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Dorsaneo, Texas Litigation Guide

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HIGHLIGHTS

- **Response to Covid-19 Pandemic.** Senate Bill 6 added several new provisions to the Civil Practices and Remedies Code to govern claims that arise out of or relate to not only the Covid-19 pandemic, but also to any future pandemic disease or pandemic emergency that might occur. There are three major features of this legislation:
 1. *Medical Claims.* Section 74.155 provides civil liability protections for injuries arising from care, treatment, or failure to provide care or treatment relating to or impacted by a pandemic. See Ch. 321, *Medical Malpractice*, § 321.03[6].
 2. *Product Liability Claims.* Chapter 148 provides civil liability protections from product liability claims to a person who designs, manu-

fatures, sells, labels, or donates certain products during a pandemic emergency. See Ch. 320, *Products Liability*, § 320.09[7][c].

- 3. *Other Claims.* Chapter 148 limits liability for claims based on injury or death from exposure of an individual to a pandemic disease. This statutory protection from liability does not depend on the liability theory asserted by the claimant alleging exposure, so it apparently applies to all such theories, including contract claims, and all negligence theories of liability, regardless of whether the claimant alleges a negligent act or omission, or a premises liability claim. See 290, *Negligence*, § 290.20[4][f].

This release updates Texas Litigation Guide with recent legislation as well as 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

Multidistrict Litigation. Amendments to the Government Code altered the requirements for appointment to the Judicial Panel on Multidistrict Litigation. See Ch. 64, *Multidistrict Litigation*, § 64.02.

Statutes of Limitation. An addition to the Civil Practice and Remedies Code created a new limitations period for some suits arising from an appraisal or review conducted by a real estate appraiser. See Ch. 72, *Limitation of Actions*, § 72.02[8].

Judgment Liens. The Legislature revised the rules for release of the record of lien on homestead property, now requiring the judgment debtor to notify the judgment creditor by letter of the filing of an affidavit stating the property is homestead, and providing a form for a certificate of mailing. See Tex. Prop. Code § 52.0012; Ch. 132, *Enforcement of Judgments*, § 132.02[3][d], 132.102.

Interlocutory Appeal. The Legislature created several new categories of orders subject to interlocutory appeal, including orders granting or denying a motion for summary judgment filed by a highway or road contractor, and certain orders in cases involving liability for causing exposure to pandemic disease. See Tex. Civ. Prac. & Rem. Code § 51.014(a)(15); Ch. 153, *Accelerated Appeals*, § 153.02[1][a].

Garnishee's Duties to Debtor.

This release includes *Strobach v. WesTex Cmty. Credit Union*, 621 S.W.3d 856, 876 (Tex. App.—El Paso 2021, pet. filed), in which the court of appeals held that, pursuant to the deposit agreement between the bank and the debtor, a garnishee bank may have a duty to the debtor to exercise reasonable care before releasing funds to the garnishor. See Ch. 42, *Garnishment*, § 42.04[3][b].

Assignees Bound by Arbitration Provision in Contract.

The Texas Supreme Court, in *Wagner v. Apache Corp.*, 627 S.W.3d 277, 2021 Tex. LEXIS 271, **19–20 (Tex. Apr. 9, 2021), held that assignees that expressly assumed and agreed to be bound by all the assignor's obligations were bound by its obligation to arbitrate. See Ch. 44, *Arbitration*, § 44.02[1][c].

Deadline to Move to Vacate Arbitration Award.

In *First Tex. Homes, Inc. v. Provost*, 622 S.W.3d 409, 411 (Tex. App.—Waco 2020, no pet.), the court of appeals held that a party must assert a motion to vacate, modify, or correct an arbitration award by the time the court considers a motion to confirm the award, regardless of whether the 90-day period to challenge the award has expired. See Ch. 44, *Arbitration*, § 44.105[1][a].

Use of Declaratory Judgment Action in Uninsured Motorist Cases.

This update includes discussion of *Allstate Ins. Co. v. Irwin*, 627 S.W. 3d 263, 2021 Tex. LEXIS 415, **14–15 (Tex. May 21, 2021), in

which the Texas Supreme Court held that a declaratory relief action by an insured against an insurer to determine entitlement to UIM benefits is appropriate before liability has been established and no remedy for breach of contract against the insurer is actually enforceable. See Ch. 45, *Declaratory Relief*, § 45.03.

Administrative Agency Jurisdiction Limited to Regulatory Enforcement. In *In re Oncor Elec. Delivery Co. LLC*, ___ S.W.3d ___, 2021 Tex. LEXIS 622, *18 (Tex. June 25, 2021), the Texas Supreme Court held that the Public Utility Commission did not have jurisdiction over a personal injury action arising from the negligent placement of electrical lines. See Ch. 420, *Introduction to Administrative Agencies*, § 420.01[3].

Business and Commercial Law

Trade Secrets

The Texas Uniform Trade Secret Act Does Not Replace Procedural Requirements. The Texas Supreme Court has held that parties seeking to seal court records containing trade secrets must meet Texas Civil Procedure Rule 76a’s procedural requirements including the public notice requirements and the prohibition against motions for reconsideration absent changed circumstances [HouseCanary, Inc. v. Title Source, Inc., 2021 Tex. LEXIS 346 **18–27 (Tex. 2021)]. See Ch. 200B, *Trade Secrets*, § 200B.25.

