onsite, supervised physical therapy with patients was entitled to invoke the learned intermediary doctrine, so that warning the patients was not required when the warning to the hospital was adequate as a matter of law because it warned of the precise risk that injured the patient (§ 320.03[5][f]).

Cases Discuss Scope of Health Care Liability Statutes. Ch. 321, *Medical Malpractice*, has been updated to include numerous recent cases from the Texas Supreme Court and courts of appeals

addressing the scope of Chapter 74 of the Civil Practices and Remedies Code, governing health care liability claims (HCLC), including:

- *Bioderm Skin Care, LLC v. Sok*, 57 Tex. Sup. Ct. J. 390 (Tex. 2014), which held that cosmetic laser hair removal constitutes “health care” under Chapter 74, so a claim of injury during that procedure is an HCLC and requires a pretrial expert report. In so concluding, the Court held that the presumption first recognized in *Loaisiga v. Cerda*, 379 S.W.3d 248 (Tex. 2012) applied, so that claims against a physician or health care provider based on facts implicating the defendant’s conduct during the patient’s care, treatment, or confinement are presumed to be HCLCs, and the claimant bears the burden of rebutting the presumption (§ 321.02[2], [3], [6]).
- *Randol Mill Pharm. v. Miller*, 413 S.W.3d 844 (Tex. App.—Fort Worth 2013, pet. filed), which held that because the Occupations Code defines “dispensing” prescription medication as providing it to an end user or agent under a practitioner’s lawful order [see Tex. Occ. Code § 551.006(13)], a pharmacist is not a “health care provider” under Chapter 74 when filling an order placed by a doctor for compounded medication to be used in the doctor’s office on unknown patients (§ 321.02[3]).
- *Christus St. Elizabeth Hosp. v. Guillory*, 415 S.W.3d 900 (Tex. App.—Beaumont 2013, pet. filed), which held that a slip-and-fall claim by a visitor to a publicly

accessible area of a hospital may be brought as a routine premises liability claim, not as an HCLC (§ 321.02[2]).

Cases Analyze Issues Relating to Liability of Design Professionals. Ch. 322, *Professional Malpractice*, has been updated to cover recent case law discussing statutory issues pertaining actions against design professionals. For example, in *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 57 Tex. Sup. Ct. J. 398 (Tex. 2014), the Texas Supreme Court held that: (1) an interlocutory appeal is available from the denial of a motion to dismiss for failure to file a certificate of merit, even if the trial court also grants an extension of time to cure; (2) the defendant may waive the requirement of a certificate of merit, but does not do so by failing to file a special exception, or by routine defense conduct such as filing an answer, participating in discovery, and joining continuance and docket control orders; and (3) the “good cause” exception for the failure to file a certificate of merit [see Tex. Civ. Prac. & Rem. Code § 150.002(c)] permits an extension only when the petition is filed within 10 days of the expiration of limitations, and good cause is shown; however, if the petition is filed more than 10 days before the expiration of limitations, an extension for good cause is not available (§ 322.04[2][d]). The chapter also covers the court of appeals decision in *Jenkins v. Occidental Chem. Corp.*, 415 S.W.3d 14 (Tex. App.—Houston [1st Dist.] 2013, pet. filed), which held that because the statute of repose applicable to design professionals [Tex. Civ. Prac. & Rem. Code § 16.008(a)] applies when the professional “designs, plans, or inspects” an improvement to real property, the jury’s finding that a licensed engineer “supervised” construction was immaterial and the professional could not

claim the protections of the repose period (§ 322.04[2][c]).

Updated Discussion of Government Tort Claims Act. Ch. 293, *Claims Against Governmental Entities*, has been revised to include recent cases from the Texas courts of appeals, including:

- *City of Georgetown v. Lower Colo. River Auth.*, 413 S.W.3d 803 (Tex. App.—Austin 2013, pet. filed), which held that the common law distinction between proprietary and governmental functions applies not only in tort actions, but also to breach of contract claims, so a city does not have immunity from suit on a utility contract because that is a proprietary function (§ 293.01[3][a]).
- *City of Dallas v. Davenport*, 418 S.W.3d 844 (Tex. App.—Dallas 2013, no pet. h.), which held that an airline passenger who slips and falls in a public area of a city-owned airport is not an invitee subject to an enhanced duty under the Tort Claims Act merely because the passenger pays either to park at the airport, or for an airline ticket (§ 293.10[5][g][iii]).
- *Kilburn v. Fort Bend County Drainage Dist.*, 411 S.W.3d 33 (Tex. App.—Houston [14th Dist.] 2013, no pet.), which held that while a claim of trespass by excavation is barred by the intentional tort exception of the Tort Claims Act, the plaintiff may alternatively allege that the same conduct was the result of the government unit's negligence in the use or operation of the excavation equipment (§§ 293.10[4][a], 293.12[11]).

