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Dorsaneo, Texas Litigation Guide

Publication 719 Release 127 December 2017

HIGHLIGHTS

2017 Statutory Updates

- This release includes extensive coverage of the statutory updates passed during the Texas Legislature's 85th Regular Session.

Texas Supreme Court Jurisdiction

- Amendments to the Government Code significantly expand the appellate jurisdiction of the Texas Supreme Court. See Chs. 151, 153.

Scope of Employment

- The Texas Supreme Court has held that whether a government employee is acting within the scope of employment under the Tort Claims Act is determined objectively; the employee's subjective motivation is irrelevant. See Ch. 293.

Exemplary Damages

- The Texas Surpeme Court has held a ratio between compensatory and exemplary damages of 48:1 was constitutionally excessive for due process purposes. See Ch. 20.

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.

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All Units

2017 Statutory Updates. This release includes extensive coverage of the statutory updates passed during the Texas Legislature's 85th Regular Session, including HB 1761 which revises the jurisdiction of the Texas Supreme Court for judgments and orders entered on or after September 1, 2017.

Pretrial, Trial, and Appellate Practice

Contingent Fee Agreement Need Not Be in Writing. This release includes a discussion of *Gillespie v. Hernden*, 516 S.W.3d 541, 552 (Tex. App.—San Antonio 2016, pet. denied), which provides that a contingent fee agreement need not be in writing if the client received the protections afforded by the Texas Disciplinary Rules of Professional Conduct. See Ch. 3, *Professional Responsibility*, § 3.04[2][b].

Canons of Statutory Construction. This release discusses *Cadena Comercial USA Corp. v. Tex. Alcoholic Bev. Comm'n*, 518 S.W.3d 318 (Tex. 2017), in which the Texas Supreme Court explained and applied many rules of statutory construction when it interpreted Texas's "tied house" statutes. See Ch. 4, *Statutory Construction*, §§ 4.01–4.03.

Statutory Deadline Does Not Allow Substantial Compliance. In *Bankdirect Capital Fin., LLC v. Plasma Fab, LLC*, 519 S.W.3d 76, 2017 Tex. LEXIS 450, *12 (Tex. 2017), the Texas Supreme Court held that substantial compliance with a statutorily required time period is insufficient and does not comply with the language of the statute. See Ch. 4, *Statutory Construction*, § 4.05[1][c].

Effect of Texas Citizens Participation Act on Presuit Deposition. In *In re Elliott*, 504 S.W.3d 455, 462–466 (Tex. App.—Austin 2016, no pet. h.), the court held that presuit depositions are stayed along with all other discovery after a defendant files a motion to dismiss under the Texas Citizens Participation Act. See Ch. 10, *Depositions Before Suit*, § 10.01.

Misidentification Versus Misnomer. The case of *Brown v. Valiyaparampil*, 507 S.W.3d 773, 775–776 (Tex. App.—El Paso 2015, pet. denied), is discussed in this release, in which the court of appeals held that when a plaintiff is mistaken as to which of two defendants is the correct one, and there is actually a party by the name of the erroneously named defendant, the plaintiff has misidentified the defendant and the statute of limitations is not tolled. See Ch. 12, Pleading the Parties, § 12.02[4].

Adding New Claims After Class Certification Denied. In *Asplundh Tree Expert Co. v. Abshire*, 517 S.W.3d 320, 342 (Tex. App.—Austin 2017, no pet. h.), the court of appeals held that new claims presented by plaintiffs after a class-action certification has been denied are tolled if the claims are "substantially similar" to the class claims, meaning that they share a common factual basis and legal nexus so that the defendant would rely on the same evidence and witnesses in its defense. See Ch. 13, *Class Actions*, § 13.06[3][d].

Specific Jurisdiction Finding Reversed. In *M&F Worldwide Corp. v. Pepsi-Cola Metro. Bottling Co.*, 512 S.W.3d 878, 887–890 (Tex. 2017), the Texas Supreme Court held that Texas did not have specific jurisdiction over defendants when, although they held planning meetings in Texas, the defendants did not seek to do business in Texas or commit a tort in Texas. See Ch. 32, *Personal Jurisdiction and Service on Nonresidents*, § 32.04[1][b].

Agreeing to Texas Arbitration Does Not Mean Agreeing to Personal Jurisdiction. Included in this release is *Guam Indus. Servs. v. Dresser-Rand Co.*, 514 S.W.3d 828, 834–837 (Tex. App.—Houston [1st Dist.] 2017, no pet. h.), in which the court of appeals held that a party agreeing to arbitration in Texas did not consent to personal jurisdiction in Texas for suits unrelated to the arbitration. See Ch. 32, *Personal Jurisdiction and Service*

on Nonresidents, § 32.04[2][b][iv].

Constructive Trusts. The Texas Supreme Court's opinion in *Kinsel v. Lindsey*, ___ S.W.3d ___, 2017 Tex. LEXIS 477, *32–*33 (Tex. May 26, 2017), in which the Court discusses the variety of permissible bases for imposition of a constructive trust, has been added to Ch. 55, *Constructive Trusts* (see § 55.02[1]).

Privileges. An amendment to the Family Code creates a privilege for the protection of victims of family violence; discussion has been added to Ch. 90, *Discovery: Scope and Limitations* (see § 90.06[4][h]).

Enforcement of Judgments. An amendment to the turnover statute, Tex. Civ. Prac. & Rem. Code § 31.002, eliminated a requirement that the statute apply only to property that "cannot readily be attached or levied on by ordinary legal process"; this change has been noted throughout Ch. 132, *Enforcement of Judgments*.

Foreign Judgments. The legislature enacted a new version of the Uniform Foreign-Country Money Judgments Recognition Act as Chapter 36A of the Texas Civil Practice and Remedies Code, repealing the former version; Ch. 134, *Foreign Judgments*, has been substantially revised to discuss the new Act.

Texas Supreme Court Jurisdiction. Amendments to the Government Code significantly expand the appellate jurisdiction of the Texas Supreme Court, especially with respect to interlocutory orders, and eliminate former, more restrictive bases of jurisdiction including conflicts and dissent jurisdiction; these changes have been incorporated into Ch. 151, *Appellate Proceedings in Supreme Court*, and Ch. 153, *Accelerated Appeals*.

Business and Commercial Litigation

Public Benefit Corporations. New provisions have been added to the Texas Business Organizations Code (Tex. Bus. Orgs. Code §§ 21.951–21.959), which govern a for-profit corporation that elects to be a public benefit corporation. See Ch. 160, *Texas Business Organizations Code*, § 160.21[13].

Certificate of Validation of Defective Corporate Act. Tex. Bus. Orgs. Code § 21.908 has been substantially amended regarding the filing of a certificate of validation with respect to ratification of a defective corporate act. See Ch. 160A, *Corporate Management*, § 160A.13[3].

Penalty for Refusing to Permit Partner to Examine LP's Records. A new section has been added to the Texas Business Organizations Code (Tex. Bus. Orgs. Code § 153.5521), which imposes a penalty on a limited partnership that refuses to allow a partner or an assignee of a partnership interest to examine and copy specified records of the partnership. See Ch. 182, *Limited Partnership*, § 182.04[3][a].

Penalty for Refusing to Permit Member to Examine LLC's Records. A new section has been added to the Texas Business Organizations Code (Tex. Bus. Orgs. Code § 101.503), which imposes a penalty on a limited liability company that refuses to allow a member to examine and copy specified records of the company. See Ch. 183, *Limited Liability Company*, § 183.04[3][e].

Service of Process on Series of LLC. New provisions have been added to the Texas Business Organizations Code (Tex. Bus. Orgs. Code §§ 5.301–5.306), which apply to service of process, notice, or demand on a series of a domestic limited liability company or a series of a foreign entity. See Ch. 183, *Limited Liability Company*, § 183.13[9].

