

PUBLICATION UPDATE

Route to: _____ _____ _____ _____
 _____ _____ _____ _____

Dorsaneo, Texas Litigation Guide

Publication 719 Release 130

August 2018

HIGHLIGHTS

Free Speech under TCPA

- *Adams v. Starside Custom Builders* which held that a homeowner's statements about a dispute with the developer over a neighborhood common area implicated the right of free speech under the TCPA because they related to: (1) the plaintiff's products or services in the marketplace as a homebuilder and neighborhood developer; and (2) environmental or community well being. See Ch. 333.

Respondeat Superior Liability

- *Painter v. Amerimex Drilling I, Ltd.* held that: (1) whether a person is an employee for purposes of respondeat superior liability depends on employer's overall right to control the progress, details, and methods of operations of the work, not whether it chooses to exercise that right as to any particular task; and (2) if that overall right of control is established, it extends to all actions within the course and scope of employment, and the court should not evaluate control

and employee status on a task-by-task basis. See Chs. 290 and 302.

Unfair Insurance Practices

- Ch. 345, *Unfair Insurance Practices*, has been revised to include recent cases from the Texas Supreme Court and courts of appeals, including the opinion on rehearing in *USAA Tex. Lloyds Co. v. Menchaca*, 2018 Tex. LEXIS 313, 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 viol-

lation 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. See ch. 345.

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

Pretrial, Trial, and Appellate Practice

Special Relationship. *SCI Tex. Funeral Servs. v. Nelson* held that: (1) a “special relationship” giving rise to the duty to avoid negligent infliction of mental anguish can arise from the nature and circumstances of the parties’ interactions, and contractual privity is not required; and (2) next of kin’s relationship with a funeral home is one such “special relationship,” so mental anguish damages are available for negligent mishandling of a deceased’s remains. See Chapter 20, *Damages in Tort*, § 20.02[3], and ch. 337, § 337.01[2]).

Mental Anguish for Birth of Child. *Hardin v. Obstetrical & Gynecological Assocs. P.A.* held that a person who became an involuntary parent of a healthy child due to tortious conduct is barred by public policy from claiming mental anguish damages based solely on the birth and life of the child. Chapter 20, *Damages in Tort*, § 20.02[3].

Personal Injury Litigation

Discovery Rule. *Schlumberger Tech.*

Corp. v. Pasko held that a personal injury claim accrued for limitations purposes when the claimant was exposed to and burned by caustic chemicals, and the later development of cancer allegedly due to that exposure did not affect accrual of the claim under either the discovery rule, or the latent occupational disease rule. See Ch. 290, *Negligence*, § 290.20[3] and 320.09[2][a].

Formal Notice Excused. *City of San Antonio v. Tenorio* held that: (1) whether formal notice from the claimant is excused because a government unit had actual notice under the Tort Claims Act is a fact question when the evidence is disputed, but it is a question of law when the evidence is undisputed; and (2) though an auto accident occurred immediately after city police officers broke off a vehicular pursuit, city lacked actual knowledge because nothing in the accident reports, witness statements, or other materials showed that the city subjectively believed its officers were at fault in initiating, continuing, or ending the pursuit. See Ch. 293, *Claims Against Governmental Entities*, § 293.16[1][c].

Insurance Litigation

Premises Liability. *Advance Tire & Wheels, LLC v. Enshikar* held that when an injured employee brings a claim that the employer breached the duty to provide necessary instrumentalities, neither the employee’s actual knowledge of the danger presented by the insufficient equipment provided, nor the open and obvious nature of that danger is an available defense to the employer. See Ch. 310, *Premises Liability*, § 310.01[2].

Negligent Hiring. *Cuevas v. Endeavor Energy Res., L.P* held that Chapter 95 of the Civil Practices and Remedies Code limiting an owner’s liability does not apply to a claim of negligent hiring because it necessarily precedes the claimant’s injury,

and does not relate to any property condition or contemporaneous activity that produces that injury. See Ch. 310, *Premises Liability*, § 310.02[3][d].

