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Dorsaneo, Texas Litigation Guide

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HIGHLIGHTS

- **Jurisdictional Analysis Ends When Suit Filed.** In *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 169–170 (Tex. 2007), the Texas Supreme Court held that the relevant jurisdictional time frame for determining whether the defendant’s contacts are sufficient to establish general jurisdiction ends at the time suit is filed. See Ch. 32, *Personal Jurisdiction and Service on Nonresidents*, § 32.03.
- In *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 173–176 (Tex. 2007), the Texas Supreme Court held that corporate parent involvement in a subsidiary that is consistent with the parent’s investor status does not provide a basis for personal jurisdiction by piercing the corporate veil. See Ch. 32, *Personal Jurisdiction and Service on Nonresidents*, § 32.06.
- **Jury Charge.** The forms in Ch. 122, *Jury Charge*, have been revised to include the definitions of “manufacturing defect” and “producing cause” announced by the

Texas Supreme Court in *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007). See §§ 122.120, 122.121, 122.122.

Pretrial, Trial, and Appellate Practice. Significant cases in the area of pretrial, trial, and appellate practice include:

Interlocutory Appeal. The Texas Supreme Court held that Tex. Civ. Prac. & Rem. Code § 51.014(a)(8), which allows interlocutory appeal from the grant or denial of a plea to the jurisdiction asserted by a governmental unit, also allows an appeal by a state official sued in an official capacity who raises a sovereign immunity defense via a plea to the jurisdiction. See *Texas A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 843 (Tex. 2007). See also Ch. 2, *Jurisdiction of Texas Courts*, § 2.01[2][b][ii][H]; see also Ch. 153, *Accelerated Appeals*, § 153.02[1][b][vii]; see also Ch. 293, *Claims Against Government Entities*, § 293.13[4].

Predominance Requirement Prevents Class Certification When Complex and Diverse Individual Issues Would Over-

whelm or Confuse Jury or Severely Compromise Party's Ability to Present Claims or Defenses. In *Stonebridge Life Insurance Company v. Pitts*, 236 S.W.3d 201, 205–206 (Tex. 2007), the Texas Supreme Court has held that claims based on equitable issues, such as money had and received, may not be appropriate for class certification. See Ch. 13, *Class Actions*, § 13.04[5][b].

Pre-Class Certification Discovery Limited. In *In re SCI Texas Funeral Services, Inc.*, 236 S.W.3d 759, 760–761 (Tex. 2007), the Texas Supreme Court held that trial courts must limit pre-certification discovery to the particular issues governing certification in each case, considering factors such as the importance, benefit, burden, expense, and time needed to produce the proposed discovery. See Ch. 13, *Class Actions*, § 13.06[4][c].

Attorney's fees on quantum meruit claim. A plaintiff that prevails on a claim for quantum meruit may also recover reasonable attorney's fees. See *Lamajak, Inc. v. Frazin*, 230 S.W.3d 760, 796–797 (Tex. App.—Dallas 2007, no pet. h.). See Ch. 21A, *Actions in Quasi Contract*, § 21A.03[3].

Statute of limitations for quantum meruit claim. The statute of limitations begins to run when the condition on the plaintiff's payment from the defendant has been met, not when the plaintiff performed services for the defendant. See *Lamajak, Inc. v. Frazin*, 230 S.W.3d 760, 795–796 (Tex. App.—Dallas 2007, no pet. h.). See Ch. 21A, *Actions in Quasi Contract*, § 21A.03[4].

Diligence in Service of Citation. In *Proulx v. Wells*, 235 S.W.3d 213, 215–216 (Tex. 2007), the Texas Supreme Court held that, in assessing diligence in service of citation, the relevant inquiry is whether the

plaintiff acted as an ordinarily prudent person would have acted under the same or similar circumstances and was diligent up until the time the defendant was served. See Ch. 31, *Service on Residents*, § 31.01.

Choice of Law Provision and Jurisdiction. In *Barnhill v. Automated Shrimp Corp.*, 222 S.W.3d 756, 764 (Tex. App.—Waco 2007, no pet. h.), the court of appeal held that a choice of law provision selecting Texas law does not confer jurisdiction in Texas, but is a factor to consider when determining whether a defendant purposefully invoked the benefits and protections of Texas law. See Ch. 32, *Personal Jurisdiction and Service on Nonresidents*, § 32.07[3].

Arbitration Clauses in Adhesion Contracts Are Not Automatically Unconscionable. In *In Re U.S. Home Corporation*, 236 S.W.3d 761, 764, (Tex. 2007), the Texas Supreme Court held that an arbitration agreement was not unconscionable even though one party refused to contract unless the other party agreed to arbitration. See Ch. 44, *Arbitration*, § 44.02[1][b].

In *Chambers v. O'Quinn*, 51 Tex. Sup. Ct. J. 236 (Tex. 2007), the Texas Supreme Court held that denial of a prior writ of mandamus did not deprive another appellate court from considering an order compelling arbitration on appeal. See Ch. 44, *Arbitration*, § 44.08[1].

Nonsignatories to Arbitration Agreement Not Bound. In *In re Merrill Lynch Trust Company FSB*, 235 S.W.3d 185, 191 (Tex. 2007), the Texas Supreme Court held that nonsignatories to an arbitration agreement may not be required to arbitrate based on a corporate relationship where there is no alter-ego relationship or on an estoppel theory based solely on substantially interdependent and concerted misconduct. See Ch. 44, *Arbitration*, § 44.02[1][c].

