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Dorsaneo, Texas Litigation Guide

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HIGHLIGHTS

- **Injunctions.** The Texas Supreme Court has ruled that a remedy that leads to a multiplicity of suits is not an adequate remedy at law and that injunctive relief may be available. See Ch. 50.
- **Baseless Causes of Action.** The Texas Supreme Court has held that the standard of review of the trial court's decision on a Rule 91a motion to dismiss is de novo. See Ch. 103.
- **Statement of Inability to Afford Payment of Court Costs.** Civil Procedure Rule 145 was amended effective September 1, 2016, to provide for a form and process for a declarant/litigant to demonstrate the inability to pay court costs. See Chs. 30, 46, 147.

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

Pretrial, Trial, and Appellate Practice

Oral Contingency Agreement. In *Shamoun & Norman, LLP v. Hill*, 483 S.W.3d 767, 779–780 (Tex. App.—Dallas 2016, pet. filed), the court of appeals held that an attorney may recover under the theory of quantum meruit for fees based on an oral contingency fee agreement. See Ch. 3, *Professional Responsibility*, § 3.50[3].

Statement of Inability to Afford Payment of Court Costs. Effective September 1, 2016, Civil Procedure Rule 145 was amended to provide for a litigant's statement of inability to afford payment of court costs, replacing the former affidavit of indigency. Civil Procedure Rule 502.3 was also revised for justice court cases, and Appellate Rule 20.1 for appellate cases. These changes are covered in Ch. 30, *Commencement of Actions*, Ch. 46, *Justice Court Proceedings*, and Ch. 147, *Perfecting and Docketing the Appeal*.

Personal Jurisdiction in Defamation Case. In *TV Azteca v. Ruiz*, 490 S.W.3d 29

(Tex. 2016), the Texas Supreme Court looked at whether the defendants from Mexico intentionally targeted Texas through their television broadcasts to determine whether the court had jurisdiction over them. See Ch. 32, *Personal Jurisdiction and Service on Nonresidents*, § 32.04[2][a][iii].

Lack of Personal Jurisdiction Over Canadian Company. Included is *Searcy v. Parex Res., Inc.*, 2016 Tex. LEXIS 500 (Tex. June 17, 2016), in which the Texas Supreme court held that Texas courts did not have general or specific jurisdiction over a Canadian defendant because it had no bank accounts, offices, property, employees, or agents in Texas, did not sell products in Texas, did not pay taxes in Texas, and showed no attempt to seek Texas business. See Ch. 32, *Personal Jurisdiction and Service on Nonresidents*, §§ 32.03, 32.04].

Proof of Mailing by Secretary of State to Foreign Defendant. In *Mc Phase II Owner, LLC v. TI Shopping Ctr., LLC*, 477 S.W.3d 489, 491–494 (Tex. App.—Amarillo 2015, no pet. h.), the court of appeals held that when service is made on the Secretary of State under Tex. Bus. Orgs. Code §§ 5.251–5.253, a trial court does not have personal jurisdiction over the foreign defendant unless a *Whitney* certificate is See Ch. 32, *Personal Jurisdiction and Service on Nonresidents*, § 32.09[3][c].

No Waiver of Right to Arbitrate. Waiver of arbitration was at issue in *RSL Funding, LLC v. Pippins*, 2016 Tex. LEXIS 616 (Tex. July 1, 2016), in which the Texas Supreme Court held that a party did not waive its arbitration rights when it was required to join parties in litigation involving third parties in order to protect its procedural rights. See Ch. 44, *Arbitration*, § 44.02[3][a].

Waiver of Right to Contest Arbitration. In *Morgan v. Bronze Queen Mgmt. Co., LLC*, 474 S.W.3d 701, 707–709 (Tex. App.—Houston [14th Dist.] 2014, no pet.), the court of appeals held that a party may waive its right to challenge the arbitrability of a dispute by substantially invoking the arbitration process. See Ch. 44, *Arbitration*, § 44.02[3][c].

Party Suing Derivatively Bound by Arbitration Agreement. This release includes *Cedillo v. Immobiliere Jeuness Establissement*, 476 S.W.3d 557, 567 (Tex. App.—Houston [14th Dist.] 2015, pet. denied), in which the court of appeals held that a plaintiff suing derivatively on behalf of another party is bound to any relevant agreements to which that party agreed, including a valid arbitration agreement. See Ch. 44, *Arbitration*, § 44.02[1][c].

