

PUBLICATION UPDATE

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Dorsaneo, Texas Litigation Guide

Publication 719 Release 96

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HIGHLIGHTS

Highlights

- **Mature Breach of Contract May Be Subject of Declaratory Judgment Claim.** In *MBM Financial Corporation v. The Woodlands Operating Company, L.P.*, 292 S.W.3d 660, 52 Tex. Sup. Ct. J. 1221, 1226 (Tex. 2009), the Texas Supreme Court held that declaratory relief is available in contract cases “before or after there has been a breach,” so a matured breach is explicitly covered by the Declaratory Judgments Act. See § 45.04[1].
- **Statutes of limitation.** The Texas Supreme Court, overruling the longstanding rule of *Vaughn v. Deitz*, 430 S.W.2d 487 (Tex. 1968), held that limitations is not tolled by a defendant’s absence from the state when the defendant is amenable to service of process under the nonresident motorist’s long-arm statute. See *Ashley v. Hawkins*, 293 S.W.3d 175, 52 Tex. Sup. Ct. J. 954 (Tex. 2009); see § 72.04[5].
- **Summary judgment.** In *Fort*

Brown Villas III Condo. Ass’n v. Gillenwater, 285 S.W.3d 879, 882 (Tex. 2009), the Texas Supreme Court resolved a split among the courts of appeals and held that the discovery rules apply with respect to summary judgment proceedings, so that the failure to properly make, amend, or supplement discovery responses may lead to exclusion of the evidence or testimony in a summary judgment proceeding. See §§ 90.05[2][a], 92.03[3], 98.04[4][c], 101.07[3][d].

- **Amended pleadings.** The Texas Supreme Court clarified that Civil Rule 21a prescribes the allowable methods of service for amended pleadings—new service of citation is not necessary even if the amended pleading seeks relief that is more onerous than that sought in the original pleading or adds a new cause of action. See *In re E.A.*, 287 S.W.3d 1, 4–5 (Tex. 2009); see § 111.02[11].
- **Joint ventures and partnerships compared.** Although many cases discuss the differences between joint ventures and partnerships, the Texas Supreme Court has con-

cluded that there is no legal or logical reason for distinguishing between the two entities on the question of formation of the entity. See *Ingram v. Deere*, 288 S.W.3d 886, 894 n.2 (Tex. 2009); see § 180.01[5].

- **Removal of executor.** A good-faith disagreement over the executor's ownership share in the estate is insufficient, by itself, to require the executor's removal under Probate Code Section 149C, which requires affirmative malfeasance. An executor's mere assertion of a claim to estate property, or a difference of opinion over the value of that property, does not warrant removal; and a potential conflict does not equal actual misconduct. See *Kappus v. Kappus*, 284 S.W.3d 831, 837 (Tex. 2009); see § 393.09[4][b].

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Pretrial, Trial, and Appellate Practice

Significant cases in the area of pretrial, trial, and appellate practice include:

To Be "Prevailing Party" in Breach on Contract Action, Party must Recover Tangible Monetary or Equitable Relief.

In *Intercontinental Group Partnership v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 52 Tex. Sup. Ct. J. 1204, 1208 (Tex. 2009), the Texas Supreme Court held that a finding of breach of contract unaccompanied by any tangible recovery (either monetary or equitable relief) cannot bestow "prevailing party" status. See § 22.20[2][a][i].

Confirmation of Arbitration Award in

Federal Court Requires Separate Federal Jurisdiction. In *Palisades Acquisition XVI, LLC v. Chatman*, 288 S.W.3d 552, 555 (Tex. App.—Houston [14th Dist.] 2009, no pet. h.), the court of appeal held that a party may seek confirmation of an arbitration award in federal court only if there is an independent basis for federal jurisdiction. See § 44.06[3][b].

Mature Breach of Contract May Be Subject of Declaratory Judgment Claim.

In *MBM Financial Corporation v. The Woodlands Operating Company, L.P.*, 292 S.W.3d 660 (Tex. 2009), the Texas Supreme Court held that declaratory relief is available in contract cases "before or after there has been a breach," so a matured breach is explicitly covered by the Declaratory Judgments Act. See § 45.04[1].

Judicial estoppel. A party seeking to assert judicial estoppel must show not only that the other party is asserting inconsistent positions but also that the other party gains an unfair advantage by doing so. See *Ferguson v. Building Materials Corp.*, 295 S.W.3d 642, 52 Tex. Sup. Ct. J. 1095, 1096 (Tex. 2009). See §§ 70.05[3][f][iii], 110.04[3].

Statutes of limitation. The Texas Supreme Court, overruling the longstanding rule of *Vaughn v. Deitz*, 430 S.W.2d 487 (Tex. 1968), held that limitations is not tolled by a defendant's absence from the state when the defendant is amenable to service of process under the nonresident motorist's long-arm statute. See *Ashley v. Hawkins*, 293 S.W.3d 175, 52 Tex. Sup. Ct. J. 954 (Tex. 2009); see § 72.04[5].

Summary judgment. In *Fort Brown Villas III Condo. Ass'n v. Gillenwater*, 285 S.W.3d 879, 882 (Tex. 2009), the Texas Supreme Court resolved a split among the courts of appeals and held that the discovery rules apply with respect to summary

judgment proceedings, so that the failure to properly make, amend, or supplement discovery responses may lead to exclusion of the evidence or testimony in a summary judgment proceeding. See §§ 90.05[2][a], 92.03[3], 98.04[4][c], 101.07[3][d].

Amended pleadings. The Texas Supreme Court clarified that Civil Rule 21a prescribes the allowable methods of service for amended pleadings—new service of citation is not necessary even if the amended pleading seeks relief that is more onerous than that sought in the original pleading or adds a new cause of action. See *In re E.A.*, 287 S.W.3d 1, 4–5 (Tex. 2009); see § 111.02[11].

Motions for new trial. When a trial court sets aside a jury verdict and orders a new trial, the court’s order must set out a reasonably specific explanation—merely stating that the order is “in the interest of justice” is not enough. See *In re Columbia Med. Ctr.*, 290 S.W.3d 204, 210–213 (Tex. 2009); see §§ 140.03[2], 140.102.