Nonsignatories to Arbitration Agreement Bound. In *In re Kaplan Higher Education Corporation*, 235 S.W.3d 206, 209–210 (Tex. 2007), the Texas Supreme Court held that signatory’s agents may invoke an arbitration clause even if they are nonsignatories to the contract and the claimant is not suing on the contract. See Ch. 44, *Arbitration*, § 44.02[1][c].

Claim for Declaratory Relief Considered Moot if Wrongful Conduct Discontinued and Defendant Can Demonstrate That it Will Not Be Repeated. In *Bexar Metro Water Dist. v. City of Bulverde*, 234 S.W.3d 126, 131 (Tex. App.—Austin 2007, no pet. h.), the court of appeal held that the standard for determining whether a declaratory judgment case is moot due to the defendant’s voluntary conduct is strident. See Ch. 45, *Declaratory Relief*, § 45.02[1].

Constructive Trusts. The Texas Supreme Court discussed the equitable remedy of constructive trust in *Wilz v. Flournoy*, 228 S.W.3d 674, 676–677 (Tex. 2007). See Ch. 55, *Constructive Trusts*, § 55.03.

Statutes of Limitation. In *Elledge v. Friberg-Cooper Water Supply Corp.*, 240 S.W.3d 869 (Tex. 2007), the Texas Supreme Court interpreted the term “debt” under the limitations statutes and clarified that actions in quasi-contract based on unjust enrichment fall under the two-year statute rather than the four-year statute applicable to “debt” or contract actions. See Ch. 72, *Limitation of Actions*, § 72.02[2].

Discovery. In a case of first impression, the Texas Supreme Court discussed the extent to which a court may or should set aside parties’ agreements as to discovery that are otherwise enforceable under Tex. R. Civ. P. 191.1. See *In re BP Prods. North America, Inc.*, 51 Tex. Sup. Ct. J. 372 (Tex. 2008); see also Ch. 90, *Discovery: Scope*

and Limitations, § 90.03[8]; see also Ch. 94, *Depositions*, § 94.01[3].

Amended Pleadings. The Texas Supreme Court ruled that superseded pleadings may be introduced into evidence against the pleader as admissions of a party-opponent, overruling lower court cases that had held that superseded pleadings were admissible only if contrary to a party’s present position. See *Bay Area Healthcare Group, Ltd. v. McShane*, 239 S.W.3d 231, 235 (Tex. 2007); see also Ch. 110, *Pretrial Conferences*, § 110.04[2]; see also Ch. 111, *Amended and Supplemental Pleadings*, § 111.02[9].

Living Ctrs. of Texas, Inc. v. Penalver, 51 Tex. Sup. Ct. J. 370 (Tex. 2008), discussed incurable jury arguments, noting that arguments that appeal to racial prejudice, attack opposing parties and witnesses, or suggest witness tampering are considered incurably harmful because they strike at the appearance of and the actual impartiality, equality, and fairness of the judicial system. See Ch. 120C, *Jury Argument*, § 120C.06[7][a].

Interlocutory Appeal. The Texas Supreme Court held that Tex. Civ. Prac. & Rem. Code § 51.014(a)(8), which allows interlocutory appeal from the grant or denial of a plea to the jurisdiction asserted by a governmental unit, also allows an appeal by a state official sued in an official capacity who raises a sovereign immunity defense via a plea to the jurisdiction. See *Texas A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 843 (Tex. 2007); see also Ch. 153, *Accelerated Appeals*, § 153.02[1][b][vii]; see also Ch. 2, *Jurisdiction of Texas Courts*, § 2.01[2][b][ii][H]; see also Ch. 293, *Claims Against Government Entities*, § 293.13[4].

Business Entities and Relationships.

Significant cases in the area of business entities and relationships include:

Single business enterprise theory. Non-resident defendants—a corporation, a limited partnership, and a limited liability company—were not a single business enterprise as might subject them to personal jurisdiction in Texas because a subsidiary of the corporation owned property in Texas, when there was no evidence showing undocumented transfers of funds, unclear allocation of profits and losses, or other lack of corporate distinctness between the defendants. See *Asshauer v. Glimcher Realty Trust*, 228 S.W.3d 922, 934 (Tex. App.—Dallas 2007, no pet. h.); see also Ch. 165, *Disregard of Corporate Entity*, § 165.01[3].

Insider trading. Insider trading, by itself, cannot create a strong inference of scienter as required for liability under the Private Securities Litigation Reform Act; but it may meaningfully enhance the strength of an inference of scienter from other evidence. Insider trading can be a strong indicator of scienter if it occurs at suspicious times or in suspicious amounts. See *Central Laborers' Pension v. Integrated Elec.*, 497 F.3d 546, 552 (5th Cir. [Tex.] 2007); see also Ch. 171, *Securities Fraud*, § 171.05[4][a].

Application of Texas antitrust statutes. The Texas antitrust statutes will not support extraterritorial relief in the absence of a showing that this relief promotes competition in Texas or benefits Texas consumers. As a matter of interstate comity, Texas courts may not decide how another state's antitrust laws and policies apply to injuries confined to that state. See *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671, 674–675 (Tex. 2006); see also Ch. 200A, *Texas Antitrust Laws*, § 200A.01[2].

