

PUBLICATION UPDATE

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Dorsaneo, Texas Litigation Guide

Publication 719 Release 117 June 2015

HIGHLIGHTS

- **Important Recent Texas Cases and Other Developments Incorporated**

This release updates *Texas Litigation Guide* with recent Texas Supreme Court and court of appeals decisions, federal cases, rule amendments, and other significant developments since Release 116. In addition, numerous pleading forms throughout the publication have been updated to reflect current best practices and recent rule amendments. The release also contains revised pages updating the index. Some of the significant developments and revisions reflected in this release are summarized below.

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Pretrial, Trial, and Appellate Practice

Special Alert on Restyled Texas Evidence Rules. This release includes a Special Alert, preceding Ch. 120A, *Presentation of Proof*, discussing the completely “restyled” Texas Rules of Evidence, to which the Texas Supreme Court gave final approval in March 2015 after receiving public comment [*see* Misc. Docket No. 15-9058 (Mar. 10, 2015)]. The final version of the amended rules, effective April 1, 2015, will be incorporated into the *Texas Litigation Guide* in an upcoming release.

Suspending Enforcement of Judgment by the State. In *In re State Bd. for Educator Certification*, ___ S.W.3d ___, 58 Tex. Sup. Ct. J. 163, 2014 Tex. LEXIS 1208, *5 (Tex. Dec. 19, 2014), the Texas Supreme Court ruled that trial courts have discretion to deny the state suspension of enforcement of a judgment under certain circumstances, notwithstanding Civil Practice and Remedies Code Section 6.001, which guaran-

tees the state the right to supersedeas without filing a bond. Discussion of this topic has been added to Ch. 148, *Suspending Enforcement of the Judgment* (§ 148.03).

Supreme Court Discusses Principles Regarding Scope of Discovery of Similar Claims by Other Plaintiffs. The Texas Supreme Court's decision in *In re Nat'l Lloyds Ins. Co.*, 449 S.W.3d 486, 58 Tex. Sup. Ct. J. 64, 2014 Tex. LEXIS 1108, *4-*8 (Tex. Oct. 31, 2014), illustrating the principles that apply when a plaintiff seeks discovery of other similar claims against the same defendant, has been added to Ch. 90, *Discovery: Scope and Limitations* (§ 90.02[8]).

Personal Jurisdiction Requires More Than Conspiracy Allegation. This release includes discussion of *Masterguard, L.P. v. Eco Techs. Int'l LLC*, 441 S.W.3d 367, 376 (Tex. App.—Dallas 2013, no pet.), in which the court of appeals held that a conspiracy claim alone is not enough to establish personal jurisdiction against a nonresident defendant. See Ch. 32, *Personal Jurisdiction and Service on Nonresidents*, § 32.06[3].

Press Had Standing to Seek Relief from Orders Barring Them from Courtroom. Included in this update is discussion of *In re Fort Worth Star-Telegram*, 441 S.W.3d 847, 850–851 (Tex. App.—Fort Worth 2014, no pet.), in which the court of appeals held that the general test for standing in Texas requires that there be a real controversy between the parties, which will be actually determined by the judicial declaration sought. The court held that members of the press had standing to seek a declaration voiding court orders that barred them from the courtroom. See Ch. 12, *Pleading the Parties*, § 12.01.

Grounds for Appointing Guardian Ad Litem. This release includes discussion of

In re KC Greenhouse Patio Apts., LP, 445 S.W.3d 168, 179 (Tex. App.—Houston [1st Dist.] 2012, no pet.), in which the court of appeals held that a trial court has no discretion to appoint a guardian ad litem for a person whose next friend or guardian has no adverse interest, even if the court finds that appointment of a guardian ad litem would be in the person's best interest. See Ch. 12, *Pleading the Parties*, § 12.03[5][c].

Entry Onto Land for Purposes of Videography. A discussion of *In re Goodyear Tire & Rubber Co.*, 437 S.W.3d 923, 928 (Tex. App.—Dallas 2014, orig. proceeding), in which the court of appeals ruled that the trial court abused its discretion in allowing plaintiffs' videographer access to the defendant's plant for purposes of creating a demonstrative exhibit documenting the defendant's tire manufacturing process, has been added to Ch. 93, *Requests to Produce; Subpoenas* (§ 93.20[1][a]).

Limitations on "Apex" Doctrine. The Austin Court of Appeals has taken the view that the "apex" doctrine protects high-level executives from discovery only when the executive is named as a defendant because of his or her status as an executive; when the executive is named based on some dispute unrelated to this status, the doctrine does not apply. This case, *In re Miscavige*, 436 S.W.3d 430, 437–438 (Tex. App.—Austin 2014, orig. proceeding), has been added to Ch. 97, *Resisting Discovery* (§ 97.20[5]).