Narrow Grounds for Vacating Arbitration Award. Vacating an arbitration award was at issue in *Hoskins v. Hoskins*, 2016 Tex. LEXIS 386 (Tex. May 20, 2016), in which the Texas Supreme Court held that Tex. Civ. Prac. & Rem. Code § 171.088 sets forth the exclusive grounds for vacating an arbitration award. See Ch. 44, *Arbitration*, § 44.06[2][c][ii].

Injunctions. In *Campbell v. Wilder*, 487 S.W.3d 146, 152 (Tex. 2016), the Texas Supreme Court ruled that a remedy that leads to a multiplicity of suits is not an adequate remedy at law, so that injunctive relief may be available under these circumstances. The First Court of Appeals, in *Stewart Beach Condo. Homeowners Ass'n v. Gili N Prop Invs.*, LLC, 481 S.W.3d 336, 351 (Tex. App.—Houston [1st Dist.] 2015, no pet.), also discussed the availability of injunctive relief, setting out the requirements for the equitable defense of "unclean hands." *See* Ch. 50, *Injunction*, § 50.02[3][d], [e].

Constructive Trusts. The Fort Worth Court of Appeals, in *In re Hayward*, 480 S.W.3d 48, 52 (Tex. App.—Fort Worth 2015, orig. proceeding), discussed the requirements for the grant of a constructive trust as an equitable remedy. *See* Ch. 55, *Constructive Trusts*, § 55.03[1].

Forum Selection Clauses. In *In re Nationwide Ins. Co. of Am.*, 59 Tex. Sup. Ct. J. 1483, 2016 Tex. LEXIS 579 (Tex. 2016), the Texas Supreme Court discussed the circumstances under which a party may waive the right to enforcement of a forum selection clause by substantially invoking the jurisdiction of the Texas courts to the other party's detriment. *See* Ch. 61, *Venue*, § 61.22.

Statutes of Limitation. In *Energy Prod. Co. v. Berry-Helfand*, 491 S.W. 3d 699, 59 Tex. Sup. Ct. J. 1080, 2016 Tex. LEXIS 480, *51–*52 (Tex. 2016), The Texas Supreme Court interpreted the three-year statute of limitation for misappropriation of trade secrets, Tex. Civ. Prac. & Rem. Code § 16.010, which explicitly incorporates the discovery rule. See Ch. 72, *Limitation of Actions*, § 72.02[1][f].

Discovery Privileges. In two cases, *In re M-I L.L.C.*, 59 Tex. Sup. Ct. J. 888, 2016 Tex. LEXIS 389 (Tex. 2016) and *In re Christus Santa Rosa Health Sys.*, 59 Tex. Sup. Ct. J. 998, 2016 Tex. LEXIS 413 (Tex. 2016), the Texas Supreme Court discussed the requirement that a court review documents in camera when the documents are sought to be produced over a claim of privilege. *See* Ch. 90, *Discovery: Scope and Limitations*, §§ 90.05[1][e], 90.06[4][c].

Discovery—Physical or Mental Examination. In *In re H.E.B. Grocery Co., L.P.*, 59 Tex. Sup. Ct. J. 1027, 2016 Tex. LEXIS 407 (Tex. 2016), the Texas Supreme Court discussed the grounds and procedure for ordering a physical or mental examination as part of the discovery process, concluding that mandamus should be granted because the trial court abused its discretion by denying a motion for a physical examination. *See* Ch. 93, *Requests to Produce; Subpoenas*, §§ 93.40[3], 93.151[1].

Dismissal of Baseless Causes of Action. In City of Dallas v. Sanchez, 59 Tex. Sup. Ct. J. 1540, 2016 Tex. LEXIS 615 (Tex. 2016), the Texas Supreme Court determined that the standard of review of the trial court's decision on a Rule 91a motion to dismiss is de novo. This and other cases discussing dismissal of baseless causes of action under Rule 91a have been added to Ch. 103, *Dismissal*. *See* § 103.02.

Motions for New Trial. In *In re Bent*, 487 S.W.3d 170, 173, 178 (Tex. 2016), the Texas Supreme Court granted mandamus when the trial court's order granting a motion for new trial failed to explain the court's reasons. *See* Ch. 140, *Motions for New Trial*, § 140.03[2].

Mootness. In *Matthews v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416, 418 (Tex. 2016), the Texas Supreme Court discussed the mootness doctrine, and ruled that a defendant's cessation of challenged conduct does not, in itself, deprive a court of the power to hear or determine claims for prospective relief. *See* Ch. 150, *Appellate Proceedings in Court of Appeals*, § 150.01[2][b].