Anti-Trust Laws

The Rule of Reason Analysis. In

the context of restraint of trade, the Supreme Court has utilized a three-step burden-shifting framework as a means for distinguishing between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest [NCAA v. Alston, *43, 141 S. Ct. 2141 (2021)]. See Ch. 200A, *Anti-trust Laws*, § 200A.02[1][d].

Employee Relations

Collective Actions Brought Under the Fair Labor Standards Act on Behalf of Other Employees Similarly Situated. The Fifth Circuit has addressed how rigorously and how promptly a district court should probe into whether potential members are “similarly situated” and thus entitled to court approved notice of a pending collective action. It concluded that “ a district court must rigorously scrutinize the realm of “similarly situated” workers, and must do so from the outset of the case . . .” [Swales v. KLLM Transp. Servs., LLC, 985 F.3d 430, 434 (5th Cir. 2021)]. See Ch. 203, *Employee Relations*, § 203.22[1][g][iii].

E-Signatures. Proof of compliance with statutory procedures under the *Uniform Electronic Transactions Act* can establish the validity of a signature as a matter of law [Aerotek, Inc. v. Boyd, 2021 Tex. LEXIS 425 *13–14 (Tex. 2021)]. See Ch. 203, *Employee Relations*, § 203.48[b].

Pre-Arbitration Discovery. A trial court retains discretion to order limited discovery only if necessary [In re Copart, Inc., 619 S.W.3d 710,

714 (Tex. 2021)]. In *In re Copart, Inc.*, the Court held that a trial court abuses its discretion in ordering pre-arbitration discovery when a requesting party presents no colorable basis or reason to believe that the discovery would be material in resolving any disputed issues of arbitrability [In re Copart, Inc., 619 S.W.3d 710, 714 (Tex. 2021)]. See Ch. 203, *Employment Relations* § 203.48[1][c].

Employment Litigation

Discrimination

Sex discrimination. This release includes *S. Tex. College v. Arriola*, 2021 Tex. App. LEXIS 1127 **6–10 (Tex. App.—Corpus Christi 2021, pet. denied) in which the Corpus Court of Appeals held that sex discrimination based on pregnancy also includes women who are attempting to become pregnant. See Ch. 203A, *Employment Litigation*, § 203A.55[2].

Disability Discrimination. The Supreme Court has reiterated that there are no formal requirements in making a request for reasonable accommodation. The request can be made “in conversation and in “plain English”. What matters is that the employer is provided with “enough information that, under the circumstances, the employer can be fairly said to know of both the disability and [the] desire for accommodation.” [Tex. DOT v. Lara, 2021 Tex. LEXIS 629 *13 (Tex. 2021)]. In the same case, the Supreme Court refused to adopt a bright line rule that an employee’s request for several months leave is never a reasonable accom-

modation. The Court held that whether a request is reasonable depends on the circumstances of each case [Tex. DOT v. Lara, 2021 Tex. LEXIS 629 *16 (Tex. 2021)]. See Ch. 203A, *Employment Litigation*, § 203A.59[5].

Retaliation

Hostile Work Environment Claims. The fifth circuit district court has held that Title II’s anti-retaliation provision allows for a hostile work environment claim [Walker v. Plant Process Fabrications LLC, 2021 U.S. Dist. LEXIS 77313 **5–6 (E.D. Tex. 2021)]. See Ch. 203A, *Employment Litigation*, § 203A.22[3][b].

Negative job references. A false or negative job reference may constitute adverse employment action regardless of whether the negative reference results in a job loss. The court reasoned that the prospect of a negative job reference might dissuade a reasonable worker from making a charge of discrimination [City of Haltom City v. Forrest, 2021 Tex. App. LEXIS 1390 **12–14 (Tex. App.—Fort Worth 2021, no pet. h.) (memo op.)]. See Ch. 203A, *Employment Litigation*, § 203A.63[1][c].

Replacement Resulting in Wrongful Discharge. The Texas Supreme Court has held that whether one employee “replaced” another employee for purposes of wrongful discharge does not depend solely on the employee’s job titles and salaries. Courts must also look to the employees’ actual duties, comparing the duties of the plaintiff’s prior position with those of the employee who al-

legedly replaced the plaintiff [Tex. Tech Univ. Health Scis. Center-El Paso v. Flores, 612 S.W.3d 299, 306 (Tex. 2020)]. See Ch. 203A, *Employment Litigation*, § 203A.61[2][a].

Causation in Retaliation Suits.

This release includes *Apache Corp. v. Davis*, 64 Tex. Sup. Ct. J. 1495, 2021 Tex. LEXIS 641 *26 (Tex. 2021) in which the Texas Supreme Court has held that the but for causation standard applies to suits based on employment retaliation. The Court reasoned that this “*would not have occurred when it did*” standard “best protects employees from unlawful discrimination without punishing employers for legitimately sanctioning misconduct or harboring bad motives never acted upon.” [Apache Corp. v. Davis, 64 Tex. Sup. Ct. J. 1495, 2021 Tex. LEXIS 641 *26 (Tex. 2021)]. See Ch. 203A, *Employment Litigation*, § 203A.63[1][e].

Pleading Requirements for Discrimination Based on Transgender. A plaintiff who alleges transgender discrimination under Title VII must plead facts sufficient to support an inference that the employer would have behaved differently toward the employee with a different gender identity [Olivarez v. T-Mobile USA, Inc., 2021 U.S. App. LEXIS 14585, **6–8 (5th Cir. 2021)]. See Ch. 203A, *Employment Litigation*, § 203A.17[3][c].