Trial Court Must Make Express Findings Regarding Depositions Before Suit. This update includes discussion of *In re Cauley*, 437 S.W.3d 650, 657 (Tex. App.—Tyler 2014, no pet.), in which the court of appeals held that the trial court abused its discretion when it ordered presuit discovery without the required finding that the likely benefit of allowing the petitioner to

take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure. *See* Ch. 10, *Depositions Before Suit*, § 10.03[4].

Declaratory Judgment to Determine Non-Liability in Contract Case. In *Feldman v. KPMG LLP*, 438 S.W.3d 678, 682–684 (Tex. App.—Houston [14th Dist.] 2014, no pet.), the court of appeals held that a declaratory judgment may not be used to assert a claim of non-liability in a contract case when there is already a breach-of-contract case pending in another court. *See* Ch. 45, *Declaratory Judgments*, § 45.03.

Governmental Immunity in Declaratory Judgment Proceeding. Included in this update is *Rourk v. Cameron Appraisal Dist.*, 443 S.W.3d 217, 220 (Tex. App.—Corpus Christi 2013, no pet.), in which the court of appeals held that the Declaratory Judgment Act does not waive governmental immunity in an action that does not challenge the validity of a statute or ordinance, but only challenges a governmental entity’s actions under the legislation. *See* Ch. 45, *Declaratory Judgments*, § 45.05[3].

Grounds for Constructive Trust Discussed. Ch. 55, *Constructive Trusts*, has been updated with *Gray v. Sangrey*, 428 S.W.3d 311, 315 (Tex. App.—Texarkana 2014, pet. denied), in which the court of appeals analyzed the use of a confidential relationship as the basis for a grant of a constructive trust (§ 55.02[3][c]).

Recent Case Law on Settlement Issues. Ch. 102, *Settlement*, has been revised to include recent cases from the Texas Supreme Court and courts of appeals, including:

- *Nat’l Prop. Holdings, L.P. v. Westergren*, 58 Tex. Sup. Ct. J. 204 (Tex. 2015) (per curiam), in which the Texas Supreme Court held that suing on a previously

released claim is independently actionable as a breach of the release only when an express covenant not to sue or other language stating a contractual commitment not to sue is included; otherwise, the issue is an affirmative defense (§ 102.102[1][c]).

- *In re Caballero*, 441 S.W.3d 562 (Tex. App.—El Paso 2014, orig. proceeding), which held that because a trial court has a ministerial duty to enforce a valid Civil Procedure Rule 11 agreement, mandamus is available to require enforcement (§ 102.02[5]).

Administrative Law

Exception to Exhaustion of Administrative Remedies Rule. The El Paso Court of Appeals, in *Marquez v. Clint Indep. Sch. Dist.*, 445 S.W.3d 450, 454–456 (Tex. App.—El Paso 2014, pet. filed), held that exhaustion of administrative remedies rule does not apply if the claims are for a violation of a constitutional right. *See* Ch. 423, *Judicial Review of Contested Cases*, § 423.02[3][c].

Arbitration

No Waiver of Arbitration by Conduct in Another Suit. Ch. 44, *Arbitration*, has been updated to reflect the Texas Supreme Court’s decision in *Richmont Holdings, Inc. v. Superior Recharge Sys., L.L.C.*, ___ S.W.3d ___, 58 Tex. Sup. Ct. J. 179, 2014 Tex. LEXIS 1211, **1–6 (Tex. 2014), in which the Court held that a party did not waive its rights to arbitrate its claim by filing a second suit in another county and engaging in limited discovery. *See* Ch. 44, *Arbitration*, § 44.02[3][a].

One-Sided Attorney-Client Arbitration Agreement Held Unconscionable. Ch. 44, *Arbitration*, now includes discussion of *Royston, Rayzor, Vickery & Wil-*

liams, L.L.P. v. Lopez, 443 S.W.3d 196, 205–208 (Tex. App.—Corpus Christi 2013, pet. filed), in which the court of appeals held that an arbitration clause in an attorney-client agreement may be considered unconscionable if it requires the client to arbitrate all of his or her claims but allows the attorney to litigate its claims regarding costs and expenses. See Ch. 44, *Arbitration*, § 44.02[1][b].

Nonsignatory May Be Bound By Arbitration Agreement. Ch. 44, *Arbitration*, has been revised to reflect *Seven Hills Commer., LLC v. Mirabal Custom Homes, Inc.*, 442 S.W.3d 706, 719–721 (Tex. App.—Dallas 2014, pet. filed), in which the court of appeals held that a limited liability company that is not a signatory to its operating agreement may nonetheless be bound by the arbitration provision in its operating agreement. See Ch. 44, *Arbitration*, § 44.02[1][c].

Attorney’s Fees

Segregating Attorney’s Fees. Discussion of *Anglo-Dutch Petroleum Int’l, Inc. v. Case Funding Network, LP*, 441 S.W.3d 612, 634 (Tex. App.—Houston [1st Dist.] 2014, pet. filed), in which the court of appeals held that attorney’s fees incurred to defeat a counterclaim that must be overcome to recover fully on a contract need not be segregated, has been added to Ch. 22, *Attorney’s Fees*, § 22.41A.