Business and Commercial Litigation

Request for Attorney's Fees in Contract Action. The Fourteenth District has clarified in Auz v. Cisneros, 477 S.W.3d 355, 359–362 (Tex. App.—Houston [14th Dist.] 2015, no pet. h.), that when a request for attorney's fees under Tex. Civ. Prac. & Rem. Code § 38.001 in a breach of contract action uses the lodestar method by relating

the hours each of the prevailing party's attorneys worked multiplied by their hourly rates for a total fee, the request must comply with specified requirements established by the Texas Supreme Court in *El Apple I, Ltd. v Olivas*, 370 S.W.3d 757 (Tex. 2012). See Ch. 21, *Damages in Contract*, § 21.20[3].

Statutory Fraud Claim Involving Stock Options. In *Ginn v. NCI Bldg. Systems, Inc.*, 472 S.W.3d 802, 823–824 (Tex. App.—Houston [1st Dist.] 2015, no pet. h.), the First District court of appeal held that a fraud claim under Tex. Bus. & Com. Code § 27.01 may be stated with respect to stock options only if those stock options have vested. See Ch. 171, *Securities Fraud*, § 171.02[1][a].

Proof of Lost Profits in Tortious Interference Case. In *Phillips v. Carlton Energy Group, LLC*, 475 S.W.3d 265, 280 (Tex. 2015), the Texas Supreme Court, in a case of first impression, was asked to address the issue of whether the requirement that lost profits be proved with reasonable certainty should apply when they are not sought as damages themselves, but are used to determine the market value of property for which recovery is sought. The Court held that "it clearly must." The purpose of the requirement is to prevent recovery that is based on speculation, and it makes no sense to deny damages based on speculative evidence of lost profits, but allow recovery of lost value based on the same evidence. The reasonable certainty requirement aligns the law with reality by limiting recovery of damages to what the claimant might have expected to realize in the real world if the claimant's rights had not been violated. See Ch. 205, *Tortious Interference With Business Relations*, § 205.06[1][b][ii].

Agreement to Agree or Binding Contract. In two recent decisions—*Railroad Commission of Texas v. Gulf Energy Exploration Corp.*, 482 S.W.3d 559, 575 (Tex. 2016), and *Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231, 236, 238–239 (Tex. 2016)—the Texas Supreme Court addressed various matters that must be considered in determining whether the parties intended to enter into an agreement to agree or a binding contract. See Ch. 210A, *Contracts*, § 210A.05[2][a][ii]–[iii].

Court Determines Whether Arbitration Agreement Is Supported by Consideration. In *S.C. Maxwell Family Partnership, Ltd. v. Kent*, 472 S.W.3d 341, 344–345 (Tex. App.—Houston 1st Dist.] 2015, no pet. h.), the First District court of appeal held that when a party alleges a lack of consideration as a defense to enforcement of an arbitration agreement, this is a matter for the court, not the arbitrator, to resolve, because the allegation, if true, undermines the very existence of that agreement. This is in accord with the general rule that the arbitrator decides challenges to the validity of the entire agreement, while the court decides issues of the contract's formation. See Ch. 210A, *Contracts*, § 210A.06[1].

Governmental Entity's Waiver of Immunity in Contract Action. In *TXU Energy Retail Co. L.L.C. v. Fort Bend Indep. Sch. Dist.*, 472 S.W.3d 462, 466 (Tex. App.—Dallas 2015, no pet. h.), the Dallas court of appeal held that a waiver of immunity under Tex. Local Gov't Code § 271.152 does not apply when the governmental entity was not statutorily authorized to enter into the contract, *e.g.*, because the contract violated a competitive bidding statute with which the entity was required to comply. The courts have also refused to recognize a waiver-by-conduct exception in breach of contract suits against governmental entities. See Ch. 210A, *Contracts*, § 210A.42[4][c][i].

Employment Litigation

Proof in Collective Action Under FLSA. In *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1047, 194 L. Ed. 2d 124 (2016), the U.S. Supreme Court held that when an employer has violated its statutory duty to keep proper time records, a court may allow representative proof from a sample, to fill the evidentiary gap created by this failure in a collective action brought by employees alleging that the employer failed to pay overtime as required by the Fair Labor Standard Act. See Ch. 203, *Employer-Employee Relations*, § 203.22[1][g][iii].