Insurance Litigation

Design Professionals; Indemnity Agreements. House Bill 2116 amended Chapter 130 of the Civil Practices and Remedies Code to limit

indemnification clauses that are either contained in or related to contracts for engineering and architectural services. These provisions are designed to ensure that the contractual obligations of an engineer or architect are consistent with malpractice insurance policies carried by the professional. See Ch. 291, *Proportionate Responsibility; Contribution and Indemnity*, § 291.05[1]; Ch. 322, *Professional Malpractice*, § 322.04[4].

Unfair Insurance Practices; Discrimination. House Bill 3433 enacted Subchapter M of Insurance Code Chapter 544 to provide that insurers may not discriminate against individuals on the basis of their political affiliation or expression. Under House Bill 317, life, health, and disability insurers may not discriminate against an individual based on status as a living organ donor. See Ch. 345, *Unfair Insurance Practices*, § 345.05[3].

Property Insurance; Homeowner’s Policy. The clause of the discontinued HO-B policy barring nonrenewal due to “claims for losses resulting from natural causes” referred to individual policy holders, so the decision to stop using the policy for each and every insured due to statewide losses was not barred by the clause and did not require renewal [Farmers Grp., Inc. v. Geter, 620 S.W.3d 702 (Tex. 2021)]. See Ch. 343, *Property Insurance*, § 343.04.

Workers’ Compensation; Exclusive Remedy. When the client com-

pany of a temp agency carries its own workers' compensation policy, whether it is entitled to invoke the exclusive remedy provision against the temp is judged by the traditional rule of employee status, i.e., whether the client company had the right to control the progress, details, and methods of operations of the temp's work [Waste Mgmt. of Tex. v. Stevenson, 622 S.W.3d 273 (Tex. 2021)]. See Ch. 340, *Workers' Compensation*, § 340.02[2].

Workers' Compensation; Administrative Proceedings. In a contested case hearing before the State Office of Administrative Hearings, the party who sought review by requesting that hearing bears the burden of proof, even if the opposing party began the proceedings by invoking the underlying medical fee dispute resolution process [Patients Med. Ctr. v. Facility Ins. Corp., 623 S.W.3d 336 (Tex. 2021)]. See Ch. 340, *Workers' Compensation*, § 340.11[4].

Unfair Insurance Practices; Insurance Code Violations. There are two exclusive paths that an insured may take to establish the damages caused by an insurer's violation of the Insurance Code: (1) show a right to receive benefits under the policy; or (2) show an injury independent of the right to receive benefits. An insured cannot recover any damages based on a violation if the insured had no right to receive benefits under the policy and sustained no injury independent of a right to benefits [In re State Farm Mut. Auto. Ins. Co.,

2021 Tex. LEXIS 222 (Tex. 2021)]. See Ch. 345, *Unfair Insurance Practices*, § 345.09[1].

Unfair Insurance Practices; Prompt Payment; Effect of Appraisal. If an insurer admits its own liability on the policy by paying some portion of the claim prior to the statutory deadline, but the appraisal process later determines that the payment was inadequate, the prompt payment statute applies, so the insured can recover the statutory penalties based on the difference between the original payment and the amount of the appraisal award [Hinojos v. State Farm Lloyds, 619 S.W.3d 651 (Tex. 2021)]. See Ch. 345, *Unfair Insurance Practices*, § 345.31.

Unfair Insurance Practices; Stowers Duty. A claim based on the *Stowers* duty is available only when the insurer refuses to settle within the policy limits and the insured ultimately becomes liable in excess of those limits—whether as a result of judgment or settlement. If the parties reach a settlement within policy limits, no *Stowers* claim is available, even if the plaintiff alleges some misconduct by the insurer in refusing to settle earlier or for a different amount [In re Farmers Tex. Cty. Mut. Ins. Co., 621 S.W.3d 261 (Tex. 2021)]. See Ch. 345, *Unfair Insurance Practices*, § 345.25[2].

Uninsured Motorist Coverage; Extra-Contractual Claims. Extra-contractual claims arising from the failure to pay UIM benefits must be bifurcated until the breach of contract claim is determined. The claimant's

omission of a formal breach of contract claim is disregarded as to the necessity of bifurcation because the same showings are required in either context [In re State Farm Mut. Auto. Ins. Co., 2021 Tex. LEXIS 222 (Tex. 2021)]. See Ch. 345, *Unfair Insurance Practices*, § 345.18[3].

Uninsured Motorist Coverage; Declaratory Judgment. Regardless of the status of the claim between the underlying parties, an insurer’s potential liability for benefits under a UIM policy may be established in a declaratory judgment action [Allstate Ins. Co. v. Irwin, 2021 Tex. LEXIS 415 (Tex. 2021)]. See Ch. 342, *Uninsured Motorist Coverage*, §§ 342.05, 342.100[1]; Ch. 345, *Unfair Insurance Practices*, § 345.30[2].

Uninsured Motorist Coverage; Liability Determination. The decision of the parties to settle and dismiss the underlying negligence claim against the driver rather than seek the entry of judgment on a jury verdict made that verdict unenforceable by both the settling parties and the UIM insurer, so the damages to which the insured was legally entitled remained to be determined in the bifurcated UIM claim. [In re USAA Gen. Indem. Co., 2021 Tex. LEXIS 373 (Tex. 2021)]. See Ch. 342, *Uninsured Motorist Coverage*, § 342.02[2].