- *Port of Houston Auth. v. Aaron*, 415 S.W.3d 355 (Tex. App.—Houston [1st Dist.] 2013, no pet.), which held that the community damages principle that applies in the inverse condemnation context also applies under the Tort Claims Act and bars recovery of property damage for nuisance that is not a particularized injury to identifiable property (§ 293.10[4][a]).

Recent Case Law on Apportionment of Fault Discussed. Ch. 291, *Proportionate Responsibility; Contribution and Indemnity*, has been revised to include recent cases from the Texas courts of appeals, including *Smith v. East*, 411 S.W.3d 519 (Tex. App.—Austin 2013, pet. denied), which held that in a mother's wrongful death suit, she and her deceased daughter were a single claimant by statute [see Tex. Civ. Prac. & Rem. Code § 33.011(1)], so recovery was barred when the jury assigned 40% fault to the mother and 25% fault to the daughter (§ 291.03[2][a][ii], [3][a]). Also discussed is *Bishop v. Miller*, 412 S.W.3d 758 (Tex. App.—Houston [14th Dist.] 2013, no pet.), which held that when the parties submitted evidence that some conduct of an individual was outside his capacity as an agent or vice principal of a corporation, the trial court properly instructed the jury to separately apportion the individual's conduct (§ 291.03[2][a][ii]).

Cases Discuss Premises Liability Issues. Ch. 310, *Premises Liability*, has been revised to include coverage of *Montoya v. Nichirin Flex U.S.A., Inc.*, 417 S.W.3d 507 (Tex. App.—El Paso 2013, no pet.), which held that when it was undisputed that a contractor was applying sealant to the roof of a building to stop leaks, that was a "repair" under Chapter 95 of the Civil Practices and Remedies Code, so the court declined to consider whether routine main-

tenance of property without an underlying problem to address falls within the statute and limits the owner's liability (§ 310.02[3][d]). The release also includes discussion of *Martinez v. Houston McLane Co.*, 414 S.W.3d 219 (Tex. App.—Houston [1st Dist.] 2013, pet. denied), which applied the “baseball rule” that stadium owners have a limited duty to protect spectators from batted balls, and specifically declined an invitation to reconsider it and replace it with the modern proportionate responsibility scheme (§ 310.05[4][c]).

Insurance and Workers' Compensation Litigation

Recent Case Law Developments in Insurance Litigation. Ch. 341, *Liability Insurance*, has been revised to include discussion of the Texas Supreme Court's decision in *Gotham Ins. Co. v. Warren E&P, Inc.*, 57 Tex. Sup. Ct. J. 336 (Tex. 2014), which held that when an insurance policy contains express provisions governing the insured's conduct, the insurer is limited to contractual remedies and cannot supplement them by appealing to claims in equity (§§ 341.03[5], 341.06[1], 341.15). This release also updates this chapter to include *Tex. Farm Bureau Underwriters v. Rasmussen*, 410 S.W.3d 335 (Tex. App.—Houston [1st Dist.] 2013, pet. denied), which held that when the insured failed to pay a renewal premium, the policy expired on its own terms, so no notice of cancellation by the insurer was required (§ 341.03[3], [4]).

Cases Address Procedural Issues Under Workers' Compensation Law. Ch. 340, *Workers' Compensation*, has been revised to include recent cases from the Texas courts of appeals, including:

- *Little v. Delta Steel, Inc.*, 409 S.W.3d 704 (Tex. App.—Fort Worth 2013, no pet.), which held

that when a widow accepted death benefits immediately after the death of her husband, and continued to receive them after becoming aware of potential coverage issues and the carrier's assertion of the exclusive remedy defense, quasi-estoppel barred the widow from contesting coverage under the workers' compensation policy (§ 340.01[2]).