Contraceptive Coverage Mandate Under Affordable Care Act (ACA). In *East Texas Baptist University v. Burwell*, 793 F.3d 449, 455–456 (5th Cir. [Tex.] 2015), the Fifth Circuit held that neither the ACA contraceptive coverage mandate nor the accommodation provision imposed a substantial burden on the religious exercise of church-affiliated universities and other religious entities, which opposed access to and use of emergency contraceptives and thus did not violate their rights under the Religious Freedom Restoration Act. See Ch. 203, *Employer-Employee Relations*, § 203.29[3].

Determining Validity of Arbitration Agreement. In *Lucchese Boot Co., Inc. v. Rodriguez*, 473 S.W.3d 373, 397–398 (Tex. App.—El Paso 2015, no pet. h.), the El Paso court of appeal held that a broadly worded arbitration provision, coupled with incorporation by reference of rules giving an arbitrator the power to rule on the arbitrator's own jurisdiction, may be sufficient to demonstrate the parties' intent to strip the court of all power and submit even gateway issues of arbitrability to an arbitrator. However, if the parties do not express a clear intent to submit gateway issues to an arbitrator, the court properly retains jurisdiction to rule on arbitrability. See Ch. 203, *Employer-Employee Relations*, § 203.48[1][c].

Proving Causation in Title VII Retaliation Case. The Fifth Circuit has clarified in *Zamora v. City of Houston*, 798 F.3d 326, 331–333 (5th Cir. [Tex.] 2015), that the "cat's paw theory" is a viable means for establishing the causal connection between the plaintiff's protected activity and the defendant's adverse employment action, as an element of the plaintiff's prima facie case of retaliation. Under this theory, a plaintiff must establish that the person with a retaliatory motive influenced the decision-maker to take the retaliatory action, *i.e.*, that the person with retaliatory animus used the decision-maker to bring about the intended retaliatory action. See Ch. 203A, *Employment Litigation*, § 203A.22[3][c].

Waiver of Governmental Employer's Sovereign Immunity. In *Texas Dept. of State Health Services v. Rockwood*, 468 S.W.3d 147, 153–154 (Tex. App.—San Antonio 2015, no pet. h.), the San Antonio court of appeal held that a governmental employer may properly file a plea to the jurisdiction challenging whether the plaintiff sufficiently alleged a violation of the TCHRA, since there is no waiver of immunity if the plaintiff has not done so. When a governmental employer challenges the trial court's subject matter jurisdiction based on its sovereign immunity by filing a motion for summary judgment, a court of appeal has jurisdiction to consider the trial court's order denying the motion, but the scope of review is limited to the elements of the prima facie case and whether a fact issue exists as to those elements or whether those elements have been negated conclusively. See Ch. 203A, *Employment Litigation*, § 203A.52[1][b].

Attorney General Is Not "Law Enforcement Authority" for Whistleblower Claim. The Texas Supreme Court held in *Office of Atty. Gen. v. Weatherspoon*, 472 S.W.3d 280, 282–283 (Tex. 2015), that the OAG is not an appropriate law enforcement authority to whom employees may report violations of law by other employees for purposes of a claim under the Whistleblower Act. See Ch. 203A, *Employment Litigation*, § 203A.70[4][b].

No Violation of Statute Prohibiting Discharge of Employee for Filing Workers' Compensation Claim. The Texas Supreme Court held in *Kingsaire, Inc. v. Melendez*, 477 S.W.3d 309, 314–316 (Tex. 2015), that an employer's uniform enforcement of its leave policy, which provided that employees could take no more than 12 weeks of FMLA leave, and its consistent termination of employees who failed to return to work when that leave expired, mandated an employee's termination on the expiration of the employee's FMLA leave, overriding the provisions of Tex. Lab. Code § 451.001. See Ch. 203A, *Employment Litigation*, § 203A.80[7][c].

Personal Injury Litigation

Ch. 321, *Medical Malpractice*, has been revised to address recent cases from the Texas Supreme Court and courts of appeals, including:

- *Hebner v. Reddy*, 59 Tex. Sup. Ct. J. 979 (Tex. 2016), which clarified the earlier decision in *Zanchi v. Lane*, 408 S.W.3d 373 (Tex. 2013) that a defendant is a "party" when named in the pleadings, and held that when the former law requiring service of an expert report within 120 days of filing applies, the report may be served before the suit is filed, because the plaintiff need not wait for the 120-day period to begin running before complying (§ 321.15[1], [5]).
- *Christus Health Gulf Coast v. Carswell*, 59 Tex. Sup. Ct. J. 866 (Tex. 2016), which held that a claim that a hospital fraudulently induced the widow of a deceased patient to consent to a private autopsy rather than by a government medical examiner in order to conceal the hospital's prior negligence is a health care liability claim because the alleged representations: (1) arose from the hospital's professional or administrative services; and (2) are directly related to the health care provided to the husband before he died (§§ 321.02[2], [7], [8], 321.12[6]).