Personal Injury Litigation

Health Care Liability Claims; Preliminary Expert Report Determination. Senate Bill 232 added Section 74.353 to Chapter 74 of the Civil Practices and Remedies Code to

permit the claimant to request from the trial court a preliminary determination of whether the action states an HCLC and therefore requires an expert report. Interlocutory review of any such determination is available to either party. See Ch. 321, *Medical Malpractice*, § 321.15[1].

Negligence Claims; Statutory Immunity. House Bill 365 amended the Farm Animal Act to broaden and clarify its applicability, as well as how it relates to an employer who elects to subscribe to workers’ compensation. These amendments were apparently intended to overrule the decision in *Waak v. Rodriguez*, 603 S.W.3d 103 (Tex. 2020) that because the ranching industry itself fell outside the coverage of the Act, a ranch hand was not a “participant” in any covered activity and liability was not limited. See Ch. 290, *Negligence*, § 290.20[4][f]; Ch. 340, *Workers’ Compensation*, § 340.03[11].

Auto Accident Cases; Liability of Owners and Operators. House Bill 19 enacted Subchapter B of Chapter 72, Civil Practice and Remedies Code to regulate both the procedures and the substantive law to be applied to a claim in an auto accident case involving a commercial motor vehicle. See Ch. 302, *Liability of Owners and Others*, § 302.01[6].

Legal Malpractice; Attorney Immunity; Publicity. Repeating a client’s allegedly defamatory allegations to the media or the public for publicity purposes is not within attorney immunity merely because counsel elects to do so personally rather

than through a third party [Landry's, Inc. v. Animal Legal Def. Fund, 2021 Tex. LEXIS 414 (Tex. 2021)]. See Ch. 322, *Professional Malpractice*, § 322.02[1][f]; Ch. 333, *Libel and Slander*, § 333.20[1].

Legal Malpractice; Attorney Immunity; Business Transaction. Attorney immunity applies in all adversarial contexts in which an attorney has a duty to zealously and loyally represent a client, including a business transaction, but only when the claim is based on the kind of conduct attorney immunity is designed to protect [Haynes & Boone, LLP v. NFTD, LLC, 2021 Tex. LEXIS 423 (Tex. 2021)]. See Ch. 322, *Professional Malpractice*, § 322.02[1][f].

Negligence; Contractor-Subcontractor Relationship. The contractually required presence of a general contractor's safety employee at the worksite does not give rise to a duty of that employee or the contractor to intervene and ensure that an independent contractor's employees safely perform their work. A contract that provides for general supervisory authority over subcontractor scheduling does not show control over the means, methods, and details of a subcontractor's work that gives rise to a duty of care [JLB Builders, L.L.C v. Hernandez, 622 S.W.3d 860 (Tex. 2021)]. See Ch. 290, *Negligence*, § 290.32[1][b].

Negligence; Negligent Entrustment. Negligent entrustment does not apply to the sale of a chattel, so a retailer that sells a rifle that is later used by the buyer to carry out a mass

shooting cannot be liable for negligent entrustment because the sale simultaneously terminates both the right to possess or control the rifle, and any potential responsibility for how it is used [In re Acad., 2021 Tex. LEXIS 623 (Tex. 2021)]. See Ch. 290, *Negligence*, § 290.32[1].

Damages in Tort; Chapter 18 Affidavit Procedure. A controverting affidavit met all the statutory requirements of Tex. Civ. Prac. & Rem. Code § 18.001(f), so the trial court clearly abused its discretion in striking it, and mandamus was available to correct that error. Even as to *insufficient* controverting affidavits, however, the sole remedy is to disregard it, and any form of evidentiary preclusion against either the offering party or the affiant is an abuse of discretion subject to correction by mandamus [In re Allstate Indem. Co., 622 S.W.3d 870 (Tex. 2021)]. See Ch. 294, *Damages in Tort*, § 294.51[2].

Medical Malpractice; Health Care Liability Claim. If the plaintiff asserts a civil rights claim under 42 U.S.C. § 1983 that arises from the provision of health care by a state actor, federal law does not preempt the expert report requirement of Chapter 74. Instead, the state law requirements to bring an HCLC are merely procedural rules that supplement the elements of a federal civil rights claim, so the plaintiff must file an expert report that complies with the statutory requirements [Rogers v. Bagley, 623 S.W.3d 343 (Tex. 2021)]. See Ch. 321, *Medical Mal-*

practice, § 321.02[2][b].

Products Liability; Safer Alternative Design. The fact that a manufacturer itself makes a newer version of an older product that includes a safer alternative design is not sufficient, by itself, to show that the original product was or is unreasonably dangerous. But when the evidence shows that the newer version was designed precisely to lessen or eliminate the exact same risk that harmed the claimant, a jury finding that the original product was unreasonably dangerous is supported by sufficient evidence [Emerson Elec. Co. v. Johnson, 2021 Tex. LEXIS 306 (Tex. 2021)]. See Ch. 320, *Products Liability*, § 320.03[2][b].

Products Liability; Federal Preemption. If congressional intent is clear that the force of a preemptive statute bars the *bringing* of the claim, not merely *liability* on the claim, the defendant is entitled to an immediate dismissal without having to incur any defense costs. Accordingly, the failure of a trial court to dismiss based on preemption grounds under such a statute is an abuse of discretion that may be corrected by mandamus [In re Acad., 2021 Tex. LEXIS 623 (Tex. 2021)]. See Ch. 320, *Products Liability*, § 320.09[3].