Mandamus. The Texas Supreme Court explained and clarified the situations in which mandamus might be appropriate to review an order compelling arbitration. See *In re Gulf Exploration, LLC*, 289 S.W.3d 836, 840–841 (Tex. 2009); see § 152.03[1][c].

Commercial Litigation

Significant cases in the area of commercial litigation include:

Demand before derivative suit. The demand that must be made on a corporation before a derivative suit may be filed must identify the shareholder who is making it. See *In re Schmitz*, 285 S.W.3d 451, 455–457 (Tex. 2009); see § 162.02[2].

Conversion of corporate shares. An unreasonable refusal to acknowledge a lawful transfer of corporate shares constitutes

conversion under Texas law. See *Arthur W. Tifford, PA v. Tandem Energy Corp.*, 562 F.3d 699, 707 (5th Cir. [Tex.] 2009); see § 170.05[1].

Choice of law securities fraud action. Texas law, rather than another state’s law, will apply to shareholders’ fraud and misrepresentation claims against a corporation, when the shareholders were in Texas during negotiations for the purchase of the stock and signed securities purchase agreements in Texas, some of the shareholders received representations in Texas, some shareholders were Texas corporations with their principal places of business in Texas, the place of performance was in neither state, and the other state lacked a compelling interest in the litigation. See *Highland Crusader Offshore v. Motient Corp.*, 281 S.W.3d 237, 249–250 (Tex. App.—Dallas 2009, no pet. h.); see § 171.02[1].

Scienter in Private Securities Litigation Reform Act action. In determining whether the complaint satisfies the scienter requirement under the PSLRA, the court looks to the state of mind of the individual corporate officials who made or issued the statement, or who ordered or approved it or its making or issuance, or who furnished information or language to be included in the statement, rather than looking generally to the collective knowledge of all of the corporation’s officers and employees acquired in the course of their employment. See *Flaherty & Crumrine Preferred Income Fund v. TXU*, 565 F.3d 200, 206 (5th Cir. [Tex.] 2009); see § 171.05[4][a].

Factors indicating existence of partnership. Although the five factors indicating the existence of a partnership specified in Tex. Bus. Orgs. Code § 152.052(a) are to be considered in determining whether a partnership has been formed, no single factor is either necessary or sufficient to

prove the existence of a partnership. Instead, a court must examine the totality of the circumstances in each case. See *Ingram v. Deere*, 288 S.W.3d 886, 891 896–898 (Tex. 2009); see § 180.01[4][b].

Joint ventures and partnerships compared. Although many cases discuss the differences between joint ventures and partnerships, the Texas Supreme Court has concluded that there is no legal or logical reason for distinguishing between the two entities on the question of formation of the entity. See *Ingram v. Deere*, 288 S.W.3d 886, 894 n.2 (Tex. 2009); see § 180.01[5].

General partner's trust obligations to partnership. A general partner in a limited partnership owes trust obligations to the partnership, having a duty of loyalty and due care, as well as being under an obligation to discharge its duties in good faith and in the reasonable belief that it is acting in the partnership's best interests. These same obligations apply when the general partner stands in a two-tiered partnership structure as the general partner of a general partner. See *McBeth v. Carpenter*, 565 F.3d 171, 177–178 (5th Cir. [Tex.] 2009); see § 182.05[1][a].

Arbitration of ADEA claims. A provision in a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate claims arising under the Age Discrimination in Employment Act (ADEA) [29 U.S.C. § 621] is enforceable. See *14 Penn Plaza LLC v. Pyett*, — U.S. —, 129 S. Ct. 1456, 1461, 1465, 1474, 173 L. Ed. 2d 398 (2009); see § 202.03[1][b].

Denial of pension plan benefits. In determining whether a plan administrator's denial of benefits was an abuse of discretion, the court must determine whether the administrator's determination was legally correct and, if not, whether the administra-

tor's decision was an abuse of discretion in light of any potential conflict of interest. See *Stone v. Unocal Termination Allowance Plan*, 570 F.3d 252, 255–256 (5th Cir. [Tex.] 2009); see § 203.24[3].

Family Medical Leave Act claim against state. Congress has abrogated the states' Eleventh Amendment immunity regarding the FMLA's self-care provision. As a result, a former employee is entitled to bring an employment discrimination action against a state agency, alleging that he or she was terminated in retaliation for taking leave under the self-care leave provision of the FMLA. See *University of Texas at El Paso v. Herrera*, 281 S.W.3d 575, 582 (Tex. App.—El Paso 2008, pet. filed); see § 203.35[3].

Benefit differentials. Benefit differentials produced by a bona fide seniority-based pension plan are permitted under Title VII of the Civil Rights Act unless they are the result of an intention to discriminate. See *AT & T Corp. v. Hulteen*, — U.S. —, 129 S. Ct. 1962, 1969–1970, 173 L. Ed. 2d 898 (2009); see § 203A.04[1][b].

Abilities test. A city's refusal to certify the results of a firefighter promotion examination based on its belief that doing so could have a disparate impact on minority firefighters violated Title VII's disparate treatment prohibition, in the absence of a valid defense. See *Ricci v. Destefano*, — U.S. —, 129 S. Ct. 2658, 2673, 174 L. Ed. 2d 490 (2009); see § 203A.06.

Official immunity. Official immunity is an affirmative defense that shields governmental employees from personal liability. A governmental employee is entitled to official immunity for the performance of discretionary duties within the scope of his or her authority in good faith. See *Newman v. Kock*, 274 S.W.3d 697 (Tex. App.—San Antonio 2008, no pet. h.); see

§§ 203A.04[1][c], 203A.12[1][c].

Disability under ADA. An employee's chronic fatigue syndrome may cause a substantial limitation on his or her major life activities of caring for self, sleeping, and thinking, thus rendering the employee disabled within the meaning of the Americans With Disabilities Act. See *E.E.O.C. v. Chevron Phillips Chemical Co., LP*, 570 F.3d 606, 615–616 (5th Cir. [Tex.] 2009); see § 203A.14[4][b][v].