Attempted monopolization. In deter-

mining if there is an actual danger of a monopoly, a court must consider the relevant product, geographic market, and the defendant's economic power in that market; therefore, to prevail on this element, a plaintiff must present evidence that clearly defines the relevant market. See *Texas Disposal Systems v. Waste Management*, 219 S.W.3d 563, 592 (Tex. App.—Austin 2007, no pet. h.); see also Ch. 200A, *Texas Antitrust Laws*, § 200A.02[2][b].

Adverse employment action under Title VII. Denial of a transfer may be considered the equivalent of the denial of a promotion and, thus an adverse employment action, if the position sought is objectively better because, for example, it entails an increase in compensation or other tangible benefits, provides greater responsibility or better job duties, provides greater opportunities for career advancement, requires greater skill, is obtained through a complex competitive selection process, or is otherwise objectively more prestigious. See *Alvarado v. Texas Rangers*, 492 F.3d 605, 613 (5th Cir. [Tex.] 2007); see also Ch. 203A, *Employment Litigation*, § 203A.05[1][c].

Emotional distress damages under Title VII. Compensable emotional distress from discriminatory acts may be manifested by sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self esteem, excessive fatigue, or nervous breakdown, and physical manifestations may include ulcers, gastrointestinal disorders, hair loss, or headaches. The plaintiff's testimony, without more, may be sufficient to support an award of compensatory damages for emotional distress [See *E.E.O.C. v. WC&M Enterprises, Inc.*, 496 F.3d 393, 402 (5th Cir. [Tex.] 2007); see also Ch. 203A, *Employment Litigation*, § 203A.10[1][a].

Age discrimination under ADEA. An employer's comment regarding the employer's desire to "build leaders internally and attract younger talent" was not considered evidence of age-based discrimination against an employee, when the statement was not directed to any particular employee and was made six months before the employee's discharge. See *Berquist v. Washington Mut. Bank*, 500 F.3d 344, 349 (5th Cir. [Tex.] 2007); see also Ch. 203A, *Employment Litigation*, § 203A.16[3][a].

Award of back pay under ADEA. A plaintiff may generally recover back pay from the date the discriminatory conduct began until the date of the judgment; however, certain events or circumstances may terminate a plaintiff's entitlement to back pay before the date of the judgment, such as the plaintiff's employment in a higher-paying position or the plaintiff's failure to seek other employment with reasonable care and diligence. See *Palasota v. Haggard Clothing Co.*, 499 F.3d 474, 481 (5th Cir. [Tex.] 2007); see also Ch. 203A, *Employment Litigation*, § 203A.16[5].

Discrimination on basis of national origin. A plaintiff can establish a discrimination claim based on national origin, even if the defendant does not correctly identify the plaintiff's actual country of origin. See *E.E.O.C. v. WC&M Enterprises, Inc.*, 496 F.3d 393, 400 (5th Cir. [Tex.] 2007); see also Ch. 203A, *Employment Litigation*, § 203A.21[5][b][iii].

Punitive damages under TCHRA. The Civil Practice and Remedies Code's generally applicable cap on punitive damages controls over the cap found in the Labor Code in a discrimination action under the TCHRA. See *Arismendez v. Nightingale Home Health Care, Inc.*, 493 F.3d 602, 608 (5th Cir. [Tex.] 2007); see also Ch. 203A, *Employment Litigation*, § 203A.21[8][c].

Commercial Litigation. Significant cases in the area of commercial litigation include:

Delivery of contract. Although delivery is generally essential to the validity of a contract, when the parties manifest an intent through their actions and words that the contract become effective, delivery is shown. See *Winchek v. American Exp. Travel Related*, 232 S.W.3d 197, 204 (Tex. App.—Houston [1st Dist.] 2007, no pet. h.); see also Ch. 210A, *Contracts*, § 210A.01[1].

Remedies specified in contract. When a valid contract prescribes particular remedies or imposes particular obligations, equity must generally yield unless the contract violates positive law or public policy. As a rule, courts should not by judicial fiat insert non-existent language into parties' agreed-to contracts or delete existent language from them either. The court's duty is confined to construing the contract, as is. See *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 648–649 (Tex. 2007); see also Ch. 210A, *Contracts*, § 210A.42[2][c].

Auctions. The right to withdraw items in a "with reserve" auction ends once the auctioneer announces the completion of the sale, *i.e.*, on the "fall of the hammer." See *Cedyco Corp. v. Petroquest Energy, LLC*, 497 F.3d 485, 488 (5th Cir. [Tex.] 2007); see also Ch. 211, *Auctioneers and Commission Merchants*, § 211.01[1].

Agent's acquisition of property. A party who contracts to acquire property from a third person and convey it to another is deemed the agent of the other only if it is agreed that the party is to act primarily for the benefit of the other and not for his or her own benefit. See *GWTP Investments, L.P. v. SES Americom, Inc.*, 497 F.3d 478, 483 (5th Cir. [Tex.] 2007); see also Ch. 216, *Agency*, § 216.01[1].

Real Estate Litigation. Significant cases in the area of real estate litigation include:

Equitable Subrogation. *LaSalle Bank Nat'l Assn. v. White*, 51 Tex. Sup. Ct. J. 259 (Tex. 2007), in which the Court held that when a home equity loan violates the constitution because it is secured by a lien on homestead property designated for agricultural use, the lender forfeits any right to the “cash-out” portion of the loan, but is nevertheless equitably subrogated to the prior lienholders’ interests for the refinancing portion of the loan. See Ch. 255, *Real Property Security Interests*, § 255.06[3], [5].