Definition of "Trade Secret." Tex. Civ.

Prac. & Rem. Code § 134A.002(6) has been amended to significantly expand the statutory definition of a "trade secret" under the Texas Uniform Trade Secrets Act. See Ch. 200B, *Trade Secrets*, § 200B.01.

Excluding Party's Representative From Hearing Involving Trade Secret. In *In re M-I L.L.C.*, 505 S.W.3d 569 (Tex. 2016), the Texas Supreme Court held that trial courts have authority under the Texas Uniform Trade Secrets Act to exclude a party's representative from portions of a temporary injunction hearing involving the opposing party's alleged trade secret information about which the representative was potentially unaware. The Court rejected the contention that only members of the general public may be excluded from such a hearing. See Ch. 200B, *Trade Secrets*, § 200B.25[1].

Requiring Verification of Identity in Credit Card Transactions. A new section has been added to the Texas Business and Commerce Code (Tex. Bus. & Com. Code § 508.002), which provides that a merchant in a point of sale transaction may require an individual using a credit or debit card to provide photo identification verifying the individual's identity as the cardholder. See Ch. 220A, *Improper Business Practices*, § 220A.10[7].

Trade-In Credit Agreements for Certain Motor Vehicle Retail Installment Sales. New provisions have been added to the Texas Finance Code (Tex. Fin. Code §§ 348.001(11), 348.125), relating to trade-in credit agreements offered in connection with certain motor vehicle retail installment contracts. See Ch. 233, *Credit Disclosures*, § 233.02[3][d][vi].

Debt Cancellation Agreements for Retail Vehicle Installment Sales. New provisions have been added to the Texas Finance Code (Tex. Fin. Code §§ 345.084, 354.001) relating to debt cancellation agreements offered in connection with certain vehicle retail installment contracts. See Ch. 233, *Credit Disclosures*, § 233.02[3][d][vii].

Debt Cancellation Agreements for Certain Vehicle Leases. New provisions have been added to the Texas Finance Code (Tex. Fin. Code §§ 397.001–397.009) relating to debt cancellation agreements offered in connection with certain vehicle leases. See Ch. 233, *Credit Disclosures*, § 233.02[3][d][viii].

Personal Injury Litigation

Significant recent developments in the area of personal injury litigation include:

Adoption of Civil Practices and Remedies Code Chapter 116 to limit the ability of government units to settle claims brought against them in certain specified circumstances (§§ 102.04[5], 293.16[6]).

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

- ☐ *Hersh v. Tatum*, 60 Tex. Sup. Ct. J. 1547 (Tex. 2017), which held that whether an action is based on one of the constitutional rights listed in the Texas Citizens Participation Act (TCPA) is determined by the allegations of the plaintiff's petition, so the defendant's denial of making the alleged communication does not remove it from the Act (§ 333.42[2][e]).
- ☐ *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895 (Tex. 2017), another TCPA case that held that the alleged statements need only be made "in connection" with any covered matter, so the court of appeals erred in requiring more

than a “tangential relationship” for the Act to apply (§ 333.42[1][b]).

- *Exxon Mobil Corp. v. Rincones*, 60 Tex. Sup. Ct. J. 1054 (Tex. 2017), which held that the publication element of a defamation claim cannot be satisfied by a theory of compelled self-disclosure, and no independent cause of action exists for compelled self-defamation (§ 333.04[3][b]).
- *Bedford v. Spassoff*, 60 Tex. Sup. Ct. J. 1213 (Tex. 2017) (per curiam), which held that an accusation that a baseball coach had an affair with the defendant’s wife and was not disciplined by the club was not defamation per se because it did not accuse either the coach or the club of lacking a peculiar or unique skill related to baseball or to running a baseball organization (§ 333.03[2]).
- *Brady v. Klentzman*, 515 S.W.3d 878 (Tex. 2017), which held that an article about alleged misconduct and intimidation by a police chief in response to his son’s interactions with law enforcement was a matter of public concern, so the trial court erred in failing to require the son to prove that the article was false (§§ 333.02[3], 333.10[1], [3]).

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

- *Horizon Health Corp. v. Acadia Healthcare Co.*, 60 Tex. Sup. Ct. J. 1083 (Tex. 2017), which held that when a case involves multiple defendants: (1) each must be found guilty of an aggravating circumstance before that defendant can be assessed exemplary damages; and (2) the guideposts for deciding whether the award is excessive must be applied to each individually to determine whether the specific award against that defendant violates due process (§ 20.01[2]).
- *Tom Bennett & James B. Bonham Corp. v. Grant*, 60 Tex. Sup. Ct. J. 791 (Tex. 2017), which held that in computing the ratio between compensatory and exemplary damages for due process purposes, any potential recovery under the Wrongful Imprisonment Act should not have been considered because any criminal prosecution was barred by limitations. Excluding this potential recovery left a ratio of 48:1, which was unconstitutionally excessive (§ 20.01[2][d]).

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

- *Engelman Irrigation Dist. v. Shields Bros.*, 514 S.W.3d 746 (Tex. 2017), which held that although a government entity’s immunity from suit is jurisdictional in the sense that is cannot be waived and may be raised at any time during the litigation, it does not prevent the entry of a judgment against the government unit, and does not make that judgment void when it has become final, unappealable, and entitled to res judicata effect (§ 293.01[1]).
- *Marino v. Lenoir*, 60 Tex. Sup. J. 832 (Tex. 2017), which held that

both actual control of the work performed and compensation for the person is required for an individual to be an "employee" under the Tort Claims Act, so that a mere legal right to control is insufficient (§ 293.10[3][b]).

- ☐ *Laverie v. Wetherbe*, 60 Tex. Sup. Ct. J. 690 (Tex. 2016), which held that whether a government employee is acting within the scope of employment under the Tort Claims Act is determined objectively, so that the employee's subjective motivation in engaging in the alleged conduct is irrelevant (§§ 293.10[3][c], 293.16[3][a]).
- ☐ *Univ. of the Incarnate Word v. Redus*, 60 Tex. Sup. Ct. J. 908 (Tex. 2017), which held that although a private university is generally not a government unit, the operation of the university's police force is authorized by and subject to the Education Code, and individual officers must be licensed as peace officers, so when a claim arises from the university's law enforcement functions, it is a "government unit" entitled to take an interlocutory appeal from any denial of its immunity defense (§§ 293.10[3][a], 293.13[4]).
- ☐ *Hall v. McRaven*, 508 S.W.3d 232 (Tex. 2017), which held that when the chancellor of a state university system had absolute discretion in determining what educational records could be withheld, disclosed, or redacted under federal privacy laws, any error the chancellor might have made was not *ultra vires*, so the chancellor had immunity from suit (§ 293.01[2]).

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

- ☐ *Melden & Hunt, Inc. v. E. Rio Hondo Water Supply Corp.*, 60 Tex. Sup. Ct. J. 1204 (Tex. 2017), which held that the statutory requirement for a certificate of merit in support of a claim against a design professional to state the "factual basis" of the claims refers to the events or circumstances giving rise to the professional errors or omissions identified, and the certificate need not address each element of a liability theory or cause of action pled by the plaintiff (§ 322.04[2][d]).
- ☐ *Pedernal Energy, LLC v. Bruington Eng'g, LTD.*, 60 Tex. Sup. J. 781 (Tex. 2017), which held that: (1) although the failure to file a certificate of merit to support a claim against a design professional requires dismissal, the trial court has discretion to dismiss with or without prejudice; and (2) the plaintiff need not establish "good cause" in order to avoid dismissal with prejudice (§ 322.04[2][d]).
- ☐ *Levinson Alcoser Assocs., L.P. v. El Pistolón II, Ltd.*, 513 S.W.3d 487 (Tex. 2017), which held that although an author's qualifications may be established by the record in the case, when the only evidence is the certificate of merit itself, failure to allege the author's knowledge in the area of practice requires dismissal (§ 322.04[2][d]).