Products Liability; Federal Preemption. Common law claims against Facebook for negligence, negligent undertaking, gross negligence, and products liability were barred by the federal Communications Decency Act, but that bar did not apply to human trafficking liabil-

ity under Civil Practices and Remedies Code Chapter 98. Instead, a statutory claim for knowingly or intentionally benefiting from participation in a human-trafficking venture is not preempted [In re Facebook, Inc., 2021 Tex. LEXIS 640 (Tex. 2021)]. See Ch. 320, *Products Liability*, § 320.09[3]; Ch. 331, *False Imprisonment*, § 331.08[4].

Products Liability; Status as Seller. When a product-related injury arises from any transaction involving a sale, “seller” under Tex. Civ. Prac. & Rem. Code § 82.001(3) is limited to those that have relinquished title to the allegedly defective product at some point in the chain of distribution. Because Amazon never holds title to any products sold on its platform by third-party sellers, it is not a “seller” even though it controls all aspects of the transaction, distribution, and delivery of the product [Amazon.com, Inc. v. McMillan, 2021 Tex. LEXIS 624 (Tex. 2021)]. See Ch. 291, *Proportionate Responsibility; Contribution and Indemnity*, § 291.05[2][c]; Ch. 320, *Products Liability*, § 320.02[2][a].

Responsible Third Parties. Tex. Civ. Prac. & Rem. Code § 33.004(j) provides the exclusive means by which defendants can designate unknown persons as responsible third parties, so when the trial court abuses its discretion in permitting designation by some other method, mandamus is available to compel the striking of the designation [In re Gonzales, 619 S.W.3d 259 (Tex. 2021)]. See Ch. 291, *Proportionate*

Responsibility; Contribution and Indemnity, § 291.03[2][b].

Premises Liability; Status of Claimant as Invitee or Licensee.

Absent unusual circumstances, a person on property to perform volunteer work for a third party benefits the third party rather than the property owner and therefore is not the owner's invitee, even if the third party itself is an invitee [Catholic Diocese of El Paso (San Lorenzo Church) v. Porter, 622 S.W.3d 824 (Tex. 2021)]. See Ch. 310, *Premises Liability*, § 310.04[1].

Premises Liability; Open and Obvious Conditions.

Overhead power lines were a condition of the premises, so Property Code Chapter 95 applied to claims arising from injury to a contractor's employees by contact with those lines during routine operations. The *presence* of those lines was open and obvious, but because they were required by statute to be de-energized before work began, the *danger* they presented was not open and obvious [Los Compadres Pescadores, L.L.C. v. Valdez, 622 S.W.3d 771 (Tex. 2021)]. See Ch. 310, *Premises Liability*, § 310.02[3][d].

Defamation; Citizens Participation Act.

When an amended or supplemental pleading: (1) adds a new party or parties; (2) alleges new essential facts to support previously asserted claims; or (3) asserts new legal claims or theories involving different elements than those previously asserted, the new pleading asserts a new "legal action" under the

TCPA and triggers a new 60-day period as to those new parties, facts, or claims [Montelongo v. Abrea, 622 S.W.3d 290 (Tex. 2021)]. See Ch. 333, *Libel and Slander*, § 333.42[4].

Defamation; Remedies of Defamation Mitigation Act.

The statutory remedies of abatement and barring recovery of exemplary damages are exclusive, so the trial court may not order dismissal or award summary judgment to the defendant for the plaintiff's failure to comply with the Act [Hogan v. Zoanni, 64 Tex. Sup. Ct. J. 1179, 2021 Tex. LEXIS 442 (Tex. 2021)]. See Ch. 333, *Libel and Slander*, § 333.21[5].

Defamation; Ecclesiastical Matters.

When the ecclesiastical abstention doctrine applies, it bars subject matter jurisdiction over the claims, so the trial court must dismiss and the failure to do so can be redressed by mandamus [In re Diocese of Lubbock, 64 Tex. Sup. Ct. J. 1328, 2021 Tex. LEXIS 460 (Tex. 2021)]. See Ch. 333, *Libel and Slander*, § 333.20[2][g].

Real Estate Litigation

Oil and Gas Liens.

House Bill 3794 enacted Property Code Chapter 67 to govern liens or security interests in oil and gas that are created on or after September 1, 2021. Corresponding amendments to the Business and Commerce Code remove those interests from the coverage of the Texas version of the UCC to make it clear that Chapter 67 governs exclusively. See Ch 283, *Oil and Gas Leases*, § 283.01[3].

Construction Contracts; Repose

Period. House Bill 3069 amended Tex. Civ. Prac. & Rem. Code § 16.009 to shorten the statute of repose for construction defect claims against design professionals to only eight years from the prior 10-year period, but only as to claims brought by government units. See Ch 270, *Construction Contracts*, § 270.42[2]; Ch. 322, *Professional Malpractice*, § 322.04[2][c].

Landlord-Tenant; Fee in Lieu of Security Deposit. Senate Bill 1783 added Section 92.111 to the Property Code to authorize and govern the procedures for a residential landlord to charge a monthly fee to the tenant in lieu of a lump sum up-front security deposit, provided the fee is used to buy lease insurance. See Ch 282, *Landlord and Tenant*, § 282.22[1].

Real Estate Sales Contracts; Seller's Notice Obligations. House Bill 1543 amended or enacted Property Code Sections 5.014–5.0145 to require that a person who proposes to sell or otherwise convey real property that is located in certain public improvement districts must first give to the purchaser the written notice specified by the statute. The legislation also authorizes cancellation of the sales contract or a suit for damages if the seller fails to provide the required notice. See Ch. 252, *Real Estate Sales Contracts*, § 252.15.