Negligent Misrepresentation Claim. *JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.* concerned the justifiable reliance element of a negligent misrepresentation claim and held that: (1) the element can be negated as a matter of law when circumstances exist under which reliance cannot be justified; and (2) the entirety of the surrounding circumstances and the sophistication of the parties may be considered in determining whether “red flags” bar justifiable reliance. Ch. 322, *Professional Malpractice*, §§ 322.01[3][b], 336.04[5], 336.06[5][b].

Real Estate Litigation

Exception to Rule Against Perpetuities. *ConocoPhillips Co. v. Koopmann* announced the following limited exception to the rule against perpetuities: in the oil and

gas context, where a defeasible term interest is created by reservation, leaving an executory interest that is certain to vest in an ascertainable grantee, the rule does not invalidate the grantee’s future interest. See Ch. 283, *Oil and Gas Leases*, § 283.02[1].

Scope of Easement. *Lance v. Robinson* held that the scope of an easement may be determined by a declaratory judgment action rather than by trespass to try title because an easement is a nonpossessory interest. Ch. 251, *Trespass to Trial Title*, §§ 251.01, 257.02[2].

Rent Credits and Eviction. *Midway CC Venture I, LP v. O&V Venture, LLC* held that when a tenant sued over the validity of rent credits, the district court erred in temporarily enjoining an eviction action because the suit in district court did not raise a title dispute or affect the right to immediate possession of the premises. Ch. 282, *Landlord and Tenant*, § 282.41[3].

Matthew Bender provides continuing customer support for all its products:

- Editorial assistance—please consult the “Questions About This Publication” directory printed on the copyright page;
- Customer Service—missing pages, shipments, billing or other customer service

matters, +1.800.833.9844.

- Outside the United States and Canada, +1.937.247.0293, or fax (+1.800.828.8341) or email (international@bender.com);
- Toll-free ordering (+1.800.223.1940) or visit www.lexisnexis.com/BrowseUs.



www.lexis.com

Copyright © 2018 Matthew Bender & Company, Inc., a member of the LexisNexis Group.
Publication 719, Release 130, August 2018

LexisNexis, the knowledge burst logo, and Michie are trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.

FILING INSTRUCTIONS

DORSANEO, TEXAS LITIGATION GUIDE

Publication 719 Release 130

August 2018

**Check
As
Done**

- 1. Check the Title page in the front of your present Volume 1. It should indicate that your set is filed through Release Number 129. If the set is current, proceed with the filing of this release. If your set is not filed through Release Number 129, DO NOT file this release. Please call Customer Services at 1-800-833-9844 for assistance in bringing your set up to date.
- 2. This Release Number 130 contains only White Revision pages.
- 3. Circulate the "Publication Update" among those individuals interested in the contents of this release.

**Check
As
Done** Remove Old
Pages Numbered

Insert New
Pages Numbered

For faster and easier filing, all references are to right-hand pages only.

VOLUME 1

Revision

Title page. Title page

VOLUME 2

Revision

Title page. Title page
 20-50.2(4)(i) thru 20-50.2(5) 20-50.2(5) thru 20-50.2(6)(c)
 20-50.2(15) thru 20-50.2(19) 20-50.2(15) thru 20-50.2(19)

VOLUME 7

Revision

Title page. Title page
 102-12.1 thru 102-20.1 102-13 thru 102-20.1
 102-28.1 thru 102-28.3 102-28.1 thru 102-28.3