- *Hand & Wrist Ctr. of Houston v. SGS Control Servs., Inc.*, 409 S.W.3d 743 (Tex. App.—Houston [1st Dist.] 2013, no pet.), which held that: (1) an employer's failure to notify the carrier of an injury as required by statute [*see* Tex. Lab. Code § 409.005(1)] does not waive the employer's coverage under the policy; and (2) the exhaustion of remedies requirement applies to health care providers seeking reimbursement or other compensation for services allegedly covered by a worker's compensation policy (§§ 340.21, 340.30[3]).

Business and Commercial Litigation

Scope of Monetary Compensation Available with Specific Performance. In *Goldman v. Olmstead*, 414 S.W.3d 346, 361–362 (Tex. App.—Dallas 2013, no pet. h.), the Dallas court of appeals held that the relief associated with specific performance may include monetary compensation in narrow circumstances—when it is deemed necessary to place the parties in the same position as if the contract had been performed in full. For example, when a court orders specific performance of a contract to purchase real property, the court, in order to relate the performance back to the contract date, may equalize any losses resulting from the delay by offsetting them with

monetary payments; in a balancing of the equities, the court may include items such as rents, profits, delay costs, and similar items. *See* Ch. 21, *Damages in Contract*, § 21.02[2].

Liability of Limited Partners for Partnership Debts. In *BJVSD Bird Family v. Star Electricity*, 413 S.W.3d 780, 784 (Tex. App.—Houston [1st Dist.] 2013, no pet. h.), the First District court of appeals held that absent a showing that a defendant partner participated in control of the limited partnership business, this defendant is not bound by a judgment against the limited partnership by virtue of the defendant’s role as a limited partner. *See* Ch. 182, *Limited Partnership*, § 182.01[2].

Piercing Corporate Veil of Limited Liability Company. In *Metroplex Mailing v. RR Donnelley & Sons*, 410 S.W.3d 889, 896 (Tex. App.—Dallas 2013, no pet.), the Dallas court of appeals held that the statutory protection afforded to members and managers of an LLC gives way only when a plaintiff shows that the LLC was used for purposes of perpetrating, and did perpetrate, an actual fraud for the members’ or manager’s direct personal benefit. Under these circumstances, a court may pierce the corporate veil and hold the members or managers personally liable. *See* Ch. 183, *Limited Liability Company*, § 183.07[1].

When Parties’ Signatures Required for Binding Contract. In *New York Party Shuttle, LLC v. Bilello*, 414 S.W.3d 206, 214 (Tex. App.—Houston [1st Dist.] 2013, no pet. h.), the First District court of appeals held that whether a written contract is signed is relevant to determining whether the contract is binding on the parties. When the parties intend that a contract will not be binding until the parties sign it, the signatures of both parties are required to give effect to the contract. *See* Ch. 210A, *Con-*

tracts, § 210A.04[1][b].

Sufficiency of Form Contract. In *Goldman v. Olmstead*, 414 S.W.3d 346, 355 (Tex. App.—Dallas 2013, no pet. h.), the Dallas court of appeals held that a form contract for the sale of a home was sufficiently definite, as required to be enforceable, even though a blank on the first page for the names of the sellers was not completed; the contract named an individual as the person to receive notices for the sellers, the sellers provided an e-mail address in the contract, and both sellers initialed each page of the contract and signed it in the appropriate places. *See* Ch. 210A, *Contracts*, § 210A.05[1][b].

Effect of Void Stamp Over Blank Indorsement Block. In *Chance v. CitiMortgage, Inc.*, 395 S.W.3d 311, 313-314 (Tex. App.—Dallas 2013, no pet. h.), the Dallas court of appeals held that a void stamp over a blank indorsement block on the last page of a note did not discharge, cancel, or otherwise renounce the borrower’s obligations under the note; the existence of a void stamp over a blank indorsement, without more, is insufficient to create a fact issue regarding the parties’ intent to “neutralize” the borrower’s obligations under the note. *See* Ch. 230, *Negotiable Instruments*, § 230.09[4].

Employment Litigation

Employment Contract May Alter At-Will Employment. In *City of Dallas v. Arredondo*, 415 S.W.3d 327, 344-345 (Tex. App.—Dallas 2013, no pet. h.), the Dallas court of appeals held that an employer and an employee may enter into an employment-related contract even in an at-will employment situation. For example, the at-will employment status of police officers and firefighters does not preclude a determination that they entered into a contract with the city-employer, falling within

the statutory waiver of sovereign immunity for an alleged breach of contract with regard to wage increases. *See* Ch. 203, *Employer-Employee Relations*, § 203.06[2][a].