Chapter 290, *Negligence*, has been revised to include recent cases from the

Texas Supreme Court and courts of appeals, including:

- ☐ *Pagayon v. Exxon Mobil Corp.*, 60 Tex. Sup. Ct. J. 1405 (Tex. 2017), which held that: (1) an employer may not be liable for negligent hiring, supervision, or retention unless the employer owed a duty to the injured party; and (2) whether to impose a duty is a question of law for the court to decide from the facts surrounding the occurrence in question, weighing the risk, foreseeability, and likelihood of injury in requiring employers to control employees, versus the burdens on and consequences to employers, and the social utility and realities of the workplace (§ 290.32[1][b]).
- ☐ *Exxon Mobil Corp. v. Rincones*, 60 Tex. Sup. Ct. J. 1054 (Tex. 2017), which held that although a refinery owner required all subcontractors to have an employee drug-testing program, when the owner did not control which testing facility would be selected by the subcontractor, or any other details of the tests, the owner could not be liable in negligence for te employee's job loss and other damages after an alleged false positive (§ 290.32[1][b]).
- ☐ *B.C. v. Steak N Shake Operations, Inc.*, 512 S.W.3d 276 (Tex. 2017), which held that when the plaintiff alleges a single incident of assault, and seeks to impose direct liability on the employer for its own negligence, the mere fact that the assault took place in the workplace does not prevent a common law claim, even if the facts would also support bringing the claim before the Texas Commission on Human Rights (§ 290.32[1][b]).

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

- ☐ *United Scaffolding, Inc. v. Levine*, 60 Tex. Sup. Ct. J. 1515 (Tex. 2017), which held that: (1) a claim that the plaintiff fell from scaffolding assembled by the defendant was for premises liability only because it was undisputed that assembly was finished and the fall resulted from the condition of the scaffolding after it was assembled, not the activity of assembling it; and (2) because the plaintiff obtained jury findings as to general negligence only, the defendant was entitled to rendition of judgment, not merely a new trial (§§ 310.01[2], 310.02[3]).
- ☐ *UDR Tex. Props., L.P. v. Petrie*, 517 S.W.3d 98 (Tex. 2017), which held that: (1) the risk of future crimes must be *both* foreseeable *and* unreasonable before a premises liability duty may be imposed on the owner; (2) the five factors of *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749 (Tex. 1998), apply only to the foreseeability element; and (3) when all evidence introduced relates to foreseeability only, no duty may be imposed on the property owner (§ 310.06[4]).

Ch. 321, *Medical Malpractice*, has been revised to include recent cases from the Texas Supreme Court and courts of appeals, including *Columbia Valley Healthcare Sys., L.P. v. Zamarripa*, 60 Tex. Sup. Ct. J. 1189 (Tex. 2017), which held that an

expert report in support of a health care liability claim must show proximate cause, so it must address both (1) foreseeability and (2) cause-in-fact; an expert's mere ipse dixit, i.e., a conclusory statement of causation without any accompanying facts, is insufficient (§ 321.15[1A]).

Insurance Litigation

Significant recent developments in the area of insurance litigation include:

Adoption of Insurance Code Chapter 542A to govern first-party claims by an insured under a property insurance policy for damage to or loss of property caused in whole or in part by forces of nature. The new statute both requires at least 60 days notice to the insurer before filing suit, and gives the insurer certain inspection rights (§§ 343.13[2], 345.03[3], 345.30[1]).

Promulgation of a new authorization form under Civil Practices & Remedies Code Section 74.052 for the release of medical and billing records of a patient or other claimant asserting a health care liability claim (§ 321.101).

Ch. 341, *Liability Insurance*, has been revised to include recent cases from the Texas Supreme Court and courts of appeals, including:

- ☐ *Great Am. Ins. Co. v. Hamel*, 60 Tex. Sup. Ct. J. 1257 (Tex. 2017), which held that: (1) an insurer that wrongfully refuses to defend its insured is barred from collaterally attacking a judgment or settlement between the insured and the plaintiff if that result was reached through "fully adversarial"proceedings; and (2) that test is met only when, at the time of the underlying trial or settlement, the insured bore an actual risk of liability for the damages awarded or agreed upon, or had some other meaningful incentive to ensure that the judgment or settlement accurately reflects the plaintiff's damages and thus the insured's loss (§§ 341.04[3][c], 341.100[1], 345.41).
- ☐ *Great Am. Ins. Co. v. Primo*, 512 S.W.3d 890 (Tex. 2017), which held that a policy's "insured-v.-insured" exclusion was unambiguous and barred any claim by an insured's assignee as a matter of law (§ 341.06[1]).
- ☐ *Bankdirect Capital Fin., LLC v. Plasma Fab, LLC*, 60 Tex. Sup. Ct. J. 892 (Tex. 2017), which held that the cancellation provision of the Premium Finance Act, which mandates at least 10 days notice of the intent to cancel or the company "may not cancel" the policy, requires strict rather than substantial compliance, so that when only nine days notice was provided, both the notice and the subsequent cancellation were ineffective and the policy remained in place (§ 341.03[4][c]).

Ch. 345, *Unfair Insurance Practices*, has been revised to include recent cases including *USAA Tex. Lloyds Co. v. Menchaca*, 60 Tex. Sup. Ct. J. 672 (Tex. 2017), which addressed the intersection of an insurer's contractual and statutory obligations under the Insurance Code in detail, and announced five distinct but interrelated rules that govern the relationship between contractual and extra-contractual claims: (1) an insured cannot recover policy benefits as damages for a statutory violation if the policy does not provide a right to receive those benefits; (2) an insured who establishes a right to receive policy benefits can recover them as actual damages under the Code if the statutory violation causes the

loss of the benefits; (3) even if the insured cannot establish a present contractual right to policy benefits, the insured can recover benefits as actual damages if the statutory violation caused the insured to lose that contractual right; (4) if a statutory violation causes an injury independent of the loss of policy benefits, the insured may recover damages for that injury even if the policy does not grant the insured a right to benefits; and (5) an insured cannot recover any damages based on a statutory violation if the insured had no right to receive benefits under the policy and sustained no injury independent of a right to benefits (§ 345.09[1]).

Amendments to the Labor Code provisions governing workers' compensation that: (1) changed the name of the official who conducts a contested case hearing in the division from the former "hearing officer" to the more accurate and modern "administrative law judge" (§ 340.23[2]); (2) eliminated the requirement of mere notice of filing of a petition for judicial review, and instead restored the requirement of filing a copy of the petition itself with the division (§§ 340.30[4], 340.120, 340.150[1]); (3) eliminated the "made by the parties" language from Section 410.258, which makes it clear that *any* proposed judgment in a judicial review action must be filed with the division at least 30 days before it is entered, regardless of whether it was reached by fully adversarial proceedings, by agreement of the parties, or by default of the defendant (§§ 340.30[4][g], 340.120).

Real Estate Litigation

Significant developments in the area of property and real estate litigation include:

Amendments to Property Code Section 12.0071 to provide that expunction of a notice of lis pendens eliminates both constructive and actual notice of any information that is derived *or could be* derived from the notice. This effectively reverses the contrary interpretation of the Texas Supreme Court that actual notice that arose independently of the notice of lis pendens was not affected by expunction (§§ 254.07[5][d], 254.101).

Enactment of Property Code Section 93.013 to give a commercial landlord the right to immediate possession if the tenant uses the premises or allows them to be used for certain offenses related to prostitution or human trafficking (§ 282.26[13]).

Adoption of Property Code Chapter 23A to govern partition of "heirs' property," which means real property held by tenants in common that satisfies certain statutory requirements (§ 284.01[3][b]).