Deeds; Effect of Quitclaim. Senate Bill 885 added Property Code Section 13.006 to provide that after the fourth anniversary of the date that it was recorded, a quitclaim deed: (1) does not affect the question of the

good faith of a subsequent purchaser or creditor; and (2) is not notice to a subsequent purchaser or creditor of any unrecorded conveyance of, transfer of, or encumbrance on the real property. See Ch. 254, *Deeds*, § 254.02[3].

Validity of Deed; Correction Instrument. When all the original parties to an erroneous deed are available, they may execute a valid correction instrument, even after one or more third parties acquire an interest affected by the original transaction. Although the instrument relates back to the date of the original deed, the correction does not affect the property interest of a bona fide purchaser that acquired the interest after the original was executed, but before the correction instrument was recorded. The statute does not require the parties to execute the instrument within four years of their mistake [*Broadway Nat'l Bank v. Yates Energy Corp.*, 64 Tex. Sup. Ct. J. ___, 2021 Tex. LEXIS 396 (Tex. 2021)]. See Ch. 254, *Deeds and Conveyances*, § 254.02[4].

Security Interests; Subrogation. A lender's right to equitable subrogation is fixed at the moment the prior, valid lien is discharged, so the failure of the lender to foreclose on its own lien within the limitations period does not affect the lender's fixed right [*PNC Mortg. v. Howard*, 616 S.W.3d 581, 583–585 (Tex. 2021) (per curiam)]. See Ch. 255, *Real Property Security Interests*, § 255.06[3].

Real Property Taxes; Exemptions. Though an open-enrollment

charter school serves a public purpose, when the property on which the school was located was leased from a private owner, not owned by the state, Tex. Tax Code § 11.11(a) was inapplicable and the property was not exempt [Odyssey 2020 Acad., Inc. v. Galveston Cent. Appraisal Dist., 64 Tex. Sup. Ct. J. 1304, 2021 Tex. LEXIS 469 (Tex. 2021)]. See Ch. 260, *Real Property Tax Suits*, § 260.01[3].

Real Property Title Claims; Effect of Pleadings. Whether a plaintiff's petition asserting adverse possession states a quiet title claim or a trespass to try title claim is based on the *substance* of the allegations, not the *label* attached to them, so when a plaintiff pleads and proves all the elements of a trespass to try title claim, the court may award relief on that claim by deciding title to the property, even if the plaintiff erroneously labeled the claim as one to quiet title to the property [Brumley v. McDuff, 616 S.W.3d 826, 832–836 (Tex. 2021)]. See Ch. 250, *Adverse Possession*, §§ 250.01[1], 250.100[1], 250.101[1]; Ch. 251, *Trespass to Try Title*, §§ 251.01[1], 251.05[2]; 251.101[1]; Ch. 257, *Suit to Quiet Title*, § 257.01[3].

Real Property Title Claims; Defenses; Boundary Dispute. Equitable defenses other than laches are available in a trespass to try title claim, including the defense of ratification. When one party submitted a stipulation of where a disputed boundary should be located, the other party's agreement and signature rati-

fied the proposal and barred any subsequent challenge to the location of the boundary [Concho Res. Inc. v. Ellison, 64 Tex. Sup. Ct. J. 701, 2021 Tex. LEXIS 301 (Tex. 2021)]. See Ch. 251, *Trespass to Try Title*, § 251.01[1]; Ch. 280, *Adjoining Landowners*, § 280.01[1].

Inverse Condemnation; Claim of Unconstitutional Taking. A takings claim based on mere infringement of intellectual property rights is unavailable because the holder is not deprived of exclusive ownership rights in the infringed trademark, patented invention, or copyrighted work; instead, holder must allege confiscation of intellectual property to state a takings claim [Jim Olive Photography v. Univ. of Hous. Sys., 64 Tex. Sup. Ct. J. 1411, 2021 Tex. LEXIS 537 (Tex. 2021)]. See Ch. 261, *Condemnation*, § 261.04[1].

Inverse Condemnation; Statutory Claim. Takings claims asserted under Government Code Chapter 2007 are available as to both a regulatory taking, and a physical takings claim, provided the claim otherwise falls within the coverage of the statute [San Jacinto River Auth. v. Medina, 64 Tex. Sup. Ct. J. 713, 2021 Tex. LEXIS 299 (Tex. 2021)]. See Ch. 261, *Condemnation*, § 261.61.

Oil and Gas Leases; Pooling. There is no bright-line rule that acceptance of royalties calculated on a pooled basis always constitutes ratification of pooling that is barred by the lease, regardless of contrary manifestations of intent. Because the lessor consistently objected to pool-

ing and was entitled to royalties in some amount, depositing royalty checks based on pooling was not ratification as a matter of law [BPX Operating Co. v. Strickhausen, 64 Tex. Sup. Ct. J. 1284, 2021 Tex. LEXIS 468 (Tex. 2021)]. See Ch 283, *Oil and Gas Leases*, § 283.03[9].

Oil and Gas Leases; “Drilling” Defined. Because the parties are free to contract as they please, an oil and gas lease itself may specify what constitutes “drilling” sufficient to keep the lease from terminating [Sundown Energy Ltd. P’ship v. HJSA No. 3, Ltd. P’ship, 2021 Tex. LEXIS 272 (Tex. 2021)]. See Ch 283, *Oil and Gas Leases*, § 283.03[9].