U.S. Supreme Court Discusses Requirements for Judicial Review Under ERISA. The U.S. Supreme Court held in *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, ___ U.S. ___, 134 S. Ct. 604, 610, ___ L. Ed. 2d ___ (2013), that, in light of the requirement that an employee must exhaust internal review before bringing a claim for judicial review under ERISA, an employee's cause of action for judicial review does not accrue until the plan issues a final denial of benefits. An employee and the plan may agree by contract to a particular limitations period for bringing a suit for judicial review of a denial of benefits, even one that starts to run before the cause of action for judicial review accrues, provided the period is reasonable. *See* Ch. 203, *Employer-Employee Relations*, § 203.24[3].

Employer's Prompt Remedial Action to Avoid Title VII Liability for Harassment. The Fifth Circuit held in *Williams—Boldware v. Denton County, Tex.*, 741 F.3d 635, 640 (5th Cir. [Tex.] 2014), that an employer may avoid Title VII liability for harassment by taking prompt remedial action to protect the claimant. When the offending conduct is infrequent or isolated, a reprimand may qualify as a prompt remedial measure. *See* Ch. 203A, *Employment Litigation*, § 203A.03.

Employer Not Required to Accommodate Religious Practices by Violating Other Laws. The Fifth Circuit has held in *Tagore v. U.S.*, 735 F.3d 324, 329–330 (5th Cir. [Tex.] 2013), that an employer need not accommodate an employee's religious practice by violating other laws. For ex-

ample, a federal agency employer could not permit a Sikh employee to wear a kirpan with a blade exceeding 2.5 inches, because by doing so the agency would violate federal law concerning the introduction of dangerous weapons into federal buildings. *See* Ch. 203A, *Employment Litigation*, § 203A.04[4][b].

Report to Internal Compliance Official Insufficient to Support Whistleblower Action. In *Ysleta Independent School Dist. v. Franco*, 417 S.W.3d 443, 445 (Tex. 2013), the Texas Supreme Court reiterated the rule that a report to someone charged only with internal compliance is jurisdictionally insufficient under the Whistleblower Act. In *Ysleta*, a principal who was suspended after reporting asbestos hazards in his school to school officials, including the superintendent and trustees of the school district, failed to show an objective, good-faith belief that the district was an appropriate law-enforcement authority under the Whistleblower Act, when he submitted no evidence showing that the district enforces the Asbestos Act beyond overseeing its own internal compliance. *See* Ch. 203A, *Employment Litigation*, § 203A.22[1][b][iv].

Attorney's Fees

E-mails Do Not Satisfy Writing Requirement for Contingency Fee Agreements. This release includes discussion of *Celmer v. McGarry*, 412 S.W.3d 691, 701–702 (Tex. App.—Dallas 2013, pet. filed), in which the court of appeals held that an attorney's e-mails to his client did not satisfy the requirement that contingency contracts must be in writing. *See* Ch. 3, *Professional Responsibility*, § 3.04[2][c].

Defendant as Prevailing Party for Purposes of Attorney's Fee Award. This update includes a discussion of *SEECO*,

Inc. v. K.T. Rock, LLC, 416 S.W.3d 664, 674 (Tex. App.—Houston [14th Dist.] 2013, pet. filed), in which the court of appeals held that for a defendant in a breach of contract case, “prevailing” means successfully defending the main action. This usually means obtaining a take-nothing judgment on the main issue or issues in the case. *See* Ch. 22, *Attorney’s Fees*, § 22.20[1][a].

Presentment of Claim Must Be Reasonable to Support Attorney’s Fee Award. The court of appeals in *Triton 88 v. Star Elec. L.L.C.*, 411 S.W.3d 42, 65 (Tex. App.—Houston [1st Dist.] 2013, appeal dismissed), held that when a claimant makes an excessive demand for attorney’s fees and will not accept a lesser amount, the claimant is not entitled to recover fees expended thereafter, even if it prevails on its breach of contract claim. *See* Ch. 22, *Attorney’s Fees*, § 22.20[3][a][i].

Waiver of Contractual Attorney’s Fees by Failure to Plead. This release includes discussion of *Peterson Group, Inc. v. PLTQ Lotus Group, L.P.*, 417 S.W.3d 46, 60–61 (Tex. App.—Houston [1st Dist.] 2013, pet. filed), in which the court of appeals held that a party who pleads for attorney’s fees only under Chapter 38 and not under a contract waives its claim for attorney’s fees under the contract. *See* Ch. 22, *Attorney’s Fees*, § 22.20[2][a][i].