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

- ☐ *Davis v. Mueller*, 60 Tex. Sup. Ct. J. 1131 (Tex. 2017), which held that a general granting clause, i.e., a conveyance of all the grantor's property in a specified geographic area, is valid and effective, even if the deed also contains inadequate descriptions of individual interests conveyed (§ 254.03[2]).
- ☐ *Sommers v. Sandcastle Homes, Inc.*, 60 Tex. Sup. Ct. J. 1291 (Tex. 2017), which held that an order expunging a notice of lis pendens that is recorded prior to Sept. 1, 2017 eliminates all constructive or actual notice derived from the notice of lis pendens itself, but does not affect that party's actual notice derived from another source (§§ 254.07[5][d], 254.101).

Ch. 282, *Landlord and Tenant*, has been revised to include recent cases from the Texas Supreme Court and courts of appeals, including *Shields Limited P'ship v. Bradberry*, 60 Tex. Sup. Ct. J. 919 (Tex. 2017), which held that when the nonwaiver clause of a lease expressly stated that acceptance of late rent payments was not a waiver, and the tenant alleged no other conduct that might waive that clause, the landlord had not waived the right to evict by accepting late rentals (§ 282.07[3][f]).

Ch. 283, *Oil and Gas Leases*, has been revised to include recent cases from the Texas Supreme Court and courts of appeals, including:

- ☐ *BP Am. Prod. Co. v. Laddex, Ltd.*, 513 S.W.3d 476 (Tex. 2017), which held that whether a lease terminated under a habendum clause due to the failure to produce in paying quantities over a reasonable time is a fact question for the jury, so the court should not define a particular "window" of time and ask the jury whether production was in paying quantities during that time period (§ 283.03[7]).
- ☐ *Forest Oil Corp. v. El Rucio Land & Cattle Co.*, 60 Tex. Sup. Ct. J. 773 (Tex. 2017), which held that the cause of action created by Section 85.321 of the Natural Resources Code in favor of a person who suffers property damage due to a violation of a conservation law or a Railroad Commission rule is in addition to any common law remedies of the surface estate owner, and the statute does not displace those remedies (§ 283.03[5][c], [18]).
- ☐ *BP Am. Prod. Co. v. Red Deer Res., LLC*, 60 Tex. Sup. Ct. J. 813 (Tex. 2017), which held that a jury finding that a lease terminated under a shut-in royalty clause because the well was not capable of producing in paying quantities on the date it was shut-in was immaterial, because the lease expressly provided that the operative date was the last date gas was sold or used (§ 283.03[8][d]).
- ☐ *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 60 Tex. Sup. Ct. J. 997 (Tex. 2017), which held that when the surface of a tract is leased to drill horizontally into an adjacent formation, the incidental loss of minerals suffered by a well being drilled through the tract's mineral estate is not a sufficient injury to support a claim for trespass (§§ 283.01[1], 283.03[5][c]).
- ☐ *Wenske v. Ealy*, 60 Tex. Sup. Ct. J. 1433 (Tex. 2017), which held that the court of appeals erred in applying a default rule that when a mineral deed conveys some portion of the minerals "subject to" a preexisting royalty interest, the obligation to pay the royalty is shared pro rata (§ 283.01[2][a]).

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

- ☐ *Valero Refining-Tex., L.P. v. Galveston Cent. Appraisal Dist.*, 60 Tex. Sup. Ct. J. 505 (Tex. 2017), which held that a taxpayer is entitled to protest on the same basis as its property was appraised, so when the appraisal district divides a tract into separate components and appraises them separately, a protest may be confined to one or more of those

components, and the taxpayer need not protest as to the entire property (§ 260.04[2][a]).

☐ *ETC Mktg. v. Harris Cnty. Appraisal Dist.*, 60 Tex. Sup. Ct. J. 838 (Tex. 2017), which held that because the state property tax on stored natural gas did not violate the Commerce Clause, Tax Code Section 11.12 did not require a reciprocal exemption of the property (§ 260.01[3]).

Ch. 255, *Real Property Security Interests*, has been revised to include recent cases from the Texas Supreme Court and courts of appeals, including *Kyle v. Strasburger*, 60 Tex. Sup. Ct. J. 1313 (Tex. 2017) (per curiam), which held that an action to quiet title to homestead property due to the failure of both spouses to sign a home equity loan cannot be barred by limitations, but the only relief available is a declaratory judgment that the lien is invalid (§ 255.06[5][a]).

Employment Litigation

Leave for State Employees. New provisions have been added to the Texas Government Code (Tex. Gov't Code §§ 661.251, 661.252, 661.923, and 661.924), governing leave that may be granted to state employees, including employees who are veterans. See Ch. 203, *Employer-Employee Relations*, § 203.37.

Discriminatory Leave Policy. Section 21.0595 has been added to the Texas Labor Code and provides that an employer commits an unlawful employment practice if it administers a leave policy under which an employee is entitled to personal leave to care for or otherwise assist the employee's sick child and the leave policy does not treat in the same manner as an employee's biological or adopted minor child any foster child of the employee who resides in the same household as the employee and is under the conservatorship of the Department of Family and Protective Services. See Ch. 203A, *Employment Litigation*, § 203A.50[5].

Waiver of Immunity in Action by First Responder Under Tex. Lab. Code § 451.001. Section 451.0025 has been added to the Texas Labor Code to provide a waiver of sovereign immunity by a state or local governmental entity that employs a first responder who sues the entity for discrimination under Tex. Lab. Code § 451.001. See Ch. 203A, *Employment Litigation*, § 203A.80[11][b].

Limitation on Liability of Political Subdivision Under Ch. 451 of Tex. Lab. Code. Section 504.002(a-1) has been added to the Texas Labor Code to provide that the liability of a political subdivision under Chapter 451 is limited to money damages of no more than $100,00 for each aggrieved person and a total of $300,00 for each single occurrence of a violation of that chapter. See Ch. 203A, *Employment Litigation*, § 203A.80[12][a].

Assault Claim Against Employer. The Texas Supreme Court has held in *B.C. v. Steak N Shake Operations, Inc.*, 512 S.W.3d 284 (Tex. 2017), that when the gravamen of an employee's claim is assault, the employee has a right to pursue his or her common law claims, even when the alleged assault occurred in the workplace and the claims are against the employer. See Ch. 203A, *Employment Litigation*, § 203A.82[1].

Estates Code Litigation

Uniform Partition of Heirs' Property Act. The legislature has adopted the Uniform Partition of Heirs' Property Act (Tex. Prop. Code § 23A.001 et seq.), which governs the partition of real property held in tenancy in common under specified cir-

cumstances. See Ch. 391, *Descent and Distribution*, § 391.11.

Beneficiary Designation That Transfers Motor Vehicle on Owner's Death. New provisions have been added to the Texas Estates Code (Tex. Estates Code §§ 115.001–115.006), which allow an owner of a motor vehicle to transfer his or her interest in that vehicle to a sole beneficiary effective on the owner's death by designating a beneficiary in accordance with specified procedures. See Ch. 391, *Descent and Distribution*, § 391.13.

Disclosure of Decedent's Digital Assets. Sections 2001.101 and 2001.102 have been added to the Texas Estates Code to provide a procedure by which a personal representative may obtain disclosure of a decedent's digital assets. See Ch. 400, *Managing the Estate*, § 400.01[6].

Distributing Property Not Specifically Devised. Section 405.0015 has been added to the Texas Estates Code to specify the actions that an independent executor may take in distributing property not specifically devised that he or she is authorized to sell. See Ch. 400, *Managing the Estate*, § 400.10[2][d].