Ch. 310, *Premises Liability*, has been revised to address recent cases from the Texas Supreme Court and courts of appeals, including:

- *Ineos USA, LLC v. Elmgren*, 59 Tex. Sup. Ct. J. 1278 (Tex. 2016), which concerned the exceptions to a property owner's liability under Chapter 95 of the Civil Practice and Remedies Code and held that: (1) the statute's protections can only be invoked by the property owner, not an employee or agent, even if acting in a managerial capacity; and (2) if the claimant relies on respondeat superior to impute the employee's negligence to the property owner, the Act applies and bars the claim (§ 310.02[3][d]).
- *First Tex. Bank v. Carpenter*, 59 Tex. Sup. Ct. J. 1142 (Tex. 2016), which held that because "contractor" is not defined by Chapter 95, it has the ordinary meaning of "someone who makes improve-

ments to real property," regardless of whether there is a formal, written contract for the particular work to be done (§ 310.02[3][d]).

- *JPMorgan Chase Bank, N.A. v. Borquez*, 481 S.W.3d 255 (Tex. App.—Dallas 2015, pet. filed), which held that although a bank had twice been robbed, those incidents involved money stolen from the bank's interior, no one was hurt, and they took place more than two years earlier, so it was not foreseeable to the bank that an armored car guard would be robbed and killed while servicing an ATM outside the bank building (§ 310.06[4]).

Ch. 280, *Adjoining Landowners*, and Ch. 311, *Nuisance*, have been revised to include *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 59 Tex. Sup. Ct. J. 1455, 2016 Tex. LEXIS 580 (Tex. 2016), which comprehensively surveyed the law of nuisance and held that: (1) the term "nuisance" does not refer to a cause of action or the defendant's conduct; instead, it refers to the legal injury suffered by an owner or occupant of property from the defendant's conduct; and (2) when the requisite injury is shown, it may be redressed by a claim for intentional nuisance, negligence, or strict liability for conduct that is abnormally dangerous and creates a high degree of risk of serious injury (§ 280.13[4], §§ 311.01[1], 311.02[2]).

Ch. 20, *Damages in Tort*, has been revised to address recent cases from the Texas Supreme Court and courts of appeals, including:

- *Wal-Mart Stores, Inc. v. Forte*, 59 Tex. Sup. Ct. J. 905 (Tex. 2016), which held that because a civil penalty imposed under Tex. Occ. Code § 351.605 constitutes "damages" under Chapter 41 of the Civil Practices and Remedies Code and is not designed to compensate, the penalty also constitutes exemplary damages and cannot be recovered in the absence of actual damages (§ 20.01[2]).
- *KBG Invs., LLC v. Greenspoint Prop. Owners' Ass'n*, 478 S.W.3d 111 (Tex. App.—Houston [14th Dist.] 2015, no pet.), which held that statutory civil damages of $200 per day for violating a restrictive covenant under Property Code Chapter 202 constitute exemplary damages and cannot be recovered in the absence of actual damages (§ 20.01[2], § 285.02[9]).

Ch. 293, *Claims Against Governmental Entities*, has been revised to address recent cases from the Texas Supreme Court and courts of appeals, including:

- *Sampson v. Univ. of Tex. at Austin*, 59 Tex. Sup. Ct. J. 1118 (Tex. 2016), which held that when an item of tangible personal property is placed on government property so as to create a condition that results in a slip-and-fall injury, the claimant is limited to a premises defect cause of action under the Tort Claims Act because no contemporaneous "use" or "condition" of the property is implicated (§ 293.10[5][e], [f], [g]).
- *City of Dallas v. Sanchez*, 59 Tex. Sup. Ct. J. 1540, 2016 Tex. LEXIS 615 (Tex. 2016) (per curiam), which held that when two different 9-1-1 calls concerning victims at the same apartment complex were received, but the responding paramedics errone-

ously concluded that the calls were redundant and left without treating second victim, no claim was stated under the Tort Claims Act because no condition or use of the 9-1-1 system was the proximate cause of the injury (§ 293.10[5][f]).