Expiration of Limitations. *Ford v. Exxon Mobil*, 235 S.W.3d 615, 618–619 (Tex. 2007), in which the Court held that when a claim to set aside a deed for fraud was barred by the expiration of limitations on the fraud claim, limitations could not be evaded by asserting an alternative quiet title claim in equity. See Ch. 257, *Suit to Quiet Title*, § 257.05[1]; see also Ch. 336, *Fraud*, § 336.08[2].

Enforceable Arbitration Clauses. *In re U.S. Home Corp.*, 51 Tex. Sup. Ct. J. 42, 43–44 (Tex. 2007) (per curiam), in which the Court held that although only the builder had signed a sales contract including an enforceable arbitration clause, the claims against the individual defendants other than the builder arose from the builder’s contractual obligations to the buyers, who were therefore required to arbitrate all the claims, including those against the individual defendants. See Ch. 270, *Improvement Contracts*, § 270.23[1]; see also Ch. 270A, *Residential Construction Defect Disputes*, § 270A.04.

Mechanic’s and Materialmen’s Liens. *Reliance Nat'l Indem. Co. v. Advance'd Temps., Inc.*, 227 S.W.3d 46, 48–49 (Tex. 2007), in which the Court held that a

temporary agency that recruited, hired, and provided construction workers to a subcontractor was entitled to a mechanic’s lien because the workers were the agency’s employees, and the agency therefore “furnishes labor” in direct prosecution of work. See Ch. 271, *Mechanic’s and Materialmen’s Liens*, § 271.01[6].

Sovereign immunity from suit on construction contract. *Abilene Housing Auth. v. Gene Duke Builders*, 226 S.W.3d 415, 416–417 (Tex. 2007) (per curiam), in which the Court held that the “sue and be sued” language of Tex. Local Gov’t Code § 392.065 does not waive a housing authority’s sovereign immunity from suit on a construction contract. See Ch. 270, *Improvement Contracts*, § 270.01[5].

Personal Injury Litigation. Significant cases in the area of personal injury litigation include:

Jury Charge. *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007), in which the Court disapproved of two different official pattern jury charges in product liability cases:

(1) Texas Pattern Jury Charge 71.3 defining *manufacturing defect* as “a condition of the product that renders it unreasonably dangerous.” This instruction was held inadequate because it omitted the essential element of a deviation from design; and

(2) Texas Pattern Jury Charge 70.1 defining *producing cause* as “an efficient, exciting, or contributing cause, which in a natural sequence, produced injuries or damages.” This instruction was rejected as archaic and as unhelpful to the jury, and the Court determined that *producing cause* should be defined for the jury as “a substantial factor that brings about injury and without which the injury would not have occurred”. See Ch. 320, *Products Liability*, §§ 320.03[3], 320.07.

Interlocutory Appeal. *Texas A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 841–846 (Tex. 2007), in which the Court held that an interlocutory appeal is permitted under Tex. Civ. Prac. & Rem. Code § 51.014(a)(8) from any order based on a governmental unit’s sovereign immunity, and the unit itself need not be a party to the appeal; therefore, when an officer or employee sued in an official capacity files a plea to the jurisdiction based on the unit’s sovereign immunity, an interlocutory appeal of an order denying the plea is permitted. See Ch. 293, *Claims Against Governmental Entities*, § 293.13[4]; see also Ch. 2, *Jurisdiction of Texas Courts*, § 2.01[2][b][ii][H]; see also Ch. 153, *Accelerated Appeals*, § 153.02[1][b][vii].

Causation for negligence or product liability claims. *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 771–774 (Tex. 2007), in which the Court held that merely proving that the plaintiff was exposed to an air contaminant is not sufficient to show that the exposure was a “substantial factor” in bringing about the plaintiff’s injury; instead, the plaintiff must present concrete evidence of the frequency, regularity, and proximity of the plaintiff’s exposure, and that the aggregate exposure was sufficient to bring about the alleged injuries in order to support a finding of causation with respect to either negligence or product liability claims. See Ch. 290, *Negligence*, § 290.03[3][a]; Ch. 320, *Products Liability*, § 320.07.

Expert Reports. *Ogletree v. Matthews*, 51 Tex. Sup. Ct. J. 165 (Tex. 2007), a medical malpractice case in which the Court held: (1) when the trial court both denies a motion to dismiss and grants an extension to cure defects in timely served expert reports, Tex. Civ. Prac. & Rem. Code § 51.014(a)(9) prohibits interlocutory appeal of both aspects of order; and (2)

when a defendant does not object to the sufficiency of expert reports within 21 days, but instead files a motion to dismiss, all objections to the sufficiency of the report are waived by the failure to timely object under Tex. Civ. Prac. & Rem. Code § 74.351(a). See Ch. 321, *Medical Malpractice*, § 321.15[5], [7].

Informed Consent. *Schaub v. Sanchez*, 229 S.W.3d 322, 323–324 (Tex. 2007) (per curiam), a medical malpractice case in which the Court held that when the plaintiff was aware of the risks of a procedure and specifically withheld consent, but the doctor nevertheless performed the procedure, a claim based on informed consent could not be maintained because the necessary element of negligence in failing to disclose under Tex. Civ. Prac. & Rem. Code § 74.101 was absent. See Ch. 321, *Medical Malpractice*, § 321.05.