Termination of Guardianship on Establishment of ABLE Account. Section 1202.003 has been added to the Texas Estates Code to provide for termination of the guardianship of a ward's estate when all of the ward's assets have been placed in an ABLE account (Texas Achieving a Better Life Experience Program). See Ch. 410, *Appointment of Guardians*, § 410.09[3].

Mental Health Public Defenders Office. Sections 571.0618 and 571.0169 have been added to the Texas Health & Safety Code and authorize courts to establish a mental health public defender office to provide proposed mental health patients with legal representation. See Ch. 415, *Mental Commitments*, § 415.09.

Family Law Proceedings

Temporary Orders Pending Appeal. The Family Code provisions for temporary orders pending appeal have been revised and expanded. See Ch. 360A, *Temporary Orders*, §§ 360A.02[6], 360A.03[7].

Temporary Orders During Pendency of SAPCR Modification Suit. While a suit to modify a SAPCR order is pending, a temporary order creating or changing a geographic restriction may be issued only under limited conditions. See Ch. 360A, *Temporary Orders*, § 360A.03[4][c].

Associate Judges. Amendments to the Family Code have clarified and expanded an associate judge's power to render a final order. Orders signed by an associate judge before May 1, 2017, but never signed by the referring court have been ratified retroactively. See Ch. 360A, *Temporary Orders*, § 360A.10[3][b][ii].

Underage Marriage. Starting September 1, 2017, a marriage is void if either party to the marriage is younger than 18, unless a court has removed the party's disabilities of minority for general purposes. See Ch. 361, *Annulment and Suit To Declare Marriage Void*, § 361.02[5].

Acceptance-of-Benefits Doctrine. In *Kramer v. Kastleman* [508 S.W.3d 211 (Tex. 2017)], the Texas Supreme Court has provided detailed guidance for applying the acceptance-of-benefits doctrine in the context of divorce. See Ch. 362, *Divorce*, § 362.13[8].

MSAs. The Family Code now expressly authorizes a trial court to refuse to enter judgment on a statutorily-compliant MSA if the agreement would expose the child to a person with a history or pattern of past or present physical or sexual abuse. See Ch. 362, *Divorce*, § 362.41[5][b].

Protective Orders. Divorce and SAPCR petitions must now state whether there is a protective order under Family Code Title 4 or Code of Criminal Procedure Chapter 7A or an order for emergency protection under Code of Criminal Procedure Article 17.292 in effect or pending with regard to the parties or a party's child. If so, a copy of the order must be attached to the petition. See Ch. 362, *Divorce*, § 362.100[1][c].

Authorization Agreements. The statutes governing authorization agreements have been revised to expand to pool of parties from relatives to "adult caregivers." The mailing procedures for notifying the nonparticipating parent have been simplified. See Ch. 371, *Conservatorship*, § 371.15.

Temporary Authorization Orders. New Family Code Ch. 35 provides for temporary authorization orders so that a nonparent who has been caring for a child can obtain needed services for the child. See Ch. 371, *Conservatorship*, § 371.16.

Defenses to Termination Under Subsection (O). When termination of parental rights is sought on the ground of failure to comply with a court order, the parent avoids termination by proving that he or she made a good faith effort to comply with the order but was unable to do so through no fault of his or her own. See Ch. 381, *Termination of Parent-Child Relationship*, § 381.03[2][b][xii].

Termination and Child's Best Interest. A new Family Code provision states that a court may not base a finding that termination is in a child's best interest on a finding that the parent home-schooled the child; is economically disadvantaged; has been charged with a nonviolent misdemeanor offense other than family violence; provided low-THC cannabis to a child for whom it was prescribed; or declined immunization for the child for reasons of conscience, including a religious belief. See Ch. 381, *Termination of Parent-Child Relationship*, § 381.03[2][c][i].

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VOLUME 1

Revision

☐	Title page thru xiii	Title page thru xv
☐	1-59 thru 1-63	1-59 thru 1-63
☐	1A-53	1A-53 thru 1A-54.1
☐	1A-159 thru 1A-173.	1A-159 thru 1A-173
☐	2-1 thru 2-17	2-1 thru 2-18.1
☐	2-53 thru 2-55	2-53 thru 2-56.1
☐	3-9 thru 3-11	3-9 thru 3-12.1
☐	3-39 thru 3-41	3-39 thru 3-42.1
☐	3-59 thru 3-63	3-59 thru 3-63
☐	3-79	3-79
☐	3-105 thru 3-107	3-105 thru 3-107
☐	3-119 thru 3-132.1	3-119 thru 3-129
☐	3-156.1 thru 3-163	3-157 thru 3-163
☐	4-9 thru 4-28.7	4-9 thru 4-28.7
☐	4-37 thru 4-45	4-37 thru 4-46.1
☐	4-57 thru 4-63	4-57 thru 4-63
☐	10-5 thru 10-11	10-5 thru 10-11
☐	10-31.	10-31
☐	11-13 thru 11-16.1.	11-13 thru 11-16.1
☐	11-43.	11-43 thru 11-44.1
☐	11-65 thru 11-69	11-65 thru 11-69
☐	12-7 thru 12-14.1	12-7 thru 12-14.1
☐	12-23 thru 12-24.1	12-23 thru 12-24.1
☐	12-33 thru 12-43	12-33 thru 12-43
☐	12-85 thru 12-89	12-85 thru 12-89
☐	13-5 thru 13-7	13-5 thru 13-8.1
☐	13-33 thru 13-34.1	13-33 thru 13-34.1
☐	13-44.1 thru 13-46.1.	13-45 thru 13-46.1
☐	13-62.1.	13-62.1 thru 13-62.2(1)
☐	13-81 thru 13-83	13-81 thru 13-83
☐	13-141 thru 13-147	13-141 thru 13-147
☐	14-13 thru 14-30.1	14-13 thru 14-30.1
☐	14-43 thru 14-45	14-43 thru 14-45

VOLUME 2

Revision

☐	Title page.	Title page
☐	20-17 thru 20-21	20-17 thru 20-22.3

Check As Done	*Remove Old Pages Numbered*	*Insert New Pages Numbered*
☐	20-31 thru 20-46.5	20-31 thru 20-46.6(7)
☐	22-7 thru 22-14.1	22-7 thru 22-14.1
☐	22-22.1 thru 22-34.3	22-23 thru 22-34.3
☐	22-65 thru 22-74.1	22-65 thru 22-74.1
☐	22-89 thru 22-91	22-89 thru 22-91
☐	22-109 thru 22-123	22-109 thru 22-123
☐	31-7 thru 31-8.1	31-7 thru 31-8.1
☐	31-19	31-19 thru 31-20.1
☐	31-42.1 thru 31-43	31-43 thru 31-44.1
☐	31-95 thru 31-99	31-95 thru 31-99
☐	32-17 thru 32-53	32-17 thru 32-54.3
☐	32-64.1 thru 32-65	32-65 thru 32-66.1
☐	32-111 thru 32-113	32-111 thru 32-113
☐	32-127	32-127 thru 32-128.1

VOLUME 3

Revision

Check As Done	*Remove Old Pages Numbered*	*Insert New Pages Numbered*
☐	Title page	Title page
☐	42-41 thru 42-49	42-41 thru 42-49
☐	43-7 thru 43-8.1	43-7 thru 43-8.1
☐	43-23	43-23
☐	43-105 thru 43-109	43-105 thru 43-109
☐	44-15 thru 44-32.1	44-15 thru 44-32.1
☐	44-41 thru 44-55	44-41 thru 44-56.5
☐	44-62.3 thru 44-62.11	44-62.3 thru 44-62.11
☐	44-91	44-91
☐	44-117	44-117
☐	44-129 thru 44-146.3	44-129 thru 44-146.3
☐	45-5 thru 45-21	45-5 thru 45-22.1
☐	45-30.1 thru 45-31	45-31 thru 45-32.1
☐	45-36.5 thru 45-36.7	45-36.5
☐	45-81 thru 45-87	45-81 thru 45-87
☐	46-17	46-17 thru 46-18.1