Attorney’s Fees on Appeal. In *In re United Servs. Auto. Ass’n*, 446 S.W.3d 162, 178–180 (Tex. App.—Houston [1st Dist.] 2014, no pet.), the court of appeals held that when an attorney is working under a contingent fee contract, and the contract does not provide for additional fees for an appeal, it is reasonable for a jury to award zero appellate attorney’s fees. See Ch. 22, *Attorney’s Fees*, § 22.50.

Personal Injury and Tort Litigation

Amendment to Avoid Dismissal Under Tort Claims Act. This release includes discussion of *Texas Department of Aging & Disability Services v. Cannon*, ___ S.W.3d ___, 58 Tex. Sup. Ct. J. 197, 2015 Tex. LEXIS 2, *9–*18 (Tex. 2015), in which the Texas Supreme Court held that when a governmental unit files a motion to dismiss under Civil Practice and Remedies Code Section 101.106(e), the plaintiff may amend his or her petition in accordance with applicable procedural rules to assert claims that are not brought under the Tort Claims Act. See Ch. 12, *Pleading the Parties*, § 12.03[6]; Ch. 293, *Claims Against Governmental Entities*, § 293.16[3][a][ii].

Other Cases on Government Tort Claims. In addition, Ch. 293, *Claims Against Governmental Entities*, has been revised to include recent cases from the Texas courts of appeals, including:

- *Molina v. Alvarado*, 441 S.W.3d 578 (Tex. App.—El Paso 2014, pet. filed), which held that when a plaintiff initially named the city as the sole defendant, but then added an employee later by amended petition, the election of remedies provision [Tex. Civ. Prac. & Rem. Code § 101.106(a)] did not bar the claims against the employee because the plaintiff alleged the operation of a vehicle while intoxicated, which was sufficient to raise a fact issue on scope of employment (§ 293.16[3][a][iii]).
- *City of El Paso v. High Ridge Constr., Inc.*, 442 S.W.3d 660 (Tex. App.—El Paso 2014, pet. filed), which held that the distinction between proprietary and governmental functions applies to a

municipality's common law liability on contract claims (§ 293.01[3][a]).

- *City of Houston v. Downstream Envtl., L.L.C.*, 444 S.W.3d 24 (Tex. App.—Houston [1st Dist.] 2014, no pet.), which held that a claim for damages from the temporary closing of a discharge line between a waste disposal facility and the city's sewer system was barred because it concerned the operation of a sanitary sewer system, and therefore related to a governmental function under Civil Practice and Remedies Code Section 101.0215(a)(9) (§ 293.01[3][c]).
- *City of El Paso v. Collins*, 440 S.W.3d 879 (Tex. App.—El Paso 2013, no pet.), which held that a city had immunity under the Tort Claims Act and the recreational use statute because the plaintiff pleaded only that the city was aware of the condition itself, not that it was aware of the extreme risk posed by that condition (§ 293.10[5][g][v]).
- *Quested v. City of Houston*, 440 S.W.3d 275 (Tex. App.—Houston [14th Dist.] 2014, no pet.), which held that: (1) the presence of an emergency situation was conclusively established because it was undisputed that the officer was responding to a dispatch from SWAT to the location of a hostage incident, and (2) the emergency exception to the Tort Claims Act therefore barred recovery because the plaintiff presented no evidence that the officer was aware of the risk and did not care about the result (§ 293.12[4]).

- *Escobar v. Harris County*, 442 S.W.3d 621 (Tex. App.—Houston [1st Dist.] 2014, no pet.), which held that when there was no dispute that a police shooting was deliberate, the plaintiff could not avoid the intentional tort exception to the Tort Claims Act by pleading either simple negligence of the officer, or negligent training of the officer by the employing governmental unit (§ 293.12[11]).

Recent Texas Cases on Manufacturer's Duty to Indemnify Seller. Ch. 320, *Products Liability*, has been revised to include discussion of the Texas Supreme Court decision in *Petroleum Solutions v. Head*, 58 Tex. Sup. Ct. J. 147 (Tex. 2014), which applied the statutory indemnity provisions of Chapter 82 of the Civil Practice and Remedies Code in the context of claims against both a component part manufacturer and a finished product manufacturer. The Court held that although each manufacturer originally owed the other a reciprocal indemnity obligation, when the finished product manufacturer nonsuited all its claims, it remained subject to the duty to indemnify the component part manufacturer. Also included is discussion of *PS Invs., L.P. v. Southern Instrument & Valve Co.*, 438 S.W.3d 638 (Tex. App.—Houston [1st Dist.] 2014, pet. filed), in which the court of appeals held that: (1) a company that merely repaired a valve and returned it to the owner was not a "seller" because it did not distribute or place valves in the stream of commerce; and (2) an allegation of faulty repair therefore states a claim for breach of a services contract only, and not a claim for statutory indemnity under Chapter 82. See §§ 291.05[2][c], 320.10[2][a].