Mixed-motive claim under ADEA. The Age Discrimination in Employment Act does not authorize a mixed-motives age discrimination claim. See *Gross v. FBL Financial Services, Inc.*, — U.S. —, 129 S. Ct. 2343, 2350, 174 L .Ed. 2d 119 (2009); see § 203A.16[3][a].

Due process rights of tenured faculty member. A tenured faculty member at a state university has a constitutionally protected interest in his or her employment. Due process in that context means the right to notice and, if the faculty member wants one, a hearing before termination. See *Newman v. Kock*, 274 S.W.3d 697 (Tex. App.—San Antonio 2008, no pet. h.); see § 203A.27.

Ban on payroll deductions for political activities. By statute, a state may ban public-employee payroll deductions for political activities without violating these employees' First Amendment rights. See *Ysursa v. Pocatello Educ. Assn.*, — U.S. —, 129 S. Ct. 1093, 1096, 1098–1101, 172 L. Ed. 2d 770 (2009); see § 203A.40[1].

Fraudulent inducement. A claim of fraudulent inducement cannot be based on a failure to disclose material facts, unless the defendant had a duty to disclose this information to the plaintiff. Whether a duty to speak exists is a question of law. For example, a party had no duty to separately disclose forum-selection clauses to the

other party, which were in two-page contracts between businesses dealing at arms length and were located in close proximity to the signature blocks and in the same font and size as all other provisions. See *In re Int'l Profit Assocs.*, 274 S.W.3d 672, 678–679 (Tex. 2009); see § 210A.04[3][c].

Health care liability claim. A patient's cause of action against a plastic surgery company following a “botched fact lift,” alleging misrepresentations and a failure to adequately disclose the risks and hazards of the procedure, was a health care liability claim and was not a claim under the DTPA; the patient was, therefore, required to satisfy the expert report requirement for a health care liability claim. See *Scientific Image Center v. Brewer*, 282 S.W.3d 233, 236–238 (Tex. 2009); see § 220.01[5][e].

Alternate or joint payees on check. Checks which separated the payees by a forward slash (/) were ambiguous as to whether they were payable to the payees alternatively or jointly, and therefore were payable alternatively. The common usage of a forward slash to separate payees on negotiable instruments means “or.” If the names of the payees are separated by a forward slash, only one endorsement is necessary. See *New Wave Techs. v. Legacy Bank of Tex.*, 281 S.W.3d 99, 101–103 (Tex. App.—El Paso 2008, no pet. h.); see § 230.03[1][c].

Real Estate Litigation

Significant cases in the area of real estate litigation include:

Governmental Entity Liable for Nuisance. The Texas Supreme Court held that for a governmental entity to be liable for a nuisance as an unconstitutional taking of property, the claimant must prove that the governmental unit acted intentionally in creating the nuisance, which requires that

the unit know (1) that a specific act is causing identifiable harm, or (2) that the specific property damage is substantially certain to result from the act. See *City of San Antonio v. Pollock*, 284 S.W.3d 809, 821 (Tex. 2009); see §§ 261.03[1], 280.13[4], 311.02[3][c].

Eminent Domain and lost income or profits. The Texas Supreme Court held that lost income or profits from a business operated on the condemned property may be considered only if: (1) the condemnation causes a material and substantial interference with access to one's property; or (2) the taking is partial, so that lost profits may demonstrate the effect on the market value of the remainder. See *State v. Central Expressway Sign Assocs.*, 52 Tex. S. Ct. J. 978, 980–981 (Tex. 2009); see § 261.01[3][f][i].

Eminent Domain and partial or temporary loss. The Texas Supreme Court held that a partial, temporary loss of access to parking spaces due to construction activity related to the taking is not compensable as damages to the remainder as a matter of law. See *State v. Bristol Hotel Asset Co.*, 293 S.W.3d 170, 52 Tex. S. Ct. J. 751, 752–753 (Tex. 2009); see § 261.01[3][f][v].

Adverse Possession. The court of appeals held that when the claim relates to separate tracts with separate legal descriptions, and the evidence of use of the tracts by the alleged adverse possessor is markedly different, the jury should be asked separate questions as to the two tracts, even if the record owner was conveyed both tracts by a common deed. See *Gutierrez v. People's Mgmt. of Tex. I, Ltd.*, 277 S.W.3d 72, 77–80 (Tex. App.—El Paso 2009, pet. denied); see § 250.02[1][a].

Improvements on Government Property. The court of appeals held that when a

lease makes it clear that improvements on government property belong to the leaseholder, not the government, the leaseholder is considered the owner of the improvements and is liable for the property taxes on them, even if the lease provides that title to the improvements will pass to the government when the lease expires. See *Dallas Cent. Appraisal Dist. v. Mission Aire IV, L.P.*, 278 S.W.3d 471, 474–479 (Tex. App.—Dallas 2009, pet. denied); see § 260.02[1][a].

Mechanic's lien claimant original contractor or subcontractor. The court of appeals held that whether a mechanic's lien claimant is an original contractor or subcontractor turns on the actual nature of the contractual arrangements, and an original contractor's erroneous designation of itself as a subcontractor in a lien affidavit does not control its rights and remedies under the mechanic's lien statutes. See *Truss World, Inc. v. ERJS, Inc.*, 284 S.W.3d 393, 395 (Tex. App.—Beaumont 2009, pet. denied); see §§ 271.01[4][b], 271.02[2][e].

Signing an improvement contract as to homestead property. The court of appeals held that when one spouse signed an improvement contract as to homestead property: (1) the signing spouse has standing to oppose a lien claim based on the absence of the other spouse's signature as required by Property Code § 53.254; and (2) the signature of both spouses is required even if the couple is separated and the nonsigning spouse has never lived on the property. See *Denmon v. Atlas Leasing, L.L.C.*, 285 S.W.3d 591, 597 (Tex. App.—Dallas 2009, no pet.); see § 271.02[8][c].