Settlement Agreements and Rule 11. *Knapp Med. Ctr. v. De La Garza*, 238 S.W.3d 767, 768 (Tex. 2007) (per curiam), in which the Court held that a hospital’s alleged oral agreement to contribute additional sums to a settlement was neither in writing nor made in open court and entered of record, and therefore was unenforceable under Tex. R. Civ. P. 11. See Ch. 102, *Settlement*, § 102.02[5].

Causation and Expert Testimony. *Guevara v. Ferrer*, 50 Tex. Sup. Ct. J. 1182, 1187–1188 (Tex. 2007), in which the Court held that: (1) although an uncontroverted affidavit under Tex. Civ. Prac. & Rem. Code § 18.001 establishes the cost and necessity of past medical services, it does not establish any necessary causal link between the occurrence or accident and the injuries for which medical treatment was provided; and (2) that causation must ordinarily be shown by expert testimony, unless the medical conditions at issue, the causal

connection between those conditions and the incident in question, and the necessity of the particular medical treatments for those conditions are all within the common knowledge and experience of laypersons. See Ch. 20, *Damages in Tort*, § 20.02[1].

Economic Loss Rule. *Equistar Chemicals, L.P. v. Dresser-Rand Co.*, 240 S.W.3d 864, 867–868 (Tex. 2007), in which the Court held that the economic loss rule is not an affirmative defense, but is instead a remedies doctrine that governs the appropriate amount of damages, but also that the defendant did not preserve error as to application of the rule when it failed to request segregation of tort and contract damages. See Ch. 20, *Products Liability*, §§ 320.01[3], 320.08[1].

Contractor's commercial general liability policy. *Lamar Homes, Inc. v. Mid-Continent Casualty Co.*, 50 Tex. Sup. Ct. J. 1162, 1165–1174 (Tex. 2007), in which the Court construed a contractor's commercial general liability policy and held that: (1) allegations of the contractor's negligence in performing under the contract were an "accident" or "occurrence" under the policy when there was no allegation that the insured intended or expected to damage the home through its alleged negligence; (2) the claim was one for "property damage" under the policy, even if the homeowner claimed only damages to or loss of the use of the home itself; (3) though the "your work" exclusion of the policy excluded damages to the home resulting from the contractor's own faulty construction, the work was actually done by a subcontractor, so that the subcontractor exception to the "your work" exclusion was applicable; and (4) an insured's request for a defense or for recovery of defense costs is a "first-party claim" under Tex. Ins. Code § 542.051(2), and therefore falls within the coverage of the prompt payment statute.

See Ch. 341, *Liability Insurance*, §§ 341.08[3], 341.09[2], 341.10[5]; see also Ch. 345, *Unfair Insurance Practices*, §§ 345.30[3], 345.114[1].

Hospital's Lien for Services. *Daughters of Charity Health Servs. of Waco v. Linns-taedter*, 226 S.W.3d 409, 411–413 (Tex. 2007), in which the Court held that although Tex. Prop. Code § 55.002 grants a lien in favor of a hospital to secure payment for services, the more specific provision of Tex. Lab. Code § 413.042 precluding a hospital from pursuing any claim against a worker's compensation claimant precluded the hospital's lien claim against the claimant's tort recovery. See Ch. 340, *Worker's Compensation*, § 340.11[4].

Worker's Compensation. *Morales v. Liberty Mut. Ins. Co.*, 241 S.W.3d 514, 516–517 (Tex. 2007), in which the Court held that the issue of whether a worker's compensation claimant was an employee or an independent contractor at the time of the injuries was one of compensability, not coverage, and so was subject to judicial review under Tex. Lab. Code § 410.301. See Ch. 340, *Worker's Compensation*, § 340.30.

Contribution or Subrogation. *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 51 Tex. Sup. Ct. J. 44, 49–51 (Tex. 2007), in which there were two insurers for the same risk, but one contributed more to the settlement of the claim, seeking contribution or subrogation from the underpaying insurer. The Court held that: (1) because each policy contained a pro rata clause, the co-insurers' liability was limited to its proportionate share of the loss, so that the decision to contribute more to the settlement fund was entirely voluntary and could not be the basis of a claim for contribution; and (2) because the insured was fully compensated for its loss, and the primary in-

sure did not breach any duty to the insured, there was no contractual or common law right to which the excess insurer could be subrogated so as to recover against the primary insurer. See Ch. 341, *Liability Insurance*, §§ 341.13[6], 341.15.

“Made Whole” Doctrine. *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 647–651 (Tex. 2007), in which the Court held that: (1) contract-based subrogation rights are governed by the parties’ express agreement in the policy, and are not invalidated by equitable considerations that might control in the absence of an agreement; and (2) when the policy provides an unfettered contractual right of subrogation, the insurer can recover all amounts paid, and the equitable “made whole” doctrine does not prevent or limit enforcement of the contractual right of subrogation. See Ch. 341, *Liability Insurance*, § 341.15; see also Ch. 344, *Life, Health, and Accident Insurance*, § 344.09.

Probate Code Litigation. Significant cases in the area of probate code litigation include:

Right of survivorship in community property. A right of survivorship provision in an account agreement can constitute an agreement between spouses to create a right of survivorship in community property; they are not required to execute separate survivorship agreements between themselves. See *Holmes v. Beatty*, 233 S.W.3d 494, 502–506 (Tex. App.—Houston [14th Dist.] 2007, no pet. h.); see also Ch. 391, *Descent and Distribution*, § 391.04.