Supreme Court Discusses Justifiable Reliance Element of Fraud Claim. Ch.

336, *Fraud*, has been revised to include discussion of *Nat'l Prop. Holdings, L.P. v. Westergren*, 58 Tex. Sup. Ct. J. 204 (Tex. 2015) (per curiam), in which the Texas Supreme Court held that when a release is negotiated at arm's length, a party who signed the release without reading it could not sue for fraud in the inducement because the signer was not justified in relying on any prior representations as to its content (§ 336.04[5][a]).

Recent Case Law on Defamation and Citizens Participation Act. Ch. 333, *Libel and Slander*, has been revised to reflect recent cases from the Texas courts of appeals, including:

- *Mayfield v. Fullhart*, 444 S.W.3d 222 (Tex. App.—Houston [14th Dist.] 2014, pet. denied), which held that the “single publication rule” that typically applies to newspapers, magazines, and other periodicals also applies to alleged defamation that occurs on the Internet, so that the one-year statute of limitations begins to run on the initial posting of the allegedly defamatory statement (§ 333.21[4][a]).
- *Senior Care Res., Inc. v. OAC Senior Living, LLC*, 442 S.W.3d 504 (Tex. App.—Dallas 2014, no pet.), which held that a hearing before the Texas Department of Aging and Disability Services to determine whether to grant a community needs waiver for Medicaid beds in a nursing facility is a quasi-judicial proceeding carrying absolute immunity for statements made in the proceeding (§ 333.20[1][b]).
- *In re Estate of Check*, 438 S.W.3d 829 (Tex. App.—San Antonio 2014, no pet.), which held that: (1)

the 60-day period to move for dismissal under the Citizens Participation Act begins to run when the first petition or other pleading stating the claim is served on the defendant, and subsequent amended pleadings do not give rise to a new opportunity to move for dismissal; and (2) the trial court could not have erred in denying the motion when it was untimely under this rule (§ 333.42[2][a]).

- *Am. Heritage Capital, LP v. Gonzalez*, 436 S.W.3d 865 (Tex. App.—Dallas 2014, no pet.), which held that: (1) when the trial court orders dismissal under the Citizens Participation Act, but reserves the issue of costs, attorney's fees, and sanctions for later determination, the order of dismissal is not final until those issues are resolved; and (2) taking an immediate appeal of the denial is merely an option available to the movant, so that the issue may also be raised on appeal from the final judgment (§ 333.42[2][f], [3]).
- *Better Bus. Bureau of Metro. Houston, Inc. v. John Moore Servs., Inc.*, 441 S.W.3d 345 (Tex. App.—Houston [1st Dist.] 2013, pet. denied), which held that although the exercise of free speech under the Citizens Participation Act is sometimes related to participation in government, no such connection is required for the communication to be a “matter of public concern” under the Act (§ 333.42[1][b]).

Recent Cases Discuss Scope of Health Care Liability Statute, Expert Witness

Report Requirements. Ch. 321, *Medical Malpractice*, has been revised to include recent cases from the Texas courts of appeals, including:

- *Baylor Univ. Med. Ctr. v. Lawton*, 442 S.W.3d 483 (Tex. App.—Dallas 2013, no pet.), which held a hospital employee’s claim of injury from exposure to chemicals does not state a health care liability claim merely because it occurred on hospital premises, because a safety-related claim that is “completely untethered from health care” is not an HCLC (§ 321.02[2][a], [f]).
- *CHCA W. Houston, L.P. v. Shelley*, 438 S.W.3d 149 (Tex. App.—Houston [14th Dist.] 2014, pet. filed), which held that a slip-and-fall claim by an employee of a health care provider is an HCLC because it alleges a departure from accepted standards of safety (§ 321.02[2][f]).
- *DHS Mgmt. Servs. v. Castro*, 435 S.W.3d 919 (Tex. App.—Dallas 2014, no pet.), which held that some relation to health care is required for a safety-related claim to be an HCLC, so that a routine auto accident is not an HCLC merely because an employee of a health care provider was driving the mobile imaging van involved in the accident (§ 321.02[2][f]).
- *Tillman v. Mem’l Hermann Hosp. Sys.*, 440 S.W.3d 203 (Tex. App.—Houston [14th Dist.] 2013, pet. denied), which held that: (1) a radiology technician’s claim of injury due to the negligence of a nurse in handling a patient following a procedure is an HCLC because the injury occurred in the

health care context, and concerned accepted standards of safety; and (2) the legislature’s extension of the definition of an HCLC to include claims brought by employees and other claimants that are not patients does not violate equal protection (§ 321.02[2][f], [8]).

- *Reddy v. Hebner*, 435 S.W.3d 323 (Tex. App.—Austin 2014, pet. filed), which held that: (1) expert reports mailed in conjunction with pre-suit notice letters are not sufficient because the defendant is not a “party” until the action is filed; and (2) when the wrong expert reports were initially served within the 120-day period, service of the correct reports after the deadline could not relate back because that would constitute a prohibited extension of the period due to an accident or mistake of the claimant (§ 321.15[1][c][ii]).