Personal Injury Litigation

Significant cases in the area of personal injury litigation include:

New duty on employers. The Texas Supreme Court held that when an employer

sets a demanding work schedule so that employee fatigue might be anticipated, the employer is nevertheless not liable for an accident caused by the employee falling asleep at the wheel after work because: (1) the employer had no actual knowledge of any incapacity when the employee left work; and (2) the employer did not affirmatively exercise any control over the employee. The Court specifically declined to create a new duty on employers to either protect the public from accidents caused by fatigued, off-duty employees, or to train employees about how to deal with work-induced fatigue. See *Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401, 405–413 (Tex. 2009); see § 290.32[1][b][ii].

Recovery for design defects claim. The Texas Supreme Court held that to recover on a product liability claim for a design defect, the claimant must prove three elements: (1) the product was unreasonably dangerous as designed; (2) a safer alternative design existed; and (3) the defect was a producing cause of the claimant’s injuries. The Court also held that the common law risk-utility analysis is used to determine whether the product was unreasonably dangerous as designed, and that the open and obvious nature of the defect does not preclude liability. See *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 311 (Tex. 2009); see § 320.03[4].

Proportionate responsibility and statute of repose. The Texas Supreme Court held that the defendant’s designation of an engineering firm as a responsible third party did not permit the plaintiff to join the firm as a defendant because the 10-year repose period of Civil Practices & Remedies Code § 16.008(a) had expired, and the proportionate responsibility statutes do not revive a claim that is barred by an applicable statute of repose. See *Galbraith*

Eng’g Consultants, Inc., v. Pochucha, 290 S.W.3d 863 (Tex. 2009); see § 291.03[2][b].

Estate and malpractice claim. The Texas Supreme Court held that: (1) because a legal malpractice action by the estate of a deceased client is identical to the action that the client could have brought, an executor has the necessary privity with the offending attorney, so the estate may bring any malpractice claim resulting in property damage to the deceased client, and is not limited to bringing estate-planning malpractice claims. See *Smith v. O’Donnell*, 288 S.W.3d 417, 421–423 (Tex. 2009); see § 322.02[1][f]; and (2) exemplary damages were not available because the claimant presented no evidence of the attorney’s malice. See § 20.01[2][c][ii].

“Special Defect” under Tort Claims Act. The Supreme Court held that an unsecured floodgate arm located three feet from a roadway and facing the wrong direction into oncoming traffic was not a “special defect” under the Tort Claims Act because it was not deployed and therefore did not obstruct an ordinary user of the road. The Court also clarified that neither the Tort Claims Act nor its prior decisions require that the condition present an “unexpected and unusual” danger in order to be a special defect. See *Denton County v. Beynon*, 283 S.W.3d 329, 332 (Tex. 2009); see § 293.10[5][g][iv].

Sovereign Immunity. The Texas Supreme Court held that: (1) a plaintiff may seek declaratory or injunctive relief against governmental entities based on violations of constitutional or statutory law, and sovereign immunity does not bar such suits, even if an incidental effect of the relief is that the governmental entity will be required to pay money to the plaintiff; and (2) in such an action, the proper defendants are

the public officials alleged to have violated the law, not the governmental entity served by those officials. See *City of El Paso v. Heinrich*, 284 S.W.3d 366, 369–373 (Tex. 2009); see § 293.01[2].

Premises liability claim versus health care liability claim. The Texas Supreme Court held that an allegation that a hospital bed was assembled incorrectly and presented a dangerous condition was a premises liability claim, not a health care liability claim because there was no professional judgment involved in either the assembly or the provision of the bed, so that its condition was not an inseparable part of the plaintiff's health care; See *Marks v. St. Luke's Episcopal Hosp.*, 52 Tex. Sup. Ct. J. 1184, 1187–1190 (Tex. 2009); see § 321.02[2].

Statutory sanctions for missing deadline for filing expert report. The Texas Supreme Court held that when the claimant misses the deadline for filing an expert report in a medical malpractice case under Civil Practices and Remedies Code Section 74.351, statutory sanctions remain available despite a voluntary nonsuit, and the nonsuit does not cut off the defendant's right to move for those sanctions. See *Crites v. Collins*, 284 S.W.3d 839, 842–843 (Tex. 2009); see § 321.15[7][b].

Appeal from a final judgment. The Texas Supreme Court held that when a defendant's motion for dismissal and sanctions based on the claimant's failure to file an expert report in a medical malpractice case is denied, but the defendant declines to take an interlocutory appeal as authorized by Civil Practices and Remedies Code Section 51.014, the defendant may nevertheless appeal from the final judgment if the plaintiff later nonsuits the action. See *Hernandez v. Ebrom*, 289 S.W.3d 316, 318–320 (Tex. 2009); see § 321.15[7][c].

Medical malpractice case instruction to the jury. The Texas Supreme Court held that: (1) the trial court properly refused to instruct the jury on new and independent cause because the hospital did not show that the negligence of the treating physicians cut off any causal connection between the hospital's negligence in failing to inform the patient of her cancer diagnosis and the harm suffered by patient; but (2) the trial court erred in failing to instruct the jury to consider only the conduct of the hospital's employees or agents, not the conduct of any independent contractors involved in the patient's care. See *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 857–859 (Tex. 2009); see §§ 321.08, 321.11[1][c].

Medical malpractice claim and attorney's fees. The Texas Supreme Court held that attorney's fees are "incurred" by a medical malpractice defendant within the meaning of Civil Practices and Remedies Code Section 74.351(b)(1) even if those fees are actually paid by an insurer, not by the defendant personally. See *Aviles v. Aguirre*, 52 Tex. Sup. Ct. J. 1087, 1088 (Tex. 2009) (per curiam); see § 321.15[7][a].

Tort Claims Act suit and failure to provide notice to government unit. The court of appeals held that: (1) in any Tort Claims Act suit filed on or after Sept. 1, 2005, the failure of the claimant to provide notice to the government unit requires dismissal for lack of jurisdiction under Government Code § 311.034; and (2) because notice is a jurisdictional "prerequisite" to suit, notice must precede the filing of the case, so any notice provided by the suit itself cannot suffice. See *Brazoria County v. Colquitt*, 282 S.W.3d 582, 586–587 (Tex. App.—Houston [14th Dist.] 2009, pet. filed); see § 293.16[1][a].