Oil and Gas Leases; “Free Use” Clause. When a “free use” clause states that the lessee may gas “produced from said land in all operations which Lessee may conduct hereunder,” free use is geographically limited to the leased premises, and does not extend to any off-site use that “benefits” or “furthers” the lease operations [Bluestone Nat. Res. II, LLC v. Randle, 620 S.W.3d 380, 394–399 (Tex. 2021)]. See Ch 283, *Oil and Gas Leases*, § 283.03[8].

Family Law

Jury Verdict. Family Code Section 105.002 has been amended to provide that a jury verdict on the question of whether to impose a geographic restriction on a sole managing conservator is binding on the court. The former version of the statute allowed the jury to impose a geographic restriction on a joint man-

aging conservator but was silent as to sole managing conservators. See Ch. 362, *Divorce*, § 362.10[2].

Spousal Maintenance Payments. Under new Family Code Section 8.062 applicable to spousal maintenance orders rendered on or after September 1, 2021, if the obligor is ordered to pay an obligee both spousal maintenance and child support, the court must order the obligor to send the maintenance payments to the state disbursement unit. See Ch. 362, *Divorce*, § 362.21[5A].

QDRO To Enforce Spousal Maintenance. Under new Family Code Section 8.351 et seq., a party to a spousal maintenance order may petition the court for a maintenance qualified domestic relations order (QDRO). A maintenance QDRO permits direct payments of pension, retirement plan, or other employee benefits to an alternate payee to satisfy amounts due under a spousal maintenance order. See Ch. 362, *Divorce*, § 362.21[8][d].

Child Custody Evaluation. Under new Family Code Section 107.103(e), when a child custody evaluator is appointed in a suit in which a party does not speak English as a primary language, the evaluator must either be able to communicate in the party’s primary language or be assisted by an interpreter. See Ch. 370, *SAPCR Procedures*, § 370.08[3].

Standard Possession Order. For noncustodial parents who live within 50 miles of the child’s primary residence, the standard possession order

now provides default expanded beginning and ending times for some periods of possession, including routine weekend and midweek periods, spring vacation, and some holidays. The expanded times generally start when school is dismissed and end when school resumes. The noncustodial parent may opt out of any component of the expanded schedule but must take affirmative steps to do so. See Ch. 371, *Conservatorship*, § 371.09[2].

QDRO for Child Support Enforcement. Under new Family Code Section 157.501 et seq., a party to a child support order may petition the court for a child support qualified domestic relations order (QDRO). A child support QDRO permits direct payments of pension, retirement plan, or other employee benefits to an alternate payee to satisfy amounts due under a child support order. See Ch. 371A, *Child Support*, § 371A.03[2][e.2].

Child Support—Monthly Net Resources Calculation. Military allowances for housing and subsistence are included in an obligor's monthly net resources [In Interest of K.M.B., 606 S.W.3d 889, 896–898 (Tex. App.—Dallas 2020, no pet.)]. See Ch. 371A, *Child Support*, § 371A.03[3][b][ii].

Child Support—Minimum Wage Presumption. New Family Code Section 154.0655(c) provides that, when basing a child support order on the minimum wage presumption, the court must consider the obligor's background circumstances, such as

job skills, education, literacy, age, health, criminal history, barriers to employment, and record of seeking work. See Ch. 371A, *Child Support*, § 371A.03[3][b][ii].

Child Support—Intentional Unemployment. New Family Code Section 154.0655(c) provides that, when considering the issue of unemployment or underemployment, the court must consider the obligor's background circumstances, such as job skills, education, literacy, age, health, criminal history, barriers to employment, and record of seeking work. Under new Family Code Section 154.066(c), the court may not consider incarceration as intentional unemployment or underemployment when establishing or modifying a support order. See Ch. 371A, *Child Support*, § 371A.03[3][b][iii][A].

Child Support Guidelines for Low-Income Obligors. A new set of child support guidelines applies to obligors with less than \$1,000 in monthly net resources. See Ch. 371A, *Child Support*, § 371A.03[3][b][v].

Child Support Arrearages. As amended, Family Code Section 157.263 now requires courts to render separate cumulative judgments for arrearages of child support, medical support, and dental support when rendering an enforcement order. See Ch. 372, *Enforcement of SAPCR Orders*, § 372.04[1].

Admission of Changed Circumstances in SAPCR Modification Proceeding. Under new Family Code Section 156.007, a party who

files a motion to modify a SAPCR order based on a material and substantial change of circumstances may not be considered on that basis alone to have admitted a material and substantial change of circumstances regarding any other matter. See Ch. 373, *Modification of SAPCR Orders*, § 373.05[3][c].

Modification of Conservatorship.

Under new Family Code Section 156.106, the death of a child's conservator is a material and substantial change of circumstances sufficient to justify modification of an existing conservatorship or possession order. See Ch. 373, *Modification of SAPCR Orders*, § 373.05[3][f.1].

Termination of Parental Rights.

Family Code Section 161.001(b)(1)(M) allows termination of parental rights based on a prior

termination on endangerment grounds. Under new Family Code Section 161.001(d-1), effective September 1, 2021, a court may not order termination under Subsection (M) unless the petition was filed within one year of the date DFPS was appointed as the child's managing conservator in the case that resulted in termination on endangerment grounds. See Ch. 381, *Termination of Parent-Child Relationship*, § 381.02[12].

Reinstatement of Parental

Rights. New Family Code Section 161.301 et seq. provide that, under certain limited circumstances, a parent whose parental rights have been terminated may have his or her parental rights reinstated by court order. See Ch. 381, *Termination of Parent-Child Relationship*, § 381.23.