Proof Requirements for Attorney’s Fee Awards. This release also includes discussion of *Petrello v. Prucka*, 415 S.W.3d 420, 431–432 (Tex. App.—Houston [1st Dist.] 2013, no pet.), in which the court of appeals held that an affidavit can establish the reasonableness of attorney’s fees; when no controverting affidavit is filed, mere criticism of the amount of attorney’s fees sought does not create a fact issue and the trial court may determine

attorney’s fees as a matter of law. *See* Ch. 22, *Attorney’s Fees*, § 22.41.

Family Law Proceedings

Limitations Period for Enforcement of Spousal Maintenance Award. Ch. 362, *Divorce*, has been revised to reflect *O’Carolan v. Hopper*, 414 S.W.3d 288, 298–304 (Tex. App.—Austin 2013, no pet. h.), in which the court of appeals held that an award of spousal maintenance is enforceable for 10 years following issuance of the divorce decree, rather than for four years under the residual statute of limitation. Furthermore, a spousal maintenance arrearage need not be reduced to judgment to make the order enforceable (§ 362.21[8][d]).

Child’s Physical Presence Alone Note Enough to Establish Jurisdiction Under UCCJEA. Ch. 374, *Interstate SAPCR Issues*, has been updated to reflect recent case law clarifying that a child’s physical presence, standing alone, is not enough to establish significant connection jurisdiction under the UCCJEA (§ 374.03[1][c]).

Probate Proceedings

Disposition of Decedent’s Body. In *In re Estate of Woods*, 402 S.W.3d 845, 849 (Tex. App.—Tyler 2013, no pet. h.), the Tyler court of appeals held that a surviving spouse, even if estranged from the decedent, has priority over a child of the decedent to designate the place and manner of burial or to dispose of the decedent’s remains. *See* Ch. 390, *Initial Procedures for Probate*, § 390.02[1].

Transfer of Contested Probate Proceedings to District Court. In *In re Estate of Trevino*, 415 S.W.3d 442, 447 (Tex. App.—San Antonio 2013, no pet. h.), the San Antonio court of appeals held that the county court’s authority to transfer a probate proceeding to a district court does not

arise when the matter is filed, but rather when a matter in the probate proceeding becomes contested. A matter may not be considered “contested” solely based on a petitioner’s allegations that another party is likely to contest the petition. *See* Ch. 392, *Admitting Wills to Probate*, § 392.03[1].

Excused Late Filing of Application to Probate Will. In *In re Estate of Allen*, 407 S.W.3d 335, 341–343 (Tex. App.—Eastland 2013, no pet. h.), the Eastland court of appeals held that a testator’s surviving wife was not in default for failing to present his will to probate as a muniment of title within the four-year statute of limitations, when she believed, based on her attorney’s advice, that the affidavit of heirship she filed transferred all of the testator’s property to her the same as the will would have done and that probate proceedings were unnecessary. *See* Ch. 392, *Admitting Wills to Probate*, § 392.13[2].

Only Texas Court Has Ancillary Probate Jurisdiction Over Texas Real Property. In *Haga v. Thomas*, 409 S.W.3d 731, 737 (Tex. App.—Houston [1st Dist.] 2013, no pet. h.), the First District court of appeals held that only a Texas court has jurisdiction to administer real property located in Texas; the “original” probate court, i.e., a probate court in another state in which the decedent died and in which the decedent’s will was admitted to probate, has no jurisdiction to construe the decedent’s will as it relates to the decedent’s real property located in Texas. Only the Texas probate court—the ancillary court—may do so. *See* Ch. 392, *Admitting Wills to Probate*, § 392.14[4][c][i].

Time for Filing Bill of Review to Set Aside Probate Orders Tolled Based on Administrator’s Nondisclosure. In *Valdez v. Hollenbeck*, 410 S.W.3d 1, 15–17 (Tex. App.—San Antonio 2013, no pet. h.),

the San Antonio court of appeals held that the period of limitations for the heirs of a decedent’s estate to bring a bill of review proceeding to set aside orders approving the account for final settlement and discharge of the administrator was tolled, when there was evidence that the administrator did not disclose certain bank accounts in the verified inventory. This failure to disclose prevented the heirs from knowing about their legal rights and making a claim. *See* Ch. 392, *Admitting Wills to Probate*, § 392.32[2].