- *City of El Paso v. Collins*, 483 S.W.3d 742 (Tex. App.—El Paso 2016, no pet.), which held that parents who claimed that a condition of the filtration system at a city-owned pool led to the near drowning of their child were limited to a premises defect theory, and could not plead an alternative claim of negligent use of tangible property (§ 293.10[5][g]).
- *Riddle v. City of Abilene*, 478 S.W.3d 842 (Tex. App.—Eastland 2015, pet. denied), which held that allegations that a city knew that a scoreboard at its softball field was exposed to the elements and was not weatherproofed related only to the *potential* for a dangerous condition to arise over time, and there was no allegation of the city's actual knowledge of the condition at the time of the incident (§ 293.10[5][g]).

Ch. 322, *Professional Malpractice*, has been revised to address recent cases from the Texas Supreme Court and courts of appeals, including:

- *Linegar v. DLA Piper, LLP (US)*, 59 Tex. Sup. Ct. J. 993 (Tex. 2016), which held that the general rule that only the represented entity has standing to sue for an attorney's malpractice does not apply when an individual beneficiary or participant in the entity pleads and proves the necessary attorney-client relationship, malpractice, and resulting damages (§ 322.02[1][f]).
- *Stanfield v. Neubaum*, 59 Tex. Sup. Ct. J. 1495, 2016 Tex. LEXIS 578 (Tex. 2016), which held that when a malpractice claimant seeks to recover unnecessary appellate costs, the claimant must prove that attorney's alleged negligence in the trial court error was the proximate cause of the trial judge's error that was corrected on appeal. In the absence of such proof, judicial error constitutes a new and independent cause that severs any causal connection between the alleged negligence and the appellate costs (§ 322.02[1][c]).
- *U. S. Bank Nat'l Ass'n v. Sheena*, 479 S.W.3d 475 (Tex. App.—Houston [14th Dist.] 2015, no pet.), which held that the disbursement of settlement funds is part of the discharge of a lawyer's duties in representing the client, so claims that the disbursement constituted negligence, tortious interference, conversion, or fraudulent transfer were barred by attorney immunity (§ 322.02[1][f]).

Ch. 291, *Proportionate Responsibility; Contribution and Indemnity*, and Ch. 320, *Products Liability*, have been revised to include *Centerpoint Builders GP, LLC v. Trussway, Ltd.*, 59 Tex. Sup. Ct. J. 1295 (Tex. 2016), which held that when a general contractor on a construction project buys products for incorporation into the project and is reimbursed at cost by the owner, it is not a "seller" of any of the incorporated products and cannot claim statutory indemnity from any product manufacturer under Chapter 82 of the Civil

Practices and Remedies Code (§ 291.05[2][c]; § 320.10[2][a]).

Ch. 333, *Defamation*, has been revised to address recent cases from the Texas Supreme Court and courts of appeals, including:

- *KBMT Operating Co., LLC v. Toledo*, 59 Tex. Sup. Ct. J. 1257 (Tex. 2016), which held that the privilege of Tex. Civ. Prac. & Rem. Code § 73.002 applied to a report that a pediatrician was disciplined for engaging in sexual contact and becoming financially involved with a patient, because an average listener would know that criminal prosecution, not a civil disciplinary proceeding, would have occurred if the patient was a child. Because the plaintiff did not carry its burden to show that the report was false, the defendant was entitled to dismissal under the Texas Citizens Participation Act (TCPA) (§§ 333.02[3], 333.11[4][a], 333.21[1], 333.42).
- *Johnson-Todd v. Morgan*, 480 S.W.3d 605 (Tex. App.—Beaumont 2015, pet. denied), which held that because communications in or relating to judicial proceedings are within the right to petition under the TCPA, the statute's protections may be invoked by either a litigant or an attorney in such a proceeding (§ 333.42[1]).
- *Tervita, LLC v. Sutterfield*, 482 S.W.3d 280 (Tex. App.—Dallas 2015, pet. denied), which held that a plaintiff's claim of discrimination for filing a workers' compensation claim arises from the Labor Code and common law, not from the insurance policy to provide compensation benefits, so the TCPA exemption for actions brought under the Insurance Code or arising from out of an insurance contract was inapplicable (§ 333.42[1]).