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Publication 719 Release 143

November 2021

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<input type="checkbox"/>	364-49	364-49
<input type="checkbox"/>	370-41 thru 370-54.15	370-41 thru 370-54.15
<input type="checkbox"/>	370-76.7 thru 370-76.9	370-76.7 thru 370-76.9
<input type="checkbox"/>	371-2.1 thru 371-3	371-3 thru 371-4.1
<input type="checkbox"/>	371-55 thru 371-61	371-55 thru 371-62.3
<input type="checkbox"/>	371-157 thru 371-158.1	371-157 thru 371-158.1
<input type="checkbox"/>	371A-1	371A-1
<input type="checkbox"/>	371A-16.1 thru 371A-48.1	371A-17 thru 371A-48.5
<input type="checkbox"/>	371A-71	371A-71
<input type="checkbox"/>	371A-89 thru 371A-90.1	371A-89 thru 371A-90.1

**Check
As
Done**

*Remove Old
Pages Numbered*

*Insert New
Pages Numbered*

VOLUME 23

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	372-61 thru 372-68.1	372-61 thru 372-68.1
<input type="checkbox"/>	372-133 thru 372-141	372-133 thru 372-141
<input type="checkbox"/>	373-3 thru 373-7	373-3 thru 373-8.1
<input type="checkbox"/>	373-25 thru 373-29	373-25 thru 373-30.1
<input type="checkbox"/>	373-49 thru 373-51	373-49 thru 373-51
<input type="checkbox"/>	373-64.9 thru 373-69	373-65 thru 373-70.1
<input type="checkbox"/>	373-103	373-103
<input type="checkbox"/>	374-51	374-51
<input type="checkbox"/>	380-74.1	380-74.1
<input type="checkbox"/>	381-7 thru 381-13	381-7 thru 381-13
<input type="checkbox"/>	381-35 thru 381-47	381-35 thru 381-48.1
<input type="checkbox"/>	381-85 thru 381-93	381-85 thru 381-94.1
<input type="checkbox"/>	381-103 thru 381-127	381-103 thru 381-128.5
<input type="checkbox"/>	381-147 thru 381-148.1	381-147 thru 381-148.1
<input type="checkbox"/>	382-87	382-87
<input type="checkbox"/>	382-99	382-99

VOLUME 24

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	391-27	391-27 thru 391-28.1
<input type="checkbox"/>	394-4.1 thru 394-7	394-5 thru 394-8.1
<input type="checkbox"/>	394-40.1 thru 394-41	394-41 thru 394-42.1
<input type="checkbox"/>	394-93 thru 394-97	394-93 thru 394-97
<input type="checkbox"/>	410-7.	410-7
<input type="checkbox"/>	410-24.1 thru 410-33	410-25 thru 410-34.1
<input type="checkbox"/>	410-43	410-43 thru 410-44.1
<input type="checkbox"/>	410-69	410-69 thru 410-70.1
<input type="checkbox"/>	410-145 thru 410-147	410-145 thru 410-147
<input type="checkbox"/>	411-49 thru 411-55	411-49 thru 411-56.1

VOLUME 25

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	420-1 thru 420-13	420-1 thru 420-13

Check As Done	<i><u>Remove Old Pages Numbered</u></i>	<i><u>Insert New Pages Numbered</u></i>
<input type="checkbox"/>	423-9.	423-9 thru 423-10.1
<input type="checkbox"/>	423-25	423-25 thru 423-26.1
<input type="checkbox"/>	423-47 thru 423-51	423-47 thru 423-53
<input type="checkbox"/>	424-5 thru 424-6.1	424-5 thru 424-6.1
<input type="checkbox"/>	425-33	425-33
<input type="checkbox"/>	425-77	425-77
<input type="checkbox"/>	TS-1 thru TS-467	TS-1 thru TS-471

VOLUME 26

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	I-85 thru I-101	I-85 thru I-102.1
<input type="checkbox"/>	I-133	I-133
<input type="checkbox"/>	I-155	I-155 thru I-156.1
<input type="checkbox"/>	I-205	I-205 thru I-206.1
<input type="checkbox"/>	I-239	I-239 thru I-240.1
<input type="checkbox"/>	I-279	I-279 thru I-280.1
<input type="checkbox"/>	I-345 thru I-355	I-345 thru I-355
<input type="checkbox"/>	I-391 thru I-403	I-391 thru I-404.1
<input type="checkbox"/>	I-425 thru I-429	I-425 thru I-430.1
<input type="checkbox"/>	I-445	I-445 thru I-446.1
<input type="checkbox"/>	I-539 thru I-541	I-539 thru I-542.1
<input type="checkbox"/>	I-599	I-599 thru I-600.1
<input type="checkbox"/>	I-663 thru I-667	I-663 thru I-668.1
<input type="checkbox"/>	I-683 thru I-685	I-683 thru I-686.1
<input type="checkbox"/>	I-719 thru I-727	I-719 thru I-728.1
<input type="checkbox"/>	I-787 thru I-803	I-787 thru I-804.1
<input type="checkbox"/>	I-833 thru I-835	I-833 thru I-835
<input type="checkbox"/>	I-865 thru I-889	I-865 thru I-890.1
<input type="checkbox"/>	I-919	I-919 thru I-920.1
<input type="checkbox"/>	I-961 thru I-971	I-961 thru I-972.1
<input type="checkbox"/>	I-1019	I-1019 thru I-1020.1
<input type="checkbox"/>	I-1043 thru I-1051	I-1043 thru I-1051

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