Elements of Tortious Interference with Inheritance Rights. In *In re Estate of Valdez*, 406 S.W.3d 228, 233 (Tex. App.—San Antonio 2013, no pet. h.), the San Antonio Court of appeals held that the elements of a cause of action of for tortious interference with inheritance rights are: (1) that an interference with a person’s property or property rights occurred; (2) that this interference was intentional and caused damage; and (3) that the interference with conducted without just cause or legal excuse. *See* Ch. 392, *Admitting Wills to Probate*, § 392.36[3][a].

No-Contest Clause Not Violated by Suit to Consolidate Trusts. In *Di Portanova v. Monroe*, 402 S.W.3d 711, 718–719 (Tex. App.—Houston [1st Dist.] 2012, no pet.), the First District court of appeals held that a suit to consolidate testamentary and other trusts for a beneficiary did not violate a no-contest clause in the will, because these administrative changes were not prohibited by the will and would not defeat the testator’s intent. *See* Ch. 394, *Will Construction*, § 394.06[4].

Judicially Discharged Executor is Not Proper Party to Will Contest. As a matter of first impression, the Eastland court of appeals held in *In re Estate of Whittington*, 409 S.W.3d 666, 667, 669–671 (Tex.

App.—Eastland 2013, no pet. h.), that a discharged independent executor is not a proper party to a will contest that is filed by a non-beneficiary after the executor has received a judicial discharge. A judicial discharge relieves an executor from any liability involving matters related to past administration of the estate, which includes the executor's defense of a will contest in his or her fiduciary capacity. *See* Ch. 400, *Managing the Estate*, § 400.10[5].

Arbitration

Evidence of Arbitrator's Evident Partiality. Ch. 44, *Arbitration*, has been revised to include discussion of *Port Arthur Steam Energy LP v. Oxbow Calcining LLC*, 416 S.W.3d 708, 714 (Tex. App.—Houston [1st Dist.] 2013, pet. filed), in which the court of appeals held that whether an arbi-

trator's failure to disclose a relationship constitutes evident partiality begins with an assessment of the level of diligence required to discover that relationship (§ 44.06[2][c][ii]).

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September 2014

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<input type="checkbox"/>	255-72.11 thru 255-79.	255-73 thru 255-82.9
<input type="checkbox"/>	260-25	260-25 thru 260-26.1
<input type="checkbox"/>	260-48.5 thru 260-48.7	260-48.5 thru 260-48.7
<input type="checkbox"/>	260-94.11.	260-94.11 thru 260-94.12(1)
<input type="checkbox"/>	260-94.23.	260-94.23 thru 260-94.24(1)
<input type="checkbox"/>	261-13	261-13 thru 261-14.1
<input type="checkbox"/>	261-29 thru 261-30.1	261-29 thru 261-30.1
<input type="checkbox"/>	261-39	261-39 thru 261-40.1
<input type="checkbox"/>	261-63	261-63 thru 261-64.1
<input type="checkbox"/>	261-91	261-91 thru 261-92.1
<input type="checkbox"/>	261-111	261-111 thru 261-112.1
<input type="checkbox"/>	261-131	261-131 thru 261-132.1

VOLUME 18

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	270-23	270-23 thru 270-24.1
<input type="checkbox"/>	270-78.1 thru 270-81	270-79 thru 270-82.1
<input type="checkbox"/>	270A-31 thru 270A-32.1.	270A-31 thru 270A-32.1
<input type="checkbox"/>	271-7 thru 271-13.	271-7 thru 271-14.1
<input type="checkbox"/>	271-24.1 thru 271-27	271-25 thru 271-28.1
<input type="checkbox"/>	271-55 thru 271-58.3	271-55 thru 271-58.5
<input type="checkbox"/>	282-53 thru 282-68.1	282-53 thru 282-68.1
<input type="checkbox"/>	282-89 thru 282-106.1.	282-89 thru 282-106.1

Check As Done	<i>Remove Old <u>Pages Numbered</u></i>	<i>Insert New <u>Pages Numbered</u></i>
<input type="checkbox"/>	285-26.9 thru 285-26.13	285-26.9 thru 285-26.13