Attorney ad litem in heirship proceeding. An attorney ad litem appointed by the

court in a proceeding to determine heirship is entitled to reasonable compensation for services in the amount set by the court; these costs are chargeable to the estate and cannot be assessed against an adverse party, even if the attorney ad litem represents the successful party. See *Ajudani v Walker*, 232 S.W.3d 219, 224 (Tex. App.—Houston [1st Dist.] 2007, no pet. h.); see also Ch. 391, *Descent and Distribution*, § 391.07.

Bequest to attorney’s employees. An individual who is working in the attorney’s office during the time period when the attorney drafted the testator’s will and when the testator executed that will is an “employee” of the attorney for purposes of Probate Code Section 58b even if that individual is employed as an independent contractor and, as a result, any devise or bequest to this individual in the testator’s will is void. See *Jones v. Krown*, 218 S.W.3d 746, 749 (Tex. App.—Fort Worth 2007, no pet. h.); see also Ch. 394, *Will Construction*, § 394.03[5].

Guardian’s appeal of order of removal. The ward’s death while the former guardian’s appeal is pending does not make the appeal moot, because either the current or former guardian will ultimately be required to present a final accounting of the guardianship estate to the court, and the interests of the estate require a full consideration of the former guardian’s claims because the estate is best served by the person the court deems most qualified to perform guardianship duties. See *Zipp v. Wuemling*, 218 S.W.3d 71, 73 (Tex. 2007); see also Ch. 411, *Administration of Guardianships*, § 411.05[5][e].

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May 2008

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<input type="checkbox"/>	2-16.1 thru 2-19.	2-17 thru 2-20.1
<input type="checkbox"/>	2-33 thru 2-49	2-33 thru 2-50.11
<input type="checkbox"/>	3-7.	3-7
<input type="checkbox"/>	3-45 thru 3-51	3-45 thru 3-51
<input type="checkbox"/>	3-63 thru 3-85	3-63 thru 3-83
<input type="checkbox"/>	3-95 thru 3-96.1.	3-95
<input type="checkbox"/>	3-143.	3-143
<input type="checkbox"/>	3-159.	3-159
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<input type="checkbox"/>	4-35 thru 4-39	4-35 thru 4-40.1
<input type="checkbox"/>	4-57 thru 4-63	4-57 thru 4-61
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<input type="checkbox"/>	12-87 thru 12-88.1	12-87
<input type="checkbox"/>	13-34.1 thru 13-38.1.	13-35 thru 13-37
<input type="checkbox"/>	13-47 thru 13-55	13-47 thru 13-56.7
<input type="checkbox"/>	13-82.1 thru 13-83	13-83
<input type="checkbox"/>	13-98.1 thru 13-98.5.	13-98.1 thru 13-98.3
<input type="checkbox"/>	13-143 thru 13-149	13-143 thru 13-147

VOLUME 2

Revision

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<input type="checkbox"/>	20-46.15 thru 20-46.35	20-46.15 thru 20-46.35
<input type="checkbox"/>	21-16.1 thru 21-36.1.	21-17 thru 21-35
<input type="checkbox"/>	21-60.1 thru 21-65	21-61 thru 21-65
<input type="checkbox"/>	21A-7 thru 21A-15	21A-7 thru 21A-15
<input type="checkbox"/>	21A-29 thru 21A-31.	21A-29 thru 21A-31
<input type="checkbox"/>	22-8.1 thru 22-34.1	22-9 thru 22-33
<input type="checkbox"/>	22-63 thru 22-69	22-63 thru 22-69
<input type="checkbox"/>	22-83 thru 22-85	22-83 thru 22-86.1
<input type="checkbox"/>	22-103 thru 22-119	22-103 thru 22-117
<input type="checkbox"/>	30-5 thru 30-20.5	30-5 thru 30-20.3
<input type="checkbox"/>	31-7 thru 31-11	31-7 thru 31-11
<input type="checkbox"/>	31-69.	31-69
<input type="checkbox"/>	31-109 thru 31-113	31-109 thru 31-113

Check As Done	<i><u>Remove Old Pages Numbered</u></i>	<i><u>Insert New Pages Numbered</u></i>
<input type="checkbox"/>	32-1	32-1
<input type="checkbox"/>	32-11 thru 32-45	32-11 thru 32-43
<input type="checkbox"/>	32-61 thru 32-67	32-61 thru 32-67
<input type="checkbox"/>	32-127 thru 32-131	32-127 thru 32-131

VOLUME 3

Revision

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<input type="checkbox"/>	41-99 thru 41-101	41-99
<input type="checkbox"/>	44-7 thru 44-27	44-7 thru 44-27
<input type="checkbox"/>	44-41 thru 44-43	44-41 thru 44-43
<input type="checkbox"/>	44-53 thru 44-55	44-53 thru 44-55
<input type="checkbox"/>	44-62.1 thru 44-62.7	44-62.1 thru 44-62.7
<input type="checkbox"/>	44-135 thru 44-137	44-135 thru 44-137
<input type="checkbox"/>	44-165 thru 44-175	44-165 thru 44-171
<input type="checkbox"/>	45-9 thru 45-31	45-9 thru 45-31
<input type="checkbox"/>	45-63.	45-63
<input type="checkbox"/>	45-77 thru 45-85	45-77 thru 45-85
<input type="checkbox"/>	46-5 thru 46-7	46-5 thru 46-7
<input type="checkbox"/>	46-17.	46-17
<input type="checkbox"/>	46-31 thru 46-35	46-31 thru 46-35
<input type="checkbox"/>	46-55.	46-55