Ch. 331, *False Imprisonment*, has been revised to include *In re Phillips*, 59 Tex. Sup. Ct. J. 828 (Tex. 2016), which held that the Comptroller's authority to decide how much the State owes to an exonerated inmate for child support arrearages under the Wrongful Imprisonment Act is exclusive, so a court's decision as to how much one parent owes another is not binding; instead, the Comptroller must compute the amount due to the claimant under the statutory formula provided by the Act (§ 331.08[3]).

Insurance Litigation

Ch. 340, *Workers' Compensation*, has been revised to address recent cases from the Texas Supreme Court and courts of appeals, including:

- *Tex. Dep't of Ins. v. Bonnie Jones & Am. Home Assur. Co.*, 59 Tex. Sup. Ct. J. 1442, 2016 Tex. LEXIS 575 (Tex. 2016), which held that Labor Code Section 410.256(b) requiring any settlement of judicial review proceedings to adhere to all appropriate provisions of the law permits approval of a settlement only for those benefits supported by either a binding administrative determination or judicial decision (§§ 340.10[4], 340.32[1]).
- *TIC Energy & Chem., Inc. v. Martin*, 59 Tex. Sup. Ct. J. 1052 (Tex. 2016), which held that Labor Code Section 406.122(b) stating that a subcontractor and its employees are not the general con-

tractor's employee in specified circumstances is the general rule that may be displaced by an exception found in Section 406.123. The inclusion of language that meets the latter's requirements demonstrates the parties' intent to invoke the exception, so the subcontractor is the general contractor's employee and may claim the protections of the exclusive remedy provision (§§ 340.01[2], 340.03[6]).

- *Am. Cas. Co. v. Bushman*, 480 S.W.3d 667 (Tex. App.—San Antonio 2015, no pet.), which held that when the Workers' Compensation Division fails to provide the hearing officer's decision to counsel for a represented party, the 15-day period to request review by the appeals panel does not begin to run until counsel receives notice (§ 340.23[4]).

Ch. 341, *Liability Insurance*, and Ch. 345, *Unfair Insurance Practices*, have been revised to include *Seger v. Yorkshire Ins. Co.*, 59 Tex. Sup. Ct. J. 1208 (Tex. 2016), which held that: (1) a surplus line insurer is an "unauthorized" insurer because it is by definition unlicensed, and cannot enforce its policy unless it establishes that the exception of Tex. Ins. Code § 101.201 applies; (2) when the exception does not apply, the policy is voidable at the election of the insured, which has the option to either enforce its rights under the policy or rescind it; and (3) enforcement by the insured is complete ratification of the policy, including its exceptions or exclusions from coverage, so a *Stowers* action is barred when there is no coverage (§ 341.17[2], § 345.25[2]).

Real Estate Litigation

Ch. 255, *Real Property Security Interests*, has been revised to address recent cases from the Texas Supreme Court and courts of appeals, including:

- *Garofolo v. Ocwen Loan Servicing*, L.L.C., 59 Tex. Sup. Ct. J. 920 (Tex. 2016), which concerned the constitutional conditions and requirements of home equity lending and held that: (1) they are not separately enforceable constitutional rights of the borrower; instead, they are merely a condition of the lender's right to foreclose, and provide a defense when the lender attempts to foreclose on a noncompliant loan; and (2) when the loan complies with all constitutional requirements at origination, the failure of the lender to comply with any post-origination obligations is actionable only as a breach of contract (§ 255.06[5][a]).
- *Wood v. HSBC Bank USA, N.A.*, 59 Tex. Sup. Ct. J. 877 (Tex. 2016), which held that when a home equity loan is noncompliant at origination, it is neither void, nor voidable; instead, it is invalid unless and until the defect is cured. Accordingly, no statute of limitations applies to cut off a homeowner's right to quiet title to real property encumbered by an invalid home equity lien (§ 255.06[5][a], § 257.05[1]).
- *Bauder v. Alegria*, 480 S.W.3d 92 (Tex. App.—Houston [14th Dist.] 2015, no pet.), which held that when a mortgage servicer failed to send a notice to cure and notice of

foreclosure to the debtor's last known address, the trial court properly set aside the foreclosure sale (§ 255.03[4]).