VOLUME 17

Revision

Title page. Title page
 251-5 thru 251-11 251-5 thru 251-12.1
 252-56.1 thru 252-57 252-57 thru 252-58.5
 254-13 thru 254-14.1 254-13 thru 254-14.1
 254-28.2(1) thru 254-28.17. 254-28.3 thru 254-28.17
 255-25 thru 255-26.1 255-25 thru 255-26.1
 255-34.17 thru 255-34.21 255-34.17 thru 255-34.23
 255-57 thru 255-61 255-57 thru 255-62.1
 257-14.1 thru 257-17 257-15 thru 257-18.1
 260-21 thru 260-22.1 260-21 thru 260-22.1
 260-85 thru 260-87 260-85 thru 260-88.1
 260-94.9 260-94.9 thru 260-94.10(1)
 260-94.36(1) 260-94.36(1) thru 260-94.36(2)(a)
 261-29 thru 261-30.1 261-29 thru 261-30.1
 261-121 261-121 thru 261-122.1

VOLUME 18

Revision

Check As Done	<i><u>Remove Old Pages Numbered</u></i>	<i><u>Insert New Pages Numbered</u></i>
<input type="checkbox"/>	Title page	Title page
<input type="checkbox"/>	270-28.2(1) thru 270-28.2(3)	270-28.2(1) thru 270-28.2(3)
<input type="checkbox"/>	271-50.3 thru 271-50.7	271-50.3 thru 271-50.7
<input type="checkbox"/>	281-19	281-19 thru 281-20.1
<input type="checkbox"/>	282-89 thru 282-93	282-89 thru 282-94.1
<input type="checkbox"/>	282-110.1 thru 282-110.5	282-110.1 thru 282-110.7
<input type="checkbox"/>	283-9 thru 283-12.1	283-9 thru 283-12.3
<input type="checkbox"/>	283-19 thru 283-28.1	283-19 thru 283-28.1
<input type="checkbox"/>	283-44.3	283-44.3 thru 283-44.4(1)
<input type="checkbox"/>	283-44.17 thru 283-44.21	283-44.17 thru 283-44.21
<input type="checkbox"/>	283-88.7 thru 283-89	283-89 thru 283-90.1
<input type="checkbox"/>	285-22.1 thru 285-26.1	285-23 thru 285-26.2(1)
<input type="checkbox"/>	285-26.13 thru 285-26.17	285-26.13 thru 285-26.19

VOLUME 19

Revision

<input type="checkbox"/>	Title page	Title page
<input type="checkbox"/>	290-24.1 thru 290-33	290-25 thru 290-34.3
<input type="checkbox"/>	290-56.1 thru 290-56.5	290-56.1 thru 290-56.5
<input type="checkbox"/>	290-89 thru 290-91	290-89 thru 290-91
<input type="checkbox"/>	291-17	291-17 thru 291-18.1
<input type="checkbox"/>	293-12.1 thru 293-14.1	293-13 thru 293-14.3
<input type="checkbox"/>	293-59 thru 293-67	293-59 thru 293-68.7
<input type="checkbox"/>	293-92.1 thru 293-92.7	293-92.1 thru 293-92.7
<input type="checkbox"/>	293-136.5 thru 293-136.8(2)(a)	293-136.5 thru 293-136.8(2)(b)(i)
<input type="checkbox"/>	293-136.9 thru 293-136.10(2)(a)	293-136.9 thru 293-136.10(2)(a)
<input type="checkbox"/>	300-65	300-65 thru 300-66.1
<input type="checkbox"/>	302-5 thru 302-9	302-5 thru 302-10.3
<input type="checkbox"/>	310-7 thru 310-11	310-7 thru 310-12.1
<input type="checkbox"/>	310-24.1 thru 310-28.3	310-25 thru 310-28.9
<input type="checkbox"/>	310-32.1 thru 310-41	310-33 thru 310-42.1
<input type="checkbox"/>	311-5	311-5 thru 311-6.1

VOLUME 20

Revision

<input type="checkbox"/>	Title page	Title page
<input type="checkbox"/>	320-59 thru 320-60.5	320-59 thru 320-60.5
<input type="checkbox"/>	321-13 thru 321-21	321-13 thru 321-22.1
<input type="checkbox"/>	321-104.1	321-104.1 thru 321-104.2(1)
<input type="checkbox"/>	321-104.18(7)	321-104.18(7) thru 321-104.18(8)(a)
<input type="checkbox"/>	321-111 thru 321-112.3	321-111 thru 321-112.3
<input type="checkbox"/>	322-15 thru 322-18.1	322-15 thru 322-18.1