VOLUME 4

Revision

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<input type="checkbox"/>	50-38.1 thru 50-39	50-39
<input type="checkbox"/>	50-53.	50-53
<input type="checkbox"/>	51-27.	51-27
<input type="checkbox"/>	55-11.	55-11
<input type="checkbox"/>	55-19 thru 55-21	55-19 thru 55-21

VOLUME 5

Revision

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<input type="checkbox"/>	61-21 thru 61-24.1	61-21 thru 61-24.1
<input type="checkbox"/>	61-53.	61-53
<input type="checkbox"/>	70-32.1 thru 70-38.1.	70-33 thru 70-38.1

Check As Done	<i><u>Remove Old Pages Numbered</u></i>	<i><u>Insert New Pages Numbered</u></i>
<input type="checkbox"/>	70-163	70-163
<input type="checkbox"/>	72-12.1 thru 72-16.1	72-13 thru 72-16.1
<input type="checkbox"/>	72-57 thru 72-60.3	72-57 thru 72-60.21

VOLUME 6

Revision

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<input type="checkbox"/>	90-29 thru 90-30.3	90-29 thru 90-30.3
<input type="checkbox"/>	90-159 thru 90-169	90-159 thru 90-167
<input type="checkbox"/>	92-11 thru 92-12.1	92-11 thru 92-12.1
<input type="checkbox"/>	92-22.3	92-22.3 thru 92-22.4(1)
<input type="checkbox"/>	92-61.	92-61
<input type="checkbox"/>	94-7	94-7 thru 94-8.1
<input type="checkbox"/>	96-21 thru 96-23	96-21 thru 96-23
<input type="checkbox"/>	97-89 thru 97-91	97-89 thru 97-91
<input type="checkbox"/>	98-31.	98-31
<input type="checkbox"/>	98-44.1	98-44.1

VOLUME 7

Revision

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<input type="checkbox"/>	101-54.16(1) thru 101-54.17	101-54.17
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<input type="checkbox"/>	102-143	102-143
<input type="checkbox"/>	110-21	110-21
<input type="checkbox"/>	110-39	110-39
<input type="checkbox"/>	110A-19 thru 110A-21.	110A-19 thru 110A-21
<input type="checkbox"/>	110A-95	110A-95
<input type="checkbox"/>	111-25 thru 111-27	111-25 thru 111-27
<input type="checkbox"/>	111-75 thru 111-77	111-75 thru 111-77
<input type="checkbox"/>	112-18.1 thru 112-27	112-19 thru 112-28.1
<input type="checkbox"/>	112-68.1 thru 112-73	112-69 thru 112-73
<input type="checkbox"/>	113-7.	113-7
<input type="checkbox"/>	113-27 thru 113-32.1	113-27 thru 113-31
<input type="checkbox"/>	113-127	113-127

Check
As
Done

Remove Old
Pages Numbered

Insert New
Pages Numbered

VOLUME 8

Revision

<input type="checkbox"/>	Title page thru iii	Title page thru iii
<input type="checkbox"/>	120-32.9	120-32.9 thru 120-32.10(1)
<input type="checkbox"/>	120C-51 thru 120C-53	120C-51 thru 120C-54.1
<input type="checkbox"/>	122-21	122-21
<input type="checkbox"/>	122-35	122-35
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<input type="checkbox"/>	122-69	122-69
<input type="checkbox"/>	122-109 thru 122-115	122-109 thru 122-115

VOLUME 9

Revision

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<input type="checkbox"/>	131-42.1 thru 131-45	131-43 thru 131-46.13
<input type="checkbox"/>	132-29	132-29

VOLUME 10

Revision

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<input type="checkbox"/>	147-12.1 thru 147-15	147-13 thru 147-16.1
<input type="checkbox"/>	147-28.1 thru 147-30.2(1)	147-29 thru 147-30.2(1)
<input type="checkbox"/>	149-33	149-33
<input type="checkbox"/>	149-93	149-93
<input type="checkbox"/>	150-47 thru 150-48.3	150-47 thru 150-48.3
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<input type="checkbox"/>	152-17	152-17
<input type="checkbox"/>	152-31	152-31
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<input type="checkbox"/>	153-23 thru 153-27	153-23 thru 153-28.1
<input type="checkbox"/>	153-50.1 thru 153-55	153-51 thru 153-55

VOLUME 11

Revision

<input type="checkbox"/>	Title page.	Title page
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<input type="checkbox"/>	165-9 thru 165-18.1	165-9 thru 165-18.1
<input type="checkbox"/>	165-27	165-27 thru 165-28.1
<input type="checkbox"/>	171-21	171-21 thru 171-22.1
<input type="checkbox"/>	171-32.9 thru 171-32.10(1).	171-32.9 thru 171-32.10(1)