Case Law Developments Regarding Proportionate Responsibility. Ch. 291, *Proportionate Responsibility; Contribution and Indemnity*, has been revised to include recent cases from the Texas courts of appeals, including:

- *Hunter Bldgs. & Mfg., L.P. v. MBI Global, L.L.C.*, 436 S.W.3d 9 (Tex. App.—Houston [14th Dist.] 2014, pet. filed), which held that: (1) the proportionate responsibility statutes apply to actions for misappropriation of trade secrets; so (2) the trial court erred in imposing liability on two individual defendants who were assigned zero percent of the fault (§ 291.03[1], [4][a]).
- *City of El Paso v. Collins*, 440 S.W.3d 879 (Tex. App.—El Paso 2013, no pet.), which held that

because designation as a responsible third party cannot be the basis of liability [Tex. Civ. Prac. & Rem. Code § 33.004(i)(1)], a government unit may not oppose its designation through a plea to the jurisdiction based on the unit's sovereign or governmental immunity (§ 291.03[2][b][iii])

Premises Liability Updates. Ch. 310, *Premises Liability*, has been updated with recent cases from the Texas courts of appeals, including:

- *Cohen v. Landry's Inc.*, 442 S.W.3d 818 (Tex. App.—Houston [14th Dist.] 2014, pet. filed), which held that the fact that the property owner did not own the adjacent sidewalk where the fall occurred did not preclude premises liability when the plaintiff produced some evidence that the owner exercised actual control over the sidewalk (§§ 310.02[1], 310.08).
- *Golden Corral Corp. v. Trigg*, 443 S.W.3d 515 (Tex. App.—Beaumont 2014, no pet.), which held that a “wet floor” sign in the area where the plaintiff fell was an adequate warning as a matter of law, and the plaintiff's failure to see or read the sign was inconsequential to the adequacy of the warning (§ 310.05[2][a]).
- *Plasencia v. Burton*, 440 S.W.3d 139 (Tex. App.—Houston [14th Dist.] 2013, no pet.), which held that leaving unattended small children in a room with a loaded shotgun presented an unreasonable risk of harm as a matter of law (§ 310.05[2][a]).

Real Estate Litigation

Case Law Analyzes Real Estate Contract Issues. Ch. 252, *Real Estate Sales Contracts*, has been revised to include recent cases from the Texas Supreme Court and courts of appeals, including:

- *Nat'l Prop. Holdings, L.P. v. Westergren*, 58 Tex. Sup. Ct. J. 204 (Tex. 2015) (per curiam), which held that: (1) because an alleged oral side agreement included the sale of real property, the statute of frauds barred enforcement of the oral agreement; and (2) the partial performance exception to the statute of frauds was inapplicable because payment of a portion of the consideration was made in conjunction with the signing of a release, and was therefore not unequivocally referable to the agreement sought to be enforced (§§ 252.02[2][a], [3][e], 252.23[2][a]).
- *Harstan, Ltd. v. Kim*, 441 S.W.3d 791 (Tex. App.—El Paso 2014, no pet.), which held that an “as is” clause was unenforceable as matter of law when the sellers were experienced businessmen, but the buyers were first time property owners, and there was evidence that the sellers knew about the condition of the property and concealed it from the buyers (§ 252.23[2][a]).

Eminent Domain and Inverse Condemnation Issues. Ch. 261, *Condemnation*, has been revised to include recent cases from the Texas Supreme Court and courts of appeals, including:

- *City of Houston v. Carlson*, 58 Tex. Sup. Ct. J. 158 (Tex. 2014),

which held that to state a regulatory takings claim, a property owner must challenge the substance of the regulation itself, and a mere challenge to the procedures employed or the manner of enforcement of the regulation is insufficient (§§ 261.05[2], 261.22[1]).

- *State v. Johnson*, 444 S.W.3d 62 (Tex. App.—Dallas 2014, pet. filed), which held that when the owner offered specific evidence of longer emergency response time and inability of fire trucks to reach the remainder, increased circuitry of travel constituted compensable special damages (§ 261.35[3]).

Enforcement of Mechanic's Liens. Ch. 271, *Mechanic's Liens*, has been revised to include recent cases from the Texas courts of appeals, including:

- *Crawford Servs. v. Skillman Int'l Firm, L.L.C.*, 444 S.W.3d 265 (Tex. App.—Dallas 2014, pet. filed), which held that although the Property Code states that a mechanic's lien "may" be foreclosed by judgment of a court of competent jurisdiction [Tex. Prop. Code § 53.154], this language does grant discretion over the ultimate issue of whether to order foreclosure; instead, once the trial court determines that the claimant has a valid debt and a perfected lien, it must enter a judgment of foreclosure and order the sale of the property subject to the lien (§§ 271.02[1], 271.100[1][b]).
- *Addison Urban Dev. Partners, LLC v. Alan Ritchey Materials Co., LC*, 437 S.W.3d 597 (Tex. App.—Dallas 2014, no pet.), which held that when the owner

admitted that gravel and concrete sand were delivered to the work-site by a mechanic's lien claimant, those materials were "furnished" as required by statute, and whether they were actually used in the project had no effect on the validity of the lien claim (§§ 271.01[7], 271.02[2][c]).