Health care liability claim versus premises liability claim. The court of appeals held that a plaintiff's claim arising from a slip-and-fall in a hospital bathroom was not a health care liability claim but instead mere premises liability claim because it related to the condition of the premises generally, not to any standard of care or safety. See *Harris Methodist Fort Worth v. Ollie*, 270 S.W.3d 720, 722–727 (Tex. App.—Fort Worth 2008, pet. filed); see § 321.02[2].

Health care liability claim and expert report. The court of appeals held that because a health care liability claimant must serve a required expert report on a “party” or that party’s attorney, and a health care provider is a “party” only after a lawsuit is filed and service of process is obtained, providing the report prior to filing the action does not comply with the statutory requirements. See *Poland v. Ott*, 278 S.W.3d 39, 47–52 (Tex. App.—Houston [1st Dist.] 2008, pet. filed); see § 321.15[1][a].

Intentional acts exclusion of a liability policy. The Texas Supreme Court construed the intentional acts exclusion of a liability policy, and held that when an insured driver fled from the police, instigating a chase that ended with a collision, the insurer did not establish as a matter of law that the exclusion applied. The Court concluded that the exclusion applies only when *injury* was caused intentionally; therefore, mere intent to engage in the *conduct* that resulted in the injury is not sufficient unless injury was also intended. See *Tanner v. Nationwide Mutual Fire Ins. Co.*, 289 S.W.3d 828 (Tex. 2009); see § 341.10[2].

Scope of an appraisal clause in insurance policy. The Texas Supreme Court construed the scope of an appraisal clause in a property insurance policy, and held

that: (1) the appraisal process is restricted to damages, not causation or liability; but: (2) the mere fact that causation questions are implicated does not mean that the dispute falls outside the appraisal agreement; instead, the appraisal process should go forward, and any causation issues addressed by the appraisers may be challenged by the parties and are subject to reassessment if necessary in subsequent court proceedings. See *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 52 Tex. Sup. Ct. J. 1042, 1045–1046 (Tex. 2009); see § 343.07[1].

Worker’s compensation carrier’s failure to contest compensability. The Texas Supreme Court held that a worker’s compensation carrier’s failure to contest compensability of an injury does not preclude a challenge to the *extent* of that injury under 28 Tex. Admin. Code § 124.3(e). The Court also concluded that an extent-of-injury dispute may be brought irrespective of whether the basis for that dispute could have been discovered by a reasonable investigation within the 60-day waiver period applicable to the compensability issue. See *State Office of Risk Mgmt. v. Lawton*, 295 S.W.3d 646, 52 Tex. Sup. Ct. J. 1218, 1219–1221 (Tex. 2009); see § 340.21.

Mandamus granted in worker’s compensation case. The Texas Supreme Court conditionally granted mandamus to require granting a plea to the jurisdiction because a worker’s compensation claimant had not exhausted all administrative remedies as to a claim for medical benefits, including medical necessity determinations, or requests for preauthorization of treatments. See *In re Liberty Mut. Fire Ins. Co.*, 52 Tex. Sup. Ct. J. 1228, 1228–1229 (Tex. 2009) (per curiam); see § 340.30[3].

Probate Code Litigation

Significant cases in the area of probate

code litigation include:

Removal of executor. A good-faith disagreement over the executor's ownership share in the estate is insufficient, by itself, to require the executor's removal under Probate Code Section 149C, which requires affirmative malfeasance. An executor's mere assertion of a claim to estate property, or a difference of opinion over the value of that property, does not warrant removal; and a potential conflict does not equal actual misconduct. See *Kappus v. Kappus*, 284 S.W.3d 831, 837 (Tex. 2009); see § 393.09[4][b].

Personal representative's right to sue on estate's behalf. A personal representative may bring suit on the estate's behalf against the decedent's attorneys for malpractice arising from allegedly negligent

advice they gave the decedent while he was serving as executor of his wife's estate, which allegedly resulted in claims being filed against the decedent's estate by the wife's beneficiaries. See *Smith v. O'Donnell*, 288 S.W.3d 417, 419, 421–423 (Tex. 2009); see § 400.01[2].

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Revision

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<input type="checkbox"/>	xiii thru xvii	xiii thru xv
<input type="checkbox"/>	1-8.1 thru 1-9.	1-9
<input type="checkbox"/>	2-31 thru 2-35	2-31 thru 2-35
<input type="checkbox"/>	2-61 thru 2-63	2-61 thru 2-63
<input type="checkbox"/>	3-51 thru 3-55	3-51 thru 3-55
<input type="checkbox"/>	4-13 thru 4-19	4-13 thru 4-19
<input type="checkbox"/>	11-23.	11-23
<input type="checkbox"/>	12-7 thru 12-15	12-7 thru 12-15
<input type="checkbox"/>	12-89 thru 12-93	12-89 thru 12-93

VOLUME 2

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	20-21.	20-21 thru 20-22.1
<input type="checkbox"/>	20-46.19	20-46.19 thru 20-46.20(1)
<input type="checkbox"/>	22-19 thru 22-31	22-19 thru 22-32.1
<input type="checkbox"/>	22-63 thru 22-71	22-63 thru 22-72.1
<input type="checkbox"/>	22-109 thru 22-116.1	22-109 thru 22-116.1
<input type="checkbox"/>	30-9	30-9 thru 30-10.1
<input type="checkbox"/>	30-20.1 thru 30-20.3.	30-20.1 thru 30-20.3
<input type="checkbox"/>	31-29 thru 31-31	31-29 thru 31-31
<input type="checkbox"/>	32-7	32-7
<input type="checkbox"/>	32-17.	32-17 thru 32-18.1
<input type="checkbox"/>	32-26.1.	32-26.1
<input type="checkbox"/>	32-73.	32-73
<input type="checkbox"/>	32-127 thru 32-128.1	32-127 thru 32-128.1

VOLUME 3

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	44-19 thru 44-33	44-19 thru 44-34.1
<input type="checkbox"/>	44-49 thru 44-62.5	44-49 thru 44-62.5
<input type="checkbox"/>	44-119	44-119
<input type="checkbox"/>	44-135 thru 44-145	44-135 thru 44-146.1
<input type="checkbox"/>	45-9 thru 45-28.1	45-9 thru 45-28.1