VOLUME 12

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	182-21	182-21

VOLUME 13

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	200-9 thru 200-19.	200-9 thru 200-19
<input type="checkbox"/>	200-32.1 thru 200-33	200-33 thru 200-34.1
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<input type="checkbox"/>	200A-9 thru 200A-17	200A-9 thru 200A-17
<input type="checkbox"/>	203-16.1 thru 203-18.1	203-17 thru 203-18.1
<input type="checkbox"/>	203-29 thru 203-34.1	203-29 thru 203-34.1
<input type="checkbox"/>	203-67 thru 203-72.1	203-67 thru 203-71
<input type="checkbox"/>	203-83 thru 203-97	203-83 thru 203-98.5
<input type="checkbox"/>	203-117	203-117
<input type="checkbox"/>	203A-23 thru 203A-31	203A-23 thru 203A-31
<input type="checkbox"/>	203A-44.1 thru 203A-51.	203A-45 thru 203A-52.1
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<input type="checkbox"/>	203A-97 thru 203A-109	203A-97 thru 203A-109
<input type="checkbox"/>	203A-124.2(1) thru 203A-124.3	203A-124.3 thru 203A-124.5
<input type="checkbox"/>	205-9 thru 205-22.1	205-9 thru 205-22.3

VOLUME 14

Revision

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<input type="checkbox"/>	210-59	210-59
<input type="checkbox"/>	210-107 thru 210-108.1	210-107 thru 210-108.1
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<input type="checkbox"/>	210A-3 thru 210A-37	210A-3 thru 210A-37
<input type="checkbox"/>	210A-53 thru 210A-67	210A-53 thru 210A-67
<input type="checkbox"/>	210A-80.1 thru 210A-97.	210A-81 thru 210A-97

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<input type="checkbox"/>	210A-111 thru 210A-145	210A-111 thru 210A-143
<input type="checkbox"/>	210A-173 thru 210A-183	210A-173 thru 210A-181
<input type="checkbox"/>	211-3.	211-3 thru 211-4.1
<input type="checkbox"/>	215-17 thru 215-19	215-17 thru 215-19
<input type="checkbox"/>	216-5 thru 216-33.	216-5 thru 216-33
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<input type="checkbox"/>	220-37 thru 220-46.1	220-37 thru 220-46.3
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<input type="checkbox"/>	220-87 thru 220-93	220-87 thru 220-93

VOLUME 15

Revision

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<input type="checkbox"/>	232-25 thru 232-27	232-25 thru 232-27

VOLUME 16

Revision

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<input type="checkbox"/>	240-65	240-65

VOLUME 17

Revision

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<input type="checkbox"/>	257-21 thru 257-22.1	257-21 thru 257-22.1
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<input type="checkbox"/>	261-23 thru 261-25	261-23 thru 261-25
<input type="checkbox"/>	261-41 thru 261-46.5	261-41 thru 261-46.3
<input type="checkbox"/>	261-50.5 thru 261-51	261-51 thru 261-52.3

VOLUME 18

Revision

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<input type="checkbox"/>	271-15	271-15
<input type="checkbox"/>	271-48.1 thru 271-48.3	271-48.1 thru 271-48.3
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<input type="checkbox"/>	271-111	271-111
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<input type="checkbox"/>	282-82.1 thru 282-82.13	282-82.1 thru 282-82.17
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<input type="checkbox"/>	285-26.11.	285-26.11

VOLUME 19

Revision

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<input type="checkbox"/>	293-71 thru 293-80.1	293-71 thru 293-80.1
<input type="checkbox"/>	293-101	293-101
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<input type="checkbox"/>	310-31 thru 310-35	310-31 thru 310-35
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VOLUME 20

Revision

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<input type="checkbox"/>	336-73 thru 336-79	336-73 thru 336-77

VOLUME 21

Revision

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<input type="checkbox"/>	344-71 thru 344-73	344-71 thru 344-73
<input type="checkbox"/>	345-89 thru 345-94.3	345-89 thru 345-94.3
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<input type="checkbox"/>	345-115	345-115
<input type="checkbox"/>	345-145	345-145 thru 345-146.1
<input type="checkbox"/>	345-185 thru 345-186.1	345-185 thru 345-186.1

VOLUME 22

Revision

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<input type="checkbox"/>	363-119 thru 363-122.1	363-119 thru 363-122.1
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<input type="checkbox"/>	371-33 thru 371-40.1	371-33 thru 371-40.1
<input type="checkbox"/>	371-49 thru 371-51	371-49 thru 371-51

VOLUME 23

Revision

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<input type="checkbox"/>	381-63 thru 381-65	381-63 thru 381-65

VOLUME 24

Revision

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<input type="checkbox"/>	392-10.1 thru 392-15	392-11 thru 392-16.1

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<input type="checkbox"/>	394-45 thru 394-49	394-45 thru 394-49
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<input type="checkbox"/>	394-113 thru 394-115	394-113
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<input type="checkbox"/>	411-43 thru 411-48.1	411-43 thru 411-47
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VOLUME 25

Revision

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<input type="checkbox"/>	420-3.	420-3
<input type="checkbox"/>	421-12.1 thru 421-29	421-13 thru 421-31
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<input type="checkbox"/>	422-51	422-51
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VOLUME 26

Revision

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<input type="checkbox"/>	I-399 thru I-425.	I-399 thru I-423
<input type="checkbox"/>	I-551 thru I-585.	I-551 thru I-583
<input type="checkbox"/>	I-611 thru I-626.1	I-611 thru I-625
<input type="checkbox"/>	I-655 thru I-711.	I-655 thru I-705
<input type="checkbox"/>	I-759 thru I-835.	I-759 thru I-829
<input type="checkbox"/>	I-925 thru I-981.	I-925 thru I-977

Check As Done	<i>Remove Old <u>Pages Numbered</u></i>	<i>Insert New <u>Pages Numbered</u></i>
<input type="checkbox"/>	I-1091 thru I-1105.	I-1091 thru I-1103

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