VOLUME 19

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	290-87 thru 290-89	290-87 thru 290-89
<input type="checkbox"/>	291-21 thru 291-24.1	291-21 thru 291-24.1
<input type="checkbox"/>	291-39 thru 291-40.1	291-39 thru 291-40.2(1)
<input type="checkbox"/>	291-129 thru 291-131	291-129 thru 291-131
<input type="checkbox"/>	292-5.	292-5 thru 292-6.1
<input type="checkbox"/>	293-18.3 thru 293-18.9	293-18.3 thru 293-18.9
<input type="checkbox"/>	293-35 thru 293-64.1	293-35 thru 293-64.5
<input type="checkbox"/>	293-75 thru 293-77	293-75 thru 293-78.1
<input type="checkbox"/>	293-106.7 thru 293-106.8(1)	293-106.7 thru 293-106.8(1)
<input type="checkbox"/>	293-122.5 thru 293-123	293-123 thru 293-124.1
<input type="checkbox"/>	293-136.8(15) thru 293-136.8(17)	293-136.8(15) thru 293-136.8(17)
<input type="checkbox"/>	302-5 thru 302-6.1	302-5 thru 302-6.1
<input type="checkbox"/>	310-23 thru 310-26.1	310-23 thru 310-26.1
<input type="checkbox"/>	310-56.4(1) thru 310-56.5	310-56.5 thru 310-56.6(1)

VOLUME 20

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	320-19 thru 320-21	320-19 thru 320-22.1
<input type="checkbox"/>	320-35 thru 320-43	320-35 thru 320-44.1
<input type="checkbox"/>	320-64.5 thru 320-64.6(1)	320-64.5 thru 320-64.6(1)
<input type="checkbox"/>	321-15 thru 321-30.5	321-15 thru 321-30.6(1)
<input type="checkbox"/>	322-54.1 thru 322-54.21	322-54.1 thru 322-54.21
<input type="checkbox"/>	332-18.1 thru 332-21	332-19 thru 332-22.1
<input type="checkbox"/>	333-5 thru 333-7	333-5 thru 333-8.1
<input type="checkbox"/>	333-50.3 thru 333-52.1	333-51 thru 333-52.3
<input type="checkbox"/>	333-78.9 thru 333-141	333-79 thru 333-142.1

VOLUME 21

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	340-11 thru 340-18.1	340-11 thru 340-18.1
<input type="checkbox"/>	340-47 thru 340-48.1	340-47 thru 340-48.1
<input type="checkbox"/>	340-57	340-57 thru 340-58.1
<input type="checkbox"/>	340-73 thru 340-76.3	340-73 thru 340-76.3
<input type="checkbox"/>	340-84.3 thru 340-85	340-85 thru 340-86.3

Check As Done	<i><u>Remove Old Pages Numbered</u></i>	<i><u>Insert New Pages Numbered</u></i>
<input type="checkbox"/>	340-88.6(1)	340-88.6(1)
<input type="checkbox"/>	341-13 thru 341-19	341-13 thru 341-20.1
<input type="checkbox"/>	341-44.5 thru 341-45	341-45 thru 341-46.1
<input type="checkbox"/>	341-113 thru 341-159	341-113 thru 341-145
<input type="checkbox"/>	342-27 thru 342-57	342-27 thru 342-53
<input type="checkbox"/>	343-5 thru 343-6.1	343-5 thru 343-6.1
<input type="checkbox"/>	345-50.1 thru 345-51	345-51 thru 345-52.1
<input type="checkbox"/>	345-72.1 thru 345-75	345-73 thru 345-76.1
<input type="checkbox"/>	345-87	345-87
<input type="checkbox"/>	350-7 thru 350-8.1	350-7 thru 350-8.1
<input type="checkbox"/>	350-25 thru 350-67	350-25 thru 350-57
<input type="checkbox"/>	351-19 thru 351-20.1	351-19 thru 351-20.1
<input type="checkbox"/>	351-39 thru 351-54.1	351-39 thru 351-54.1
<input type="checkbox"/>	351-66.1 thru 351-85	351-67 thru 351-85