VOLUME 4

Revision

Check As Done	*Remove Old Pages Numbered*	*Insert New Pages Numbered*
☐	Title page	Title page
☐	55-5 thru 55-7	55-5 thru 55-8.1
☐	55-21 thru 55-25	55-21 thru 55-23

VOLUME 5

Check As Done	*Remove Old Pages Numbered*	*Insert New Pages Numbered*

Revision

☐	Title page.	Title page
☐	61-60.1 thru 61-61	61-61 thru 61-62.3
☐	72-51.	72-51 thru 72-52.1
☐	72-58.1 thru 72-59	72-59 thru 72-60.1

VOLUME 6

Revision

☐	Title page.	Title page
☐	90-91 thru 90-99	90-91 thru 90-100.1
☐	90-114.9	90-114.9 thru 90-114.10(1)

VOLUME 7

Revision

☐	Title page.	Title page
☐	101-47 thru 101-49	101-47 thru 101-49
☐	102-2.1	102-2.1
☐	102-11	102-11 thru 102-12.1
☐	102-33 thru 102-34.1	102-33 thru 102-34.3
☐	102-51 thru 102-53	102-51 thru 102-54.5
☐	102-113	102-113
☐	103-41 thru 103-44.3	103-41 thru 103-44.3
☐	104-9 thru 104-10.1	104-9 thru 104-10.1
☐	104-51 thru 104-53	104-51 thru 104-53
☐	104-75	104-75

VOLUME 8

Revision

☐	Title page.	Title page
☐	120-7.	120-7 thru 120-8.1

VOLUME 9

Revision

☐	Title page.	Title page
☐	132-9 thru 132-11	132-9 thru 132-11
☐	132-39 thru 132-54.1	132-39 thru 132-53
☐	132-71	132-71 thru 132-72.1
☐	132-89 thru 132-99	132-89 thru 132-97
☐	132-129 thru 132-133	132-129 thru 132-133

Check As Done	*Remove Old Pages Numbered*	*Insert New Pages Numbered*
☐	134-1 thru 134-13	134-1 thru 134-13
☐	134-23 thru 134-81	134-23 thru 134-69

VOLUME 10

Revision

☐	Title page.	Title page
☐	141-1 thru 141-9	141-1 thru 141-10.1
☐	145-11	145-11
☐	150-23 thru 150-25	150-23 thru 150-25
☐	150-70.1 thru 150-72.1	150-71 thru 150-72.7
☐	150-143	150-143
☐	151-11 thru 151-27	151-11 thru 151-25
☐	151-39	151-39
☐	151-56.1 thru 151-57	151-57 thru 151-58.1
☐	151-72.9 thru 151-75	151-73 thru 151-76.1
☐	151-101 thru 151-109	151-101 thru 151-110.1
☐	152-11	152-11
☐	152-30.1 thru 152-31	152-31 thru 152-32.1
☐	152-40.1 thru 152-40.5	152-40.1 thru 152-40.5
☐	152-87	152-87 thru 152-88.1
☐	153-11 thru 153-13	153-11 thru 153-13
☐	153-23 thru 153-25	153-23 thru 153-25
☐	153-33	153-33
☐	153-43 thru 153-47	153-43 thru 153-47
☐	153-77 thru 153-81	153-77 thru 153-81

VOLUME 11

Revision

☐	Title page.	Title page
☐	160-1 thru 160-35	160-1 thru 160-36.5
☐	160-47	160-47
☐	160A-9 thru 160A-11	160A-9 thru 160A-11
☐	160A-30.1 thru 160A-43.	160A-31 thru 160A-44.11
☐	160A-67	160A-67
☐	160A-89 thru 160A-91	160A-89 thru 160A-91
☐	161-1 thru 161-8.1	161-1 thru 161-8.1
☐	161-35 thru 161-37	161-35 thru 161-37
☐	162-13 thru 162-14.1	162-13 thru 162-14.1
☐	162-83 thru 162-85	162-83 thru 162-85
☐	163-5 thru 163-9	163-5 thru 163-9
☐	163-25	163-25
☐	164-5.	164-5

Check As Done	*Remove Old Pages Numbered*	*Insert New Pages Numbered*
☐	164-25 thru 164-27	164-25 thru 164-27
☐	165-45 thru 165-47	165-45 thru 165-47
☐	170-7 thru 170-10.1	170-7 thru 170-10.1
☐	170-39 thru 170-40.7	170-39 thru 170-40.9
☐	171-9 thru 171-13	171-9 thru 171-14.1
☐	171-72.1 thru 171-79	171-73 thru 171-83
☐	172-5.	172-5 thru 172-6.1

VOLUME 12

Revision

☐	Title page.	Title page
☐	180-1 thru 180-23	180-1 thru 180-24.1
☐	180-71 thru 180-73	180-71 thru 180-73
☐	181-11 thru 181-12.1	181-11 thru 181-12.1
☐	181-25 thru 181-27	181-25 thru 181-27
☐	181-51 thru 181-53	181-51 thru 181-54.1
☐	181-81	181-81 thru 181-82.1
☐	182-9 thru 182-34.1	182-9 thru 182-34.1
☐	182-77 thru 182-79	182-77 thru 182-79
☐	183-2.1 thru 183-5	183-3 thru 183-5
☐	183-13 thru 183-35	183-13 thru 183-36.7
☐	183-59 thru 183-65	183-59 thru 183-65
☐	190-5 thru 190-16.1	190-5 thru 190-16.1
☐	191-13	191-13 thru 191-14.1

VOLUME 13

Revision

☐	Title page.	Title page
☐	200-13 thru 200-18.1	200-13 thru 200-18.1
☐	200-44.1 thru 200-57	200-45 thru 200-58.3
☐	200-66.1 thru 200-71	200-67 thru 200-72.3
☐	200-115 thru 200-125	200-115 thru 200-125
☐	200B-7	200B-7 thru 200B-8.1
☐	200B-28.1	200B-28.1
☐	200B-45 thru 200B-60.3	200B-45 thru 200B-60.3
☐	200B-81 thru 200B-83.	200B-81 thru 200B-83
☐	203-3 thru 203-8.3	203-3 thru 203-8.3
☐	203-21	203-21 thru 203-22.1
☐	203-47 thru 203-58.1	203-47 thru 203-58.1
☐	203-98.9 thru 203-98.19	203-98.9 thru 203-98.20(1)
☐	203-118.1 thru 203-119	203-119 thru 203-120.1
☐	203-128.1 thru 203-151	203-129 thru 203-151

Check As Done	*Remove Old Pages Numbered*	*Insert New Pages Numbered*
☐	203A-9 thru 203A-10.1	203A-9 thru 203A-10.1
☐	203A-55	203A-55
☐	203A-71 thru 203A-73	203A-71 thru 203A-74.1
☐	203A-119	203A-119 thru 203A-120.1
☐	203A-140.1 thru 203A-148.1	203A-141 thru 203A-148.3
☐	203A-180.1 thru 203A-183	203A-181 thru 203A-184.5
☐	203A-235 thru 203A-243	203A-235 thru 203A-244.1
☐	203A-253	203A-253 thru 203A-254.1
☐	203A-301 thru 203A-323	203A-301 thru 203A-327
☐	205-11	205-11 thru 205-12.1

VOLUME 14

Revision

☐	Title page	Title page
☐	210A-13 thru 210A-14.1	210A-13 thru 210A-14.1
☐	210A-31	210A-31 thru 210A-32.1
☐	210A-68.9	210A-68.9 thru 210A-68.10(1)
☐	212-15	212-15 thru 212-16.1
☐	220-31 thru 220-32.1	220-31 thru 220-32.1
☐	220A-3 thru 220A-5	220A-3 thru 220A-5
☐	220A-41 thru 220A-44.1	220A-41 thru 220A-44.1
☐	220A-53 thru 220A-60.3	220A-53 thru 220A-60.3
☐	220A-83 thru 220A-85	220A-83 thru 220A-85