Ch. 261, *Condemnation*, has been revised to address recent cases from the Texas Supreme Court and courts of appeals, including:

- *Harris Cnty. Flood Control Dist. v. Kerr*, 59 Tex. Sup. Ct. J. 1185 (Tex. 2016), which held that a mere allegation that the government permitted private development of property without mitigating the risk of potential flooding does not state a takings claim because: (1) there is no affirmative conduct of the government in merely permitting development; (2) the government lacks knowledge that any specific property will flood; and (3) approving private development is not a public use of the property (§ 261.21[2]).
- *In re Lazy W Dist. No. 1*, 59 Tex. Sup. Ct. J. 1016 (Tex. 2016), which held that when a government landowner files a plea to the jurisdiction arguing that sovereign or governmental immunity prevents condemnation of its property, the trial court may decide the immunity issue either before or after appointing commissioners to determine the value of the property, and deciding the issue after the appointment is not an interference with the administrative phase of the proceeding (§§ 261.04[2], 261.44, 261.45[1]).

Ch. 282, *Landlord and Tenant*, has been revised to address recent cases from the Texas Supreme Court and courts of appeals, including *Phila. Indem. Ins. Co. v. White*, 59 Tex. Sup. Ct. J. 743 (Tex. 2016), which concerned a residential apartment lease and held that when the landlord's duty to repair is inapplicable: (1) the parties are free to contract for any allocation of repair costs permitted by the Property Code and public policy; and (2) a lease clause requiring the tenant to pay for any damages that are tenant-caused is enforceable, and the tenant's absence of negligence is insufficient to prove the absence of causation (§ 282.21[2]).

Ch. 280, *Adjoining Landowners*, has been revised to include *Coyote Lake Ranch, LLC v. City of Lubbock*, 59 Tex. Sup. Ct. J. 967 (Tex. 2016), which held that when a landowner contracts with a developer to drill wells to capture groundwater and bring it to the surface, a "severed groundwater estate" is created that is functionally analogous to the mineral estate created by an oil and gas lease. Accordingly, the accommodation doctrine applies to resolve conflicts between the two estates, unless the parties' contract controls how the surface estate is to be used (§ 280.11[2]).

Ch. 254, *Deeds and Conveyances*, has been revised to address recent cases from the Texas courts of appeals, including:

- *West 17th Res., LLC v. Pawelek*, 482 S.W.3d 690 (Tex. App.—San Antonio 2015, pet. filed), which held that when the grantor signed an unambiguous deed conveying the entire property, the grantor's failure to state her capacity as trustee of a trust that owned 1/10 of the property did not affect the validity of the deed, and there was no implied reservation of the trust's interest (§ 254.03[3]).
- *Huff Energy Fund, L.P. v. Longview Energy Co.*, 482 S.W.3d 184 (Tex. App.—San An-

tonio 2015, pet. filed), which held that a motion to expunge a notice of lis pendens must be addressed to the trial court, because a court of appeals has no power to order expunction (§ 254.101[1]).

Ch. 260, *Real Property Tax Suits*, has been revised to address recent cases from the Texas courts of appeals, including:

- *City of Conroe v. TPProperty LLC*, 480 S.W.3d 545 (Tex. App.—Beaumont 2015, no pet.), which held that if a trial court acquires jurisdiction over an action before the taxing unit acts in a way that aggrieves the taxpayer, exhaustion of administrative remedies by the taxpayer is not required (§ 260.04[1][b]).
- *Hydrogeo, LLC v. Quitman Indep. Sch. Dist.*, 483 S.W.3d 51 (Tex. App.—Texarkana 2016, no pet.), which held that the statute preserving the defense of nonownership in a suit to collect delinquent taxes is expressly limited to a suit "to enforce personal liability for the tax" [Tex. Tax Code § 42.09(b)(1)], so when the only remedy sought by the taxing unit is a lien on the property, the defense is unavailable (§ 260.03[4], [5]).
- *MidCon Compression, L.L.C. v. Reeves Cnty. Appraisal Dist.*, 478 S.W.3d 804 (Tex. App.—El Paso 2015, pet. filed), which held that an award of attorney's fees is unavailable in a suit challenging the taxability of the property, rather than its appraised value (§ 260.04[3][b]).

Family Law Proceedings

Termination of Parental Rights. The Texas courts of appeals are divided on the question of whether an affidavit of voluntary relinquishment that includes a statement that termination is in the child's best interest is sufficient, standing alone, to support a best interest finding. See Ch. 381, *Termination of Parent-Child Relationship*, § 381.03[2][c][iii].

Appointed Counsel in DFPS Termination Cases. An indigent parent's right to a court-appointed attorney extends to proceedings in the Texas Supreme Court, including the filing of a petition for review. Counsel may still file an *Anders* brief in the court of appeals but must have more than "dissatisfaction" with the client to justify withdrawal. See Ch. 381, *Termination of Parent-Child Relationship*, § 381.05[4][a].

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