VOLUME 22

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	360A-10.1 thru 360A-13.	360A-11 thru 360A-14.1
<input type="checkbox"/>	360A-93	360A-93 thru 360A-94.1
<input type="checkbox"/>	362-5.	362-5 thru 362-6.1
<input type="checkbox"/>	362-76.1 thru 362-77	362-77 thru 362-78.1
<input type="checkbox"/>	362-127 thru 362-135	362-127 thru 362-135
<input type="checkbox"/>	363-53 thru 363-55	363-53 thru 363-55
<input type="checkbox"/>	363-128.1 thru 363-139	363-129 thru 363-140.1
<input type="checkbox"/>	363-151 thru 363-158.1	363-151 thru 363-157
<input type="checkbox"/>	363-177	363-177
<input type="checkbox"/>	370-9 thru 370-14.1	370-9 thru 370-14.1
<input type="checkbox"/>	370-64.3	370-64.3
<input type="checkbox"/>	370-75 thru 370-78.5	370-75 thru 370-78.3
<input type="checkbox"/>	371-105	371-105 thru 371-106.1
<input type="checkbox"/>	371-127 thru 371-129	371-127 thru 371-129
<input type="checkbox"/>	371-157	371-157 thru 371-158.1
<input type="checkbox"/>	371A-61 thru 371A-63	371A-61 thru 371A-63
<input type="checkbox"/>	371A-79 thru 371A-81	371A-79 thru 371A-81

VOLUME 23

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	373-49 thru 373-53	373-49 thru 373-54.1
<input type="checkbox"/>	373-101 thru 373-107	373-101 thru 373-107
<input type="checkbox"/>	374-11 thru 374-20.1	374-11 thru 374-20.1

Check As Done	<i>Remove Old <u>Pages Numbered</u></i>	<i>Insert New <u>Pages Numbered</u></i>
<input type="checkbox"/>	380-26.1 thru 380-27	380-27 thru 380-28.1
<input type="checkbox"/>	381-57 thru 381-61	381-57 thru 381-62.1
<input type="checkbox"/>	382-9 thru 382-11	382-9 thru 382-11

VOLUME 24

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	390-3.	390-3 thru 390-4.1
<input type="checkbox"/>	391-27 thru 391-37	391-27 thru 391-38.1
<input type="checkbox"/>	392-15 thru 392-17	392-15 thru 392-18.1
<input type="checkbox"/>	392-31 thru 392-39	392-31 thru 392-40.1
<input type="checkbox"/>	392-85 thru 392-103.	392-85 thru 392-104.1
<input type="checkbox"/>	392-173	392-173
<input type="checkbox"/>	393-15	393-15 thru 393-16.1
<input type="checkbox"/>	393-31	393-31 thru 393-32.1
<input type="checkbox"/>	393-53	393-53 thru 393-54.1
<input type="checkbox"/>	394-59 thru 394-61	394-59 thru 394-62.1
<input type="checkbox"/>	394-99 thru 394-105.	394-99 thru 394-105
<input type="checkbox"/>	400-15	400-15 thru 400-16.1
<input type="checkbox"/>	400-33 thru 400-35	400-33 thru 400-36.1
<input type="checkbox"/>	400-59	400-59 thru 400-60.1
<input type="checkbox"/>	400-71	400-71 thru 400-72.1
<input type="checkbox"/>	401-21 thru 401-23	401-21 thru 401-23
<input type="checkbox"/>	410-13	410-13
<input type="checkbox"/>	410-27	410-27 thru 410-28.1
<input type="checkbox"/>	410-149 thru 410-153	410-149 thru 410-153
<input type="checkbox"/>	411-101	411-101 thru 411-102.1

VOLUME 25

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	420-1 thru 420-13.	420-1 thru 420-11
<input type="checkbox"/>	421-10.1 thru 421-14.1	421-11 thru 421-14.1
<input type="checkbox"/>	422-23 thru 422-24.1	422-23 thru 422-24.1
<input type="checkbox"/>	423-3 thru 423-15.	423-3 thru 423-16.1
<input type="checkbox"/>	423-49 thru 423-51	423-49 thru 423-51
<input type="checkbox"/>	TS-1 thru TS-249	TS-1 thru TS-429

VOLUME 26

Revision

<input type="checkbox"/>	Title page.	Title page
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Check As Done	<i><u>Remove Old Pages Numbered</u></i>	<i><u>Insert New Pages Numbered</u></i>
<input type="checkbox"/>	I-51 thru I-59	I-51 thru I-60.1
<input type="checkbox"/>	I-111 thru I-141	I-111 thru I-141
<input type="checkbox"/>	I-261 thru I-311	I-261 thru I-309
<input type="checkbox"/>	I-381 thru I-473	I-381 thru I-473
<input type="checkbox"/>	I-617 thru I-631	I-617 thru I-631
<input type="checkbox"/>	I-705 thru I-763	I-705 thru I-763
<input type="checkbox"/>	I-873 thru I-911	I-873 thru I-909
<input type="checkbox"/>	I-979 thru I-1051	I-979 thru I-1049

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