Check As Done	<i><u>Remove Old Pages Numbered</u></i>	<i><u>Insert New Pages Numbered</u></i>
<input type="checkbox"/>	45-49 thru 45-51	45-49 thru 45-51
<input type="checkbox"/>	45-71.	45-71
<input type="checkbox"/>	45-83 thru 45-85	45-83 thru 45-85
<input type="checkbox"/>	46-7	46-7 thru 46-8.1
<input type="checkbox"/>	46-79 thru 46-81	46-79

VOLUME 4

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	50-33 thru 50-34.1	50-33 thru 50-34.1
<input type="checkbox"/>	50-42.3.	50-42.3

VOLUME 5

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	61-59 thru 61-60.1	61-59 thru 61-60.1
<input type="checkbox"/>	61-125	61-125 thru 61-126.1
<input type="checkbox"/>	70-65.	70-65
<input type="checkbox"/>	70-171 thru 70-173	70-171 thru 70-173
<input type="checkbox"/>	72-11.	72-11 thru 72-12.1
<input type="checkbox"/>	72-23.	72-23 thru 72-24.1
<input type="checkbox"/>	72-60.7 thru 72-60.8(1)	72-60.7 thru 72-60.8(1)
<input type="checkbox"/>	72-60.17	72-60.17 thru 72-60.18(1)
<input type="checkbox"/>	72-92.1 thru 72-99	72-93 thru 72-99
<input type="checkbox"/>	80-11.	80-11
<input type="checkbox"/>	81-5 thru 81-19	81-5 thru 81-17
<input type="checkbox"/>	81-41 thru 81-43	81-41

VOLUME 6

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	90-59 thru 90-65	90-59 thru 90-65
<input type="checkbox"/>	90-91 thru 90-92.1	90-91 thru 90-92.1
<input type="checkbox"/>	90-163	90-163 thru 90-164.1
<input type="checkbox"/>	92-11 thru 92-22.4(1)	92-11 thru 92-22.3
<input type="checkbox"/>	92-57 thru 92-61	92-57 thru 92-61
<input type="checkbox"/>	98-3	98-3 thru 98-4.1
<input type="checkbox"/>	98-33 thru 98-36.1	98-33 thru 98-35
<input type="checkbox"/>	98-109	98-109

VOLUME 7

Check As Done	<i>Remove Old Pages Numbered</i>	<i>Insert New Pages Numbered</i>
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Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	100-10.1 thru 100-11	100-11
<input type="checkbox"/>	100-33 thru 100-41	100-33 thru 100-41
<input type="checkbox"/>	100-107 thru 100-109	100-107 thru 100-109
<input type="checkbox"/>	101-5.	101-5 thru 101-6.1
<input type="checkbox"/>	101-39 thru 101-45	101-39 thru 101-45
<input type="checkbox"/>	101-54.3 thru 101-54.6(1)	101-54.3 thru 101-54.5
<input type="checkbox"/>	101-54.17 thru 101-54.19	101-54.17 thru 101-54.19
<input type="checkbox"/>	101-109	101-109
<input type="checkbox"/>	102-34.1	102-34.1 thru 102-34.3
<input type="checkbox"/>	102-99 thru 102-102.1	102-99 thru 102-102.1
<input type="checkbox"/>	103-9 thru 103-13	103-9 thru 103-13
<input type="checkbox"/>	103-83 thru 103-84.1	103-83 thru 103-84.1
<input type="checkbox"/>	110-21 thru 110-25	110-21 thru 110-25
<input type="checkbox"/>	110-43	110-43
<input type="checkbox"/>	110-59	110-59
<input type="checkbox"/>	111-27 thru 111-29	111-27 thru 111-29
<input type="checkbox"/>	111-83 thru 111-85	111-83 thru 111-85
<input type="checkbox"/>	113-53	113-53 thru 113-54.1
<input type="checkbox"/>	113-125	113-125

VOLUME 8

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	120C-51 thru 120C-54.1	120C-51 thru 120C-54.1
<input type="checkbox"/>	121-26.1	121-26.1
<input type="checkbox"/>	122-28.1	122-28.1

VOLUME 9

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	131-27	131-27
<input type="checkbox"/>	131-43 thru 131-46.1	131-43 thru 131-46.2(1)
<input type="checkbox"/>	131-75	131-75
<input type="checkbox"/>	134-9.	134-9

VOLUME 10

Revision

<input type="checkbox"/>	Title page.	Title page
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Check As Done	<i><u>Remove Old Pages Numbered</u></i>	<i><u>Insert New Pages Numbered</u></i>
<input type="checkbox"/>	140-3.	140-3
<input type="checkbox"/>	140-34.5	140-34.5 thru 140-34.7
<input type="checkbox"/>	140-36.9	140-36.9
<input type="checkbox"/>	140-47 thru 140-59	140-47 thru 140-57
<input type="checkbox"/>	141-39	141-39
<input type="checkbox"/>	150-85	150-85
<input type="checkbox"/>	150-167	150-167
<input type="checkbox"/>	152-22.1 thru 152-24.1	152-23 thru 152-24.1
<input type="checkbox"/>	152-39 thru 152-40.1	152-39 thru 152-40.2(1)
<input type="checkbox"/>	152-62.1 thru 152-63	152-63 thru 152-64.1
<input type="checkbox"/>	153-15 thru 153-27	153-15 thru 153-27

VOLUME 11

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	160-15	160-15 thru 160-16.1
<input type="checkbox"/>	160-21 thru 160-29	160-21 thru 160-30.1
<input type="checkbox"/>	162-7 thru 162-13.	162-7 thru 162-14.1
<input type="checkbox"/>	162-29 thru 162-31	162-29 thru 162-32.1
<input type="checkbox"/>	162-41 thru 162-43	162-41 thru 162-44.1
<input type="checkbox"/>	165-5 thru 165-13.	165-5 thru 165-13
<input type="checkbox"/>	165-29 thru 165-35	165-29 thru 165-36.1
<input type="checkbox"/>	165-43 thru 165-45	165-43 thru 165-45
<input type="checkbox"/>	170-15 thru 170-19	170-15 thru 170-19
<input type="checkbox"/>	170-77 thru 170-87	170-77 thru 170-79
<input type="checkbox"/>	171-7.	171-7
<input type="checkbox"/>	171-32.9	171-32.9 thru 171-32.10(1)