VOLUME 15

Revision

☐	Title page	Title page
☐	232-43 thru 232-44.1	232-43 thru 232-44.1
☐	233-3	233-3 thru 233-4.1
☐	233-99 thru 233-104.1	233-99 thru 233-104.3
☐	233-175 thru 233-179	233-175 thru 233-179
☐	234-9 thru 234-11	234-9 thru 234-11
☐	234-33 thru 234-37	234-33 thru 234-35

VOLUME 17

Revision

☐	Title page	Title page
☐	250-47	250-47 thru 250-48.1
☐	252-9 thru 252-10.1	252-9 thru 252-10.1
☐	252-34.5 thru 252-34.9	252-34.5 thru 252-34.9
☐	253-27 thru 253-29	253-27 thru 253-30.1

Check As Done	*Remove Old Pages Numbered*	*Insert New Pages Numbered*
☐	254-15 thru 254-23	254-15 thru 254-24.1
☐	254-28.7 thru 254-28.17	254-28.7 thru 254-28.17
☐	254-47 thru 254-48.5	254-47 thru 254-48.5
☐	254-65 thru 254-67	254-65 thru 254-68.1
☐	255-11	255-11
☐	255-34.6(3) thru 255-34.7	255-34.7 thru 255-34.8(1)
☐	255-55 thru 255-66.5	255-55 thru 255-66.7
☐	260-5 thru 260-14.1	260-5 thru 260-14.3
☐	260-37 thru 260-45	260-37 thru 260-46.1
☐	260-51 thru 260-63	260-51 thru 260-64.3
☐	260-75 thru 260-77	260-75 thru 260-78.1
☐	260-85 thru 260-89	260-85 thru 260-90.1
☐	260-94.7 thru 260-94.9	260-94.7 thru 260-94.9
☐	260-94.19 thru 260-94.23	260-94.19 thru 260-94.24(1)
☐	260-94.42(1) thru 260-94.61	260-94.43 thru 260-94.71
☐	261-29 thru 261-30.1	261-29 thru 261-30.1
☐	261-55	261-55 thru 261-56.1
☐	261-78.1 thru 261-79	261-79 thru 261-80.3

VOLUME 18

Revision

Check As Done	Remove Old Pages Numbered	Insert New Pages Numbered
☐	Title page	Title page
☐	280-49 thru 280-52.1	280-49 thru 280-52.3
☐	282-5 thru 282-6.1	282-5 thru 282-6.1
☐	282-26.1 thru 282-27	282-27 thru 282-28.1
☐	282-43 thru 282-45	282-43 thru 282-46.1
☐	282-81	282-81 thru 282-82.1
☐	282-106.1 thru 282-107	282-107 thru 282-108.1
☐	282-115	282-115
☐	283-9 thru 283-12.1	283-9 thru 283-12.1
☐	283-19 thru 283-20.1	283-19 thru 283-20.1
☐	283-31 thru 283-43	283-31 thru 283-44.21
☐	283-88.3 thru 283-88.7	283-88.3 thru 283-88.7
☐	284-11 thru 284-12.1	284-11 thru 284-12.1
☐	285-23	285-23 thru 285-24.1
☐	285-46.13	285-46.13 thru 285-46.14(1)

VOLUME 19

Revision

Check As Done	Remove Old Pages Numbered	Insert New Pages Numbered
☐	Title page	Title page
☐	290-56.1 thru 290-56.5	290-56.1 thru 290-56.5
☐	290-66.3 thru 290-66.7	290-66.3 thru 290-66.9

Check As Done	*Remove Old Pages Numbered*	*Insert New Pages Numbered*
☐	290-93 thru 290-103	290-93 thru 290-104.1
☐	291-31 thru 291-40.2(5)	291-31 thru 291-40.2(5)
☐	293-9 thru 293-11	293-9 thru 293-12.1
☐	293-19 thru 293-20.1	293-19 thru 293-20.3
☐	293-35 thru 293-45	293-35 thru 293-46.1
☐	293-90.1 thru 293-90.3	293-90.1 thru 293-90.3
☐	293-125 thru 293-126.7	293-125 thru 293-126.7
☐	293-136.9 thru 293-136.10(2)(a)	293-136.9 thru 293-136.10(2)(a)
☐	293-136.17	293-136.17
☐	310-7 thru 310-16.1	310-7 thru 310-16.5
☐	310-39 thru 310-40.1	310-39 thru 310-40.1
☐	310-56.9 thru 310-56.17	310-56.9 thru 310-56.17
☐	311-21 thru 311-22.1	311-21 thru 311-22.3

VOLUME 20

Revision

Check As Done	Remove Old Pages Numbered	Insert New Pages Numbered
☐	Title page	Title page
☐	321-99 thru 321-101	321-99 thru 321-102.1
☐	321-104.13	321-104.13 thru 321-104.14(1)
☐	321-104.18(13) thru 321-104.19	321-104.19 thru 321-104.20(3)
☐	321-104.33 thru 321-104.37	321-104.33 thru 321-104.37
☐	321-111 thru 321-112.3	321-111 thru 321-112.3
☐	321-132.1 thru 321-133	321-133 thru 321-134.7
☐	322-29 thru 322-34.5	322-29 thru 322-34.9
☐	322-54.3 thru 322-54.25	322-54.3 thru 322-54.27
☐	330-7 thru 330-8.1	330-7 thru 330-8.1
☐	333-11 thru 333-35	333-11 thru 333-36.1
☐	333-49 thru 333-54.2(1)	333-49 thru 333-54.2(1)
☐	333-88.3 thru 333-88.23	333-88.3 thru 333-88.23

VOLUME 21

Revision

Check As Done	Remove Old Pages Numbered	Insert New Pages Numbered
☐	Title page	Title page
☐	340-3	340-3 thru 340-4.1
☐	340-13	340-13 thru 340-14.1
☐	340-22.1 thru 340-31	340-23 thru 340-32.1
☐	340-37 thru 340-47	340-37 thru 340-48.5
☐	340-56.1 thru 340-56.3	340-56.1 thru 340-56.3
☐	340-62.1 thru 340-83	340-63 thru 340-84.7
☐	340-88.1	340-88.1 thru 340-88.2(1)
☐	340-88.11 thru 340-88.13	340-88.11 thru 340-88.14(1)
☐	340-95 thru 340-113	340-95 thru 340-113

Check As Done	*Remove Old Pages Numbered*	*Insert New Pages Numbered*
☐	341-17 thru 341-20.1	341-17 thru 341-20.3
☐	341-34.1 thru 341-34.3	341-34.1 thru 341-34.3
☐	341-48.1 thru 341-48.3	341-48.1 thru 341-48.3
☐	341-129 thru 341-130.1	341-129 thru 341-130.1
☐	343-1	343-1
☐	343-19 thru 343-32.1	343-19 thru 343-32.17
☐	345-19	345-19 thru 345-20.1
☐	345-27 thru 345-28.1	345-27 thru 345-28.1
☐	345-47	345-47 thru 345-48.3
☐	345-87	345-87 thru 345-88.1
☐	345-98.1 thru 345-100.3	345-99 thru 345-100.5
☐	350-7 thru 350-8.1	350-7 thru 350-8.1
☐	350-23 thru 350-38.1	350-23 thru 350-38.1
☐	351-10.1	351-10.1
☐	351-25 thru 351-31	351-25 thru 351-32.1
☐	351-43 thru 351-45	351-43 thru 351-46.3
☐	351-58.1 thru 351-59	351-59 thru 351-60.7
☐	351-69 thru 351-70.1	351-69 thru 351-70.1