Statute of Limitations on Action Alleging Violation of Home Equity Loan Requirements. Ch. 255, *Real Property Security Interests*, has been revised to reflect the court of appeals decisions in *Santiago v. Novastar Mortg., Inc.*, 443 S.W.3d 462 (Tex. App.—Dallas 2014, pet. filed), and *Wood v. HSBC Bank USA, N.A.*, 439 S.W.3d 585 (Tex. App.—Houston [14th Dist.] 2014, pet. filed), each of which concerned alleged violations of the constitutional requirements for home equity lending and held that: (1) the borrower's claim accrues on the closing date of the loan; and (2) the residual statute of limitations applies [Tex. Civ. Prac. & Rem. Code § 16.051] and bars the claims when brought more than four years after the closing date (§ 255.06[5][a]).

Interpretation of Oil and Gas Leases. Ch. 283, *Oil and Gas Leases*, has been revised to include discussion of *PNP Petroleum I, LP v. Taylor*, 438 S.W.3d 723 (Tex. App.—San Antonio 2014, pet. filed), which held that when the parties specifically agree to omit any "capable of producing" language from a shut in royalty clause, that requirement is eliminated, and payment of the royalty extends the lease regardless of whether any well is producing or is capable of producing (§ 283.03[8][d]).

Insurance Litigation

Declaratory Relief Against Liability Insurers Limited. This release includes discussion of *In re Essex Ins. Co.*, 450

S.W.3d 524, 58 Tex. Sup. Ct. J. 112, 2014 Tex. LEXIS 1164, *3–*8 (Tex. 2014), in which the Texas Supreme Court held that, because an injured third party cannot sue a tortfeasor’s liability insurer directly until the tortfeasor’s liability has been finally determined by agreement or judgment, the injured party similarly must wait to pursue a declaratory judgment action against the insurer. See Ch. 45, *Declaratory Judgments*, § 45.01; Ch. 341, *Liability Insurance*, §§ 341.04[3][c], 341.100[1][b].

Other Liability Insurance Developments. Ch. 341, *Liability Insurance*, has also been revised to include recent cases from the Texas courts of appeals, including:

- *Great Am. Ins. Co. v. Hamel*, 444 S.W.3d 780 (Tex. App.—El Paso 2014, no pet.), which held that because the insurer had breached its duty to defend, it was barred from contesting the “actual trial” requirement of the policy before a third-party claimant could recover the amount of the insured’s liability (§ 341.04[3][c]).
- *In re Cypress Tex. Lloyds*, 437 S.W.3d 1 (Tex. App.—Corpus Christi 2011, orig. proceeding), which held that the insured’s duty to submit to an examination under oath as required by the policy applies only during the time that the claim is under investigation, so an action on the policy need not be abated when the insurer first requests the examination after disposition of the claim (§ 341.05[1][c]).

Case Law Discusses Issues Under Insurance Practices Statutes. Ch. 345, *Unfair Insurance Practices*, has been revised to include recent cases from the Texas

courts of appeals, including:

- *In re Cypress Tex. Lloyds*, 437 S.W.3d 1 (Tex. App.—Corpus Christi 2011, orig. proceeding), which held that: (1) the plaintiff must plead and offer some proof of a potential limitations bar for prior notice to the insurer to be excused under Tex. Ins. Code § 541.154(c), and the mere “genuine belief” of the plaintiff is insufficient; and (2) a notice letter is sufficient when it provides the factual basis for the claims, identifies the causes of action, and specifies any alleged damages (§ 345.08[2]).
- *In re Progressive County Mut. Ins. Co.*, 439 S.W.3d 422 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding), which held that severance and abatement of extra contractual claims was required because it was prejudicial to require the insurer to defend those claims until liability on underlying uninsured motorist claim was established (§ 345.18[3]).
- *Prudential Ins. Co. of Am. v. Durrante*, 443 S.W.3d 499 (Tex. App.—El Paso 2014, pet. filed), which held that: (1) the statute permitting a life insurer to comply with its prompt payment obligations by commencing an interpleader action within 90 days of the claim [Tex. Ins. Code § 542.058(c)] was inapplicable because the wife and children of the deceased were both policy beneficiaries and were not adverse; and (2) when commencement of an interpleader action and deposit of the policy proceeds in the court’s registry are not simul-

taneous, interest continues to run until the proceeds are deposited (§ 345.31).

Scope of Mortgagee Rights Under Property Insurance Policy Discussed.