VOLUME 12

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	180-9 thru 180-11.	180-9 thru 180-12.1
<input type="checkbox"/>	180-43	180-43 thru 180-44.1
<input type="checkbox"/>	180-71 thru 180-105.	180-71 thru 180-73
<input type="checkbox"/>	182-7.	182-7 thru 182-8.1
<input type="checkbox"/>	182-23 thru 182-31	182-23 thru 182-32.1
<input type="checkbox"/>	183-9 thru 183-33.	183-9 thru 183-34.1
<input type="checkbox"/>	190-7.	190-7 thru 190-8.1
<input type="checkbox"/>	191-11	191-11 thru 191-12.1

VOLUME 13

Check As Done	<i><u>Remove Old Pages Numbered</u></i>	<i><u>Insert New Pages Numbered</u></i>
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Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	200-63 thru 200-66.1	200-63 thru 200-66.1
<input type="checkbox"/>	201-1 thru 201-25	201-1 thru 201-25
<input type="checkbox"/>	202-33 thru 202-34.1	202-33 thru 202-34.1
<input type="checkbox"/>	202-93 thru 202-95	202-93
<input type="checkbox"/>	203-17 thru 203-18.1	203-17 thru 203-18.1
<input type="checkbox"/>	203-34.1 thru 203-35	203-35 thru 203-36.1
<input type="checkbox"/>	203-57 thru 203-92.1	203-57 thru 203-92.1
<input type="checkbox"/>	203A-1 thru 203A-6.1	203A-1 thru 203A-6.1
<input type="checkbox"/>	203A-15 thru 203A-23	203A-15 thru 203A-24.3
<input type="checkbox"/>	203A-33 thru 203A-37	203A-33 thru 203A-37
<input type="checkbox"/>	203A-59 thru 203A-131	203A-59 thru 203A-132.5
<input type="checkbox"/>	203A-136.4(1) thru 203A-157	203A-137 thru 203A-158.9
<input type="checkbox"/>	203A-169 thru 203A-177	203A-169 thru 203A-177
<input type="checkbox"/>	205-7 thru 205-15	205-7 thru 205-15
<input type="checkbox"/>	205-45	205-45
<input type="checkbox"/>	205-53	205-53
<input type="checkbox"/>	205-67 thru 205-73	205-67 thru 205-71

VOLUME 14

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	210-10.1 thru 210-17	210-11 thru 210-17
<input type="checkbox"/>	210-29 thru 210-30.1	210-29
<input type="checkbox"/>	210-41 thru 210-42.1	210-41 thru 210-42.1
<input type="checkbox"/>	210-59 thru 210-61	210-59 thru 210-61
<input type="checkbox"/>	210-111	210-111 thru 210-112.1
<input type="checkbox"/>	210A-1 thru 210A-3	210A-1 thru 210A-3
<input type="checkbox"/>	210A-11 thru 210A-67	210A-11 thru 210A-68.5
<input type="checkbox"/>	210A-77 thru 210A-181	210A-77 thru 210A-177
<input type="checkbox"/>	216-1 thru 216-47	216-1 thru 216-45
<input type="checkbox"/>	220-13 thru 220-48.5	220-13 thru 220-48.3
<input type="checkbox"/>	220-139 thru 220-150.1	220-139 thru 220-145

VOLUME 15

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	230-17 thru 230-31	230-17 thru 230-31
<input type="checkbox"/>	230-55 thru 230-56.1	230-55
<input type="checkbox"/>	231-13 thru 231-19	231-13 thru 231-19
<input type="checkbox"/>	232-11 thru 232-15	232-11 thru 232-16.1

Check As Done	<i>Remove Old Pages Numbered</i>	<i>Insert New Pages Numbered</i>
<input type="checkbox"/>	232-25 thru 232-35	232-25 thru 232-35
<input type="checkbox"/>	233-105	233-105 thru 233-106.1

VOLUME 17

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	250-13	250-13
<input type="checkbox"/>	253-51 thru 253-53	253-51 thru 253-53
<input type="checkbox"/>	254-43	254-43 thru 254-44.1
<input type="checkbox"/>	254-61	254-61 thru 254-62.1
<input type="checkbox"/>	255-23 thru 255-24.1	255-23 thru 255-24.3
<input type="checkbox"/>	260-17 thru 260-19	260-17 thru 260-20.1
<input type="checkbox"/>	260-33 thru 260-37	260-33 thru 260-38.1
<input type="checkbox"/>	260-55 thru 260-58.9	260-55 thru 260-58.11
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<input type="checkbox"/>	261-23 thru 261-25	261-23 thru 261-26.1
<input type="checkbox"/>	261-37	261-37 thru 261-38.1
<input type="checkbox"/>	261-66.1	261-66.1 thru 261-66.2(1)
<input type="checkbox"/>	261-67 thru 261-68.1	261-67 thru 261-68.2(1)

VOLUME 18

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	270-17 thru 270-18.1	270-17 thru 270-18.1
<input type="checkbox"/>	270-41	270-41 thru 270-42.1
<input type="checkbox"/>	270-71 thru 270-72.1	270-71 thru 270-72.2(1)
<input type="checkbox"/>	270-107	270-107 thru 270-108.1
<input type="checkbox"/>	271-11	271-11 thru 271-12.1
<input type="checkbox"/>	271-29 thru 271-31	271-29 thru 271-31
<input type="checkbox"/>	271-42.1 thru 271-48.3	271-43 thru 271-48.3
<input type="checkbox"/>	280-49 thru 280-56.1	280-49 thru 280-56.1
<input type="checkbox"/>	281-31 thru 281-32.1	281-31 thru 281-32.1
<input type="checkbox"/>	282-82.5 thru 282-82.6(1)	282-82.5 thru 282-82.6(1)
<input type="checkbox"/>	282-82.15 thru 282-83	282-83 thru 282-84.1
<input type="checkbox"/>	285-22.1 thru 285-24.1	285-23 thru 285-24.1