Check As Done	<i>Remove Old <u>Pages Numbered</u></i>	<i>Insert New <u>Pages Numbered</u></i>
<input type="checkbox"/>	322-54.19 thru 322-54.20(1)	322-54.19 thru 322-54.20(1)
<input type="checkbox"/>	333-88.5 thru 333-88.7	333-88.5 thru 333-88.8(1)
<input type="checkbox"/>	333-88.17.	333-88.17 thru 333-88.18(1)
<input type="checkbox"/>	336-21 thru 336-24.3	336-21 thru 336-24.3
<input type="checkbox"/>	336-41	336-41 thru 336-42.1
<input type="checkbox"/>	337-6.1 thru 337-7	337-7 thru 337-8.1

VOLUME 21

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	341-34.1 thru 341-34.3	341-34.1 thru 341-34.5
<input type="checkbox"/>	341-56.1 thru 341-56.3	341-56.1 thru 341-56.3
<input type="checkbox"/>	341-87 thru 341-89	341-87 thru 341-89
<input type="checkbox"/>	341-129 thru 341-130.1	341-129 thru 341-130.1
<input type="checkbox"/>	342-16.1 thru 342-17	342-17 thru 342-18.1
<input type="checkbox"/>	343-29 thru 343-32.2(1)	343-29 thru 343-32.2(1)
<input type="checkbox"/>	345-27 thru 345-28.1	345-27 thru 345-28.1
<input type="checkbox"/>	345-44.1 thru 345-48.3	345-45 thru 345-48.5
<input type="checkbox"/>	345-91 thru 345-92.1	345-91 thru 345-92.1
<input type="checkbox"/>	345-100.1 thru 345-100.5	345-100.1 thru 345-100.5

VOLUME 22

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	360A-40.9 thru 360A-41.	360A-41 thru 360A-42.1
<input type="checkbox"/>	362-4.1 thru 362-6.1.	362-5 thru 362-6.1
<input type="checkbox"/>	362-71 thru 362-76.1	362-71 thru 362-76.1
<input type="checkbox"/>	371-33 thru 371-39	371-33 thru 371-39
<input type="checkbox"/>	371-83	371-83 thru 371-84.1

VOLUME 23

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	372-57 thru 372-62.1	372-57 thru 372-62.1
<input type="checkbox"/>	372-73	372-73 thru 372-74.1
<input type="checkbox"/>	373-43 thru 373-49	373-43 thru 373-50.1
<input type="checkbox"/>	380-9 thru 380-10.1	380-9 thru 380-10.1
<input type="checkbox"/>	381-97	381-97 thru 381-98.1

VOLUME 25

**Check
As
Done**

*Remove Old
Pages Numbered*

*Insert New
Pages Numbered*

Revision

- Title page. Title page
- TS-1 thru TS-441 TS-1 thru TS-451

FILE IN THE FRONT OF THE FIRST VOLUME
OF YOUR SET

To order missing pages log on to our self service center, www.lexisnexis.com/printcdsc or call Customer Services at 1 (800) 833-9844 and have the following information ready:

- (1) the publication title;
- (2) specific volume, chapter and page numbers; and
- (3) your name, phone number, and Matthew Bender account number.

Please recycle removed pages.

MISSING FILING INSTRUCTIONS?
FIND THEM AT www.lexisnexis.com/printcdsc

Use the search tool provided to find and download missing filing instructions, or sign on to the Print & CD Service Center to order missing pages or replacement materials. Visit us soon to see what else the Print & CD Service Center can do for you!



www.lexis.com

Copyright © 2018 Matthew Bender & Company, Inc., a member of the LexisNexis Group.
Publication 719, Release 130, August 2018

LexisNexis, the knowledge burst logo, and Michie are trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.