Ch. 343, *Property Insurance*, has been revised to reflect the court of appeals decision in *SWE Homes, LP v. Wellington Ins. Co.*, 436 S.W.3d 86 (Tex. App.—Houston [14th Dist.] 2014, no pet.), which held that: (1) although vacancy of the property terminated coverage as to the owner, it had no effect on the mortgagee's right to recover on the fire policy under the standard mortgagee's loss payable clause; and (2) to extent the policy did attempt to preclude recovery by the mortgagee, it was invalid under Tex. Ins. Code § 862.055(b) (§ 343.12).

Business and Commercial Litigation

Fiduciary Duties in LLC. In *Bazan v. Muñoz*, 444 S.W.3d 110, 118–119 (Tex. App.—San Antonio 2014, no pet. h.), the San Antonio court of appeals held that managing members of an Limited Liability Company may be found to have had an informal fiduciary relationship with a non-managing member, giving rise to a duty to disclose material information to this non-managing member. *See* Ch. 183, *Limited Liability Company*, § 183.01[5].

Award of Attorney's Fees to Defendant in Texas Theft Liability Act Suit. In *Arrow Marble, LLC v. Estate of Killion*, 441 S.W.3d 702, 706–708 (Tex. App.—Houston [1st Dist.] 2014, no pet. h.), the First District court of appeals held that a defendant is considered the prevailing party for purposes of making a mandatory award of attorney's fees under the Texas Theft Liability Act (TTLA), even if it loses on its breach of contract claim it asserted against the plaintiff and even if the plaintiff's TTLA claim is dismissed for want of pros-

ecution, rather than on the evidence at trial. The Dallas court of appeals, similarly, held in *West Fork Advisors v. Sungard Consulting*, 437 S.W.3d 917, 922–923 (Tex. App.—Dallas 2014, no pet. h.), that a defendant may be the prevailing party for purposes of an award of attorney's fees, after the plaintiff nonsuits without prejudice, when the court determines that the nonsuit was taken to avoid an unfavorable ruling on the merits. *See* Ch. 200B, *Trade Secrets*, § 200B.21[8].

Duration of Injunction in Trade Secret Misappropriation Case. In *Halliburton Energy Services v. Axis Tech*, 444 S.W.3d 251, 257 (Tex. App.—Dallas 2014, no pet. h.), the Dallas court of appeals noted that although the “usual” equitable order in a trade secret misappropriation case is a perpetual injunction against the wrongdoer, the defendant may show that an injunction of lesser duration than a perpetual injunction is adequate. *See* Ch. 200B, *Trade Secrets*, § 200B.23[2][d].

Breach of Warranty of Title. In *Green Tree Servicing, LLC v. ICA Wholesale*, 439 S.W.3d 657, 660–661 (Tex. App.—Austin 2014, no pet. h.), the Austin court of appeals noted that Texas cases in which a breach of the warranty of title has been found due to the seller's failure to provide a title certificate have also involved disturbance of the buyer's possession by seizure or other deprivation of the physical item by a third party. No Texas court has held that a buyer whose quiet possession has not been disturbed may prevail on a claim against the seller for breach of the warranty of title. *See* Ch. 221, *Warranties*, § 221.14[1][a].

Payment of Check to Co-Payee. In *Viewpoint Bank v. Allied Property*, 439 S.W.3d 626, 631 (Tex. App.—Dallas 2014, no pet. h.), the Dallas court of appeals held

that payment of a check to one non-alternative co-payee without the indorsement of the other does not constitute payment to a holder and thus does not discharge the drawer of either its liability on the instrument or the underlying obligation. *See* Ch. 230, *Negotiable Instruments*, § 230.03[1][c].

Application of Usury Statutes to Leases. In *Jones v. R.O. Pomroy Equipment Rental, Inc.*, 438 S.W.3d 125, 132 (Tex. App.—Eastland 2014, no pet. h.), the Eastland court of appeals held that before the usury statutes can be applied to leases, it is necessary to first establish that the leases were not merely leases, but were instead lease-purchase agreements; the usury laws do not apply to pure rental transactions. *See* Ch. 232, *Usury*, § 232.02[7].

Family Law Proceedings

Transgender Marriage. Discussions of the validity of marriage have been updated to reflect the Corpus Christi court of appeals' holding that, as the result of a 2009 amendment to the marriage license statute, an individual who has had a sex change is eligible to marry a person of the opposite sex [In re Estate of Araguz, 443 S.W.3d 233, 242–249 (Tex. App.—Corpus Christi 2014, no pet. h.)]. *See* Ch. 361, *Annulment and Suit to Declare Marriage Void*, § 361.02[5]; Ch. 362, *Divorce*, § 362.01[1].

Characterization of Damages Awards. This release includes a new discussion of the characterization of damages awards as separate or community property. *See* Ch. 363, *Division of Property*, § 363.09[13].

Support for Adult Disabled Child. To obtain support for an adult disabled child, the disability must have existed before the child turned 18, but a court need not have made such a finding before the child's 18th

birthday [In re Thompson, 434 S.W.3d 624, 627 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding)]. *See* Ch. 371A, *Child Support*, § 371A.02[2][b].