VOLUME 22

Revision

Check As Done	Remove Old Pages Numbered	Insert New Pages Numbered
☐	Title page	Title page
☐	360-25 thru 360-29	360-25 thru 360-29
☐	360-39 thru 360-57	360-39 thru 360-58.1
☐	360-85 thru 360-87	360-85 thru 360-87
☐	360A-1 thru 360A-39	360A-1 thru 360A-40.9
☐	361-7	361-7 thru 361-8.1
☐	361-19 thru 361-33	361-19 thru 361-34.1
☐	362-3	362-3 thru 362-4.1
☐	362-27 thru 362-37	362-27 thru 362-38.1
☐	362-47 thru 362-54.1	362-47 thru 362-54.1
☐	362-99 thru 362-102.3	362-99 thru 362-102.3
☐	362-112.1 thru 362-125	362-113 thru 362-126.1
☐	363-71 thru 363-73	363-71 thru 363-74.1
☐	363-129 thru 363-133	363-129 thru 363-134.1
☐	364-7 thru 364-14.1	364-7 thru 364-14.1
☐	370-3 thru 370-5	370-3 thru 370-5
☐	370-21	370-21 thru 370-22.1
☐	370-31 thru 370-53	370-31 thru 370-54.15
☐	370-78.1 thru 370-85	370-79 thru 370-87
☐	371-5 thru 371-6.1	371-5 thru 371-6.1
☐	371-13	371-13 thru 371-14.1
☐	371-23 thru 371-27	371-23 thru 371-28.5
☐	371-45 thru 371-51	371-45 thru 371-52.1

Check As Done	*Remove Old Pages Numbered*	*Insert New Pages Numbered*
☐	371-89 thru 371-101.	371-89 thru 371-102.5
☐	371-121 thru 371-137	371-121 thru 371-138.5
☐	371A-11 thru 371A-12.1.	371A-11 thru 371A-12.1
☐	371A-41 thru 371A-44.1.	371A-41 thru 371A-44.1
☐	371A-67 thru 371A-93	371A-67 thru 371A-94.1

VOLUME 23

Revision

☐	Title page.	Title page
☐	372-13 thru 372-17	372-13 thru 372-17
☐	372-41	372-41
☐	372-80.1 thru 372-83	372-81 thru 372-84.3
☐	373-9 thru 373-37.	373-9 thru 373-38.1
☐	373-83 thru 373-87	373-83 thru 373-88.1
☐	374-22.1 thru 374-24.1	374-23 thru 374-24.3
☐	380-47 thru 380-53	380-47 thru 380-54.1
☐	380-67 thru 380-71	380-67 thru 380-72.1
☐	381-3 thru 381-4.1	381-3 thru 381-4.1
☐	381-47 thru 381-59	381-47 thru 381-60.1
☐	381-93	381-93 thru 381-94.1
☐	381-103 thru 381-107	381-103 thru 381-105
☐	381-124.13 thru 381-124.17	381-124.13 thru 381-124.19
☐	382-1 thru 382-3	382-1 thru 382-4.1
☐	382-27 thru 382-38.1	382-27 thru 382-38.1
☐	382-47 thru 382-51	382-47 thru 382-53
☐	382-87 thru 382-89	382-87
☐	382-113 thru 382-115	382-113
☐	382-131 thru 382-135	382-131 thru 382-133

VOLUME 24

Revision

☐	Title page.	Title page
☐	390-2.1 thru 390-4.1.	390-3 thru 390-4.1
☐	391-2.1 thru 391-23	391-3 thru 391-24.1
☐	391-41 thru 391-42.11	391-41 thru 391-42.15
☐	391-57 thru 391-61	391-57 thru 391-61
☐	392-21 thru 392-35	392-21 thru 392-36.3
☐	392-47	392-47 thru 392-48.1
☐	392-77	392-77 thru 392-78.1
☐	392-163 thru 392-175	392-163 thru 392-177
☐	393-13 thru 393-15	393-13 thru 393-15
☐	393-31 thru 393-33	393-31 thru 393-34.1

Check As Done	*Remove Old Pages Numbered*	*Insert New Pages Numbered*
☐	393-46.1 thru 393-49	393-47 thru 393-50.1
☐	393-59	393-59 thru 393-60.1
☐	393-81	393-81
☐	393-93 thru 393-99	393-93 thru 393-99
☐	394-18.1 thru 394-27	394-19 thru 394-28.1
☐	394-77 thru 394-78.1	394-77 thru 394-78.1
☐	394-97	394-97 thru 394-98.1
☐	400-1 thru 400-3	400-1 thru 400-4.1
☐	400-19 thru 400-27	400-19 thru 400-28.1
☐	400-53	400-53 thru 400-54.1
☐	400-69 thru 400-85	400-69 thru 400-86.1
☐	400-105	400-105 thru 400-106.1
☐	400-121 thru 400-131	400-121 thru 400-131
☐	401-5	401-5 thru 401-6.1
☐	401-31	401-31 thru 401-32.1
☐	410-1 thru 410-3	410-1 thru 410-4.1
☐	410-17 thru 410-39	410-17 thru 410-40.1
☐	410-61 thru 410-63	410-61 thru 410-64.1
☐	410-77 thru 410-79	410-77 thru 410-80.1
☐	410-95	410-95 thru 410-96.1
☐	410-131	410-131 thru 410-132.1
☐	410-149 thru 410-155	410-149 thru 410-155
☐	411-1 thru 411-9	411-1 thru 411-10.1
☐	411-27	411-27 thru 411-28.1
☐	411-37	411-37 thru 411-38.1
☐	411-69	411-69 thru 411-70.1
☐	411-121 thru 411-125	411-121 thru 411-125
☐	415-3 thru 415-5	415-3 thru 415-6.1
☐	415-13	415-13 thru 415-14.1
☐	415-41 thru 415-55	415-41 thru 415-56.3
☐	415-83 thru 415-87	415-83 thru 415-87

VOLUME 25

Revision

Check As Done	Remove Old Pages Numbered	Insert New Pages Numbered
☐	Title page	Title page
☐	422-8.1 thru 422-11	422-9 thru 422-13
☐	422-23 thru 422-39	422-23 thru 422-40.1
☐	423-13 thru 423-26.3	423-13 thru 423-26.3
☐	423-38.1 thru 423-38.3	423-38.1 thru 423-38.3
☐	424-5	424-5 thru 424-6.1
☐	425-1 thru 425-3	425-1 thru 425-3
☐	425-23 thru 425-25	425-23 thru 425-25
☐	425-55 thru 425-57	425-55 thru 425-57

Check As Done	*Remove Old Pages Numbered*	*Insert New Pages Numbered*

VOLUME 26

Revision

☐	Title page.	Title page
☐	I-15 thru I-19	I-15 thru I-20.1
☐	I-105 thru I-111	I-105 thru I-112.1
☐	I-141 thru I-143.	I-141 thru I-144.1
☐	I-163 thru I-173.	I-163 thru I-173
☐	I-203 thru I-209.	I-203 thru I-210.1
☐	I-369 thru I-433.	I-369 thru I-434.1
☐	I-461 thru I-465.	I-461 thru I-465
☐	I-497 thru I-543.	I-497 thru I-544.1
☐	I-647 thru I-661.	I-647 thru I-662.1
☐	I-751 thru I-757.	I-751 thru I-758.1
☐	I-821	I-821 thru I-822.1
☐	I-859 thru I-869.	I-859 thru I-870.1
☐	I-895 thru I-903.	I-895 thru I-904.1
☐	I-953 thru I-967.	I-953 thru I-968.1
☐	I-1077 thru I-1091.	I-1077 thru I-1091

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