VOLUME 19

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	290-62.1	290-62.1
<input type="checkbox"/>	290-88.1 thru 290-95	290-89 thru 290-96.1

Check As Done	<i><u>Remove Old Pages Numbered</u></i>	<i><u>Insert New Pages Numbered</u></i>
<input type="checkbox"/>	291-27 thru 291-28.1	291-27 thru 291-28.1
<input type="checkbox"/>	291-61	291-61 thru 291-62.1
<input type="checkbox"/>	293-9 thru 293-15	293-9 thru 293-15
<input type="checkbox"/>	293-55 thru 293-60.1	293-55 thru 293-60.1
<input type="checkbox"/>	293-71 thru 293-80.1	293-71 thru 293-80.2(1)
<input type="checkbox"/>	293-106.5 thru 293-106.7	293-106.5 thru 293-106.8(1)
<input type="checkbox"/>	293-127 thru 293-136.1	293-127 thru 293-136.2(1)
<input type="checkbox"/>	293-136.7 thru 293-136.9	293-136.7 thru 293-136.9
<input type="checkbox"/>	293-177 thru 293-178.1	293-177 thru 293-178.1
<input type="checkbox"/>	310-21 thru 310-22.3	310-21 thru 310-22.3
<input type="checkbox"/>	310-49	310-49 thru 310-50.1
<input type="checkbox"/>	311-13	311-13 thru 311-14.1

VOLUME 20

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	320-19 thru 320-23	320-19 thru 320-23
<input type="checkbox"/>	320-63 thru 320-64.7	320-63 thru 320-64.8(1)
<input type="checkbox"/>	320-118.1.	320-118.1
<input type="checkbox"/>	321-13 thru 321-22.3	321-13 thru 321-22.5
<input type="checkbox"/>	321-30.1 thru 321-30.3	321-30.1 thru 321-30.3
<input type="checkbox"/>	321-53 thru 321-61	321-53 thru 321-62.3
<input type="checkbox"/>	321-83 thru 321-104.15	321-83 thru 321-104.17
<input type="checkbox"/>	321-130.1 thru 321-131	321-131 thru 321-132.1
<input type="checkbox"/>	322-29 thru 322-34.1	322-29 thru 322-34.3
<input type="checkbox"/>	322-54.1 thru 322-54.4(1)	322-54.1 thru 322-54.4(3)
<input type="checkbox"/>	322-93	322-93
<input type="checkbox"/>	332-7 thru 332-14.1	332-7 thru 332-14.1

VOLUME 21

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	340-16.1 thru 340-17	340-17 thru 340-18.1
<input type="checkbox"/>	340-29	340-29 thru 340-30.1
<input type="checkbox"/>	340-56.1 thru 340-57	340-57 thru 340-58.1
<input type="checkbox"/>	340-67 thru 340-84.11	340-67 thru 340-84.13
<input type="checkbox"/>	340-123 thru 340-126.1	340-123 thru 340-125
<input type="checkbox"/>	341-68.1 thru 341-69	341-69 thru 341-70.3
<input type="checkbox"/>	342-15	342-15
<input type="checkbox"/>	343-23 thru 343-25	343-23 thru 343-26.1

VOLUME 22

Check As Done	<u>Remove Old Pages Numbered</u>	<u>Insert New Pages Numbered</u>
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Revision

- | | | |
|--------------------------|----------------------------------|----------------------|
| <input type="checkbox"/> | Title page. | Title page |
| <input type="checkbox"/> | 363-124.1 thru 363-137 | 363-125 thru 363-135 |

VOLUME 23

Revision

- | | | |
|--------------------------|--------------------------------|----------------------|
| <input type="checkbox"/> | Title page. | Title page |
| <input type="checkbox"/> | 381-21 thru 381-47 | 381-21 thru 381-48.1 |
| <input type="checkbox"/> | 381-63 thru 381-67 | 381-63 thru 381-68.1 |
| <input type="checkbox"/> | 381-137 thru 381-141 | 381-137 thru 381-141 |

VOLUME 24

Revision

- | | | |
|--------------------------|------------------------------------|-------------------------|
| <input type="checkbox"/> | Title page. | Title page |
| <input type="checkbox"/> | 391-9 thru 391-18.1 | 391-9 thru 391-18.1 |
| <input type="checkbox"/> | 392-3 thru 392-5 | 392-3 thru 392-6.1 |
| <input type="checkbox"/> | 392-27 thru 392-31 | 392-27 thru 392-31 |
| <input type="checkbox"/> | 392-41 thru 392-80.1 | 392-41 thru 392-80.7 |
| <input type="checkbox"/> | 392-88.1 thru 392-91 | 392-89 thru 392-92.1 |
| <input type="checkbox"/> | 392-100.3 thru 392-100.5 | 392-100.3 |
| <input type="checkbox"/> | 392-123 thru 392-124.1 | 392-123 thru 392-124.1 |
| <input type="checkbox"/> | 392-165 thru 392-173 | 392-165 thru 392-173 |
| <input type="checkbox"/> | 393-7. | 393-7 |
| <input type="checkbox"/> | 393-45 thru 393-48.1 | 393-45 thru 393-48.1 |
| <input type="checkbox"/> | 393-105 thru 393-111 | 393-105 thru 393-109 |
| <input type="checkbox"/> | 394-19 thru 394-23 | 394-19 thru 394-24.1 |
| <input type="checkbox"/> | 400-7 thru 400-16.3 | 400-7 thru 400-16.3 |
| <input type="checkbox"/> | 400-49 thru 400-58.1 | 400-49 thru 400-57 |
| <input type="checkbox"/> | 415-23 thru 415-40.1 | 415-23 thru 415-40.2(1) |

VOLUME 25

Revision

- | | | |
|--------------------------|------------------------------|--------------------|
| <input type="checkbox"/> | Title page. | Title page |
| <input type="checkbox"/> | 423-17 thru 423-21 | 423-17 thru 423-21 |

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