Effect of Inability to Pay Support on Contempt Proceedings. The discussion of inability to pay as a defense to contempt for nonpayment of child support has been updated to include recent case law holding that a party asserting that defense has the burden of pleading and proof even if he or she was found indigent for purposes of the appointment of counsel [In re Mancha, 440 S.W.3d 158, 166–167 (Tex. App.—Houston [14th Dist.] 2013, orig. proceeding)]. *See* Ch. 372, *Enforcement of SAPCR Orders*, § 372.02[6][a][iii].

Termination of Parent-Child Relationship Based on Mistaken Paternity. Ch. 381, *Termination of Parent-Child Relationship*, has been updated to clarify that termination on the basis of mistaken paternity does not include a best-interest determination. If a petitioner makes a prima facie showing entitling him to genetic testing and the testing excludes him as the father, he is entitled to termination without regard to the child's best interest [In re J.K.B., 439 S.W.3d 442, 450 (Tex. App.—Houston [1st Dist.] 2014, no pet. h.)]. *See* Ch. 381, *Termination of Parent-Child Relationship*, § 381.02[2][c].

Sufficiency of Affidavit of Relinquishment. The discussion of affidavits of relinquishment of parental rights now incorporates the recent Texas Supreme Court holding that an affidavit of relinquishment is adequately verified if it states that it is made under oath [In re K.M.L., 443 S.W.3d 101, 108–111 (Tex. 2014)]. *See* Ch. 381, *Termination of Parent-Child Relationship*, § 381.102[1][f].

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Publication 719 Release 117

June 2015

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<input type="checkbox"/>	341-129	341-129 thru 341-130.1
<input type="checkbox"/>	343-9 thru 343-11	343-9 thru 343-11
<input type="checkbox"/>	343-29 thru 343-31	343-29 thru 343-32.1
<input type="checkbox"/>	344-43	344-43 thru 344-44.1
<input type="checkbox"/>	345-41	345-41 thru 345-42.1
<input type="checkbox"/>	345-71	345-71 thru 345-72.1
<input type="checkbox"/>	345-93	345-93 thru 345-94.1

VOLUME 22

Revision

<input type="checkbox"/>	Title page	Title page
<input type="checkbox"/>	361-5 thru 361-7	361-5 thru 361-9
<input type="checkbox"/>	362-11	362-11 thru 362-12.1
<input type="checkbox"/>	362-61 thru 362-65	362-61 thru 362-66.1
<input type="checkbox"/>	362-91 thru 362-95	362-91 thru 362-96.1
<input type="checkbox"/>	363-3 thru 363-4.1	363-3 thru 363-4.1
<input type="checkbox"/>	363-36.1 thru 363-37	363-37 thru 363-38.1
<input type="checkbox"/>	371A-11	371A-11 thru 371A-12.1

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Revision

<input type="checkbox"/>	Title page	Title page
<input type="checkbox"/>	372-46.1 thru 372-51	372-47 thru 372-52.1
<input type="checkbox"/>	372-91 thru 372-92.2(1)	372-91 thru 372-92.2(1)
<input type="checkbox"/>	374-18.1 thru 374-20.1	374-19 thru 374-20.3
<input type="checkbox"/>	380-15	380-15 thru 380-16.1
<input type="checkbox"/>	380-27 thru 380-28.1	380-27 thru 380-28.1
<input type="checkbox"/>	381-13 thru 381-14.1	381-13 thru 381-14.1
<input type="checkbox"/>	381-37 thru 381-43	381-37 thru 381-44.1
<input type="checkbox"/>	381-129	381-129
<input type="checkbox"/>	381-141	381-141 thru 381-142.1

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<input type="checkbox"/>	391-16.1 thru 391-17	391-17 thru 391-18.1
<input type="checkbox"/>	392-31 thru 392-33	392-31 thru 392-34.1

VOLUME 25

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	421-14.1 thru 421-15	421-15 thru 421-16.1
<input type="checkbox"/>	421-31 thru 421-33	421-31 thru 421-33
<input type="checkbox"/>	423-7 thru 423-13	423-7 thru 423-14.1
<input type="checkbox"/>	423-47 thru 423-51	423-47 thru 423-51
<input type="checkbox"/>	424-7 thru 424-8.1	424-7 thru 424-8.1
<input type="checkbox"/>	424-31 thru 424-35	424-31 thru 424-35

VOLUME 26

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	I-125 thru I-191	I-125 thru I-191
<input type="checkbox"/>	I-283 thru I-351	I-283 thru I-347
<input type="checkbox"/>	I-435 thru I-445	I-435 thru I-445
<input type="checkbox"/>	I-627 thru I-631	I-627 thru I-631
<input type="checkbox"/>	I-731 thru I-749	I-731 thru I-749
<input type="checkbox"/>	I-801 thru I-895	I-801 thru I-895

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