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Dorsaneo, Texas Litigation Guide

Publication 719 Release 98 August 2010

HIGHLIGHTS

Forum selection clauses.

- Two Texas Supreme Court cases, *In re ADM Investor Servs., Inc.*, 304 S.W.3d 371 (Tex. 2010) and *In re Laibe Corp.*, 307 S.W.3d 314, 53 Tex. Sup. Ct. J. 495 (Tex. 2010), reaffirm the principle that forum selection clauses in favor of a non-Texas forum are regularly enforceable through writ of mandamus, as a trial court that improperly refuses to enforce such a clause has clearly abused its discretion, and there is no adequate remedy by appeal. See § 61.22.

Statutes of limitation.

- The Texas Supreme Court ruled that the 10-year statute of repose applicable to medical malpractice claims is not unconstitutional under the open courts provision of the Texas Constitution. In a companion case, the Court reaffirmed its former rule that the open courts provision *does* apply to the “absolute” two-year statute of limitation, so that medical malpractice claims are not barred by the statute

of limitation if the claimant could not reasonably have discovered the wrong and filed suit within the two-year period, but are barred by the statute of repose if not brought within 10 years regardless of when discovered. See *Methodist Healthcare Sys. of San Antonio, Ltd., L.L.P., v. Rankin*, ___ S.W.3d ___, 2010 Tex. LEXIS 362 (Tex. 2010); *Walters v. Cleveland Regional Med. Ctr.*, 307 S.W.3d 292, 53 Tex. Sup. Ct. J. 450 (Tex. 2010); see § 72.02A[1], [5]; see § 72.03[3][d][ii].

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Pretrial, Trial, and Appellate Practice

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

Assignee May Be Class Representative. In *Southwestern Bell Tel. Co. v. Mktg. on Hold Inc.*, ___ S.W.3d ___, 53 Tex. Sup. Ct. J. 322 (Tex. 2010), the Texas Supreme Court held that an assignee of a claim may have standing to pursue a class action and be a class representative. See § 13.03[2].

Purposeful Availment Issue. In *Spir Star AG v. Kimich*, ___ S.W.3d ___, 53 Tex. Sup. Ct. J. 423 (Tex. 2010), the Texas Supreme Court held that a foreign manufacturer may be subject to Texas jurisdiction when it hires a Texas distributor and targets Texas as a market. See § 32.04[2][a][ii].

No Jurisdiction When Good Sent Through Texas. In *Zinc Nacional v. Bouche Trucking, Inc.*, 308 S.W.3d 395, 53 Tex. Sup. Ct. J. 574 (Tex. 2010) (per curiam), the Texas Supreme Court held that there was no jurisdiction over a foreign manufacturer that transported goods through Texas to another state with no intention of selling in Texas. See § 32.04[2][a][ii].

Appeal of Order Denying Confirmation of Arbitration Award Allowed. In *East Texas Salt Water Disposal Company, Inc. v. Werline*, 307 S.W.3d 267, 53 Tex. Sup. Ct. J. 410 (Tex. 2010), the Texas Supreme Court held that Tex. Civ. Prac. & Rem. Code § 171.098(a) allows an appeal from a trial court's order that denies confirmation of an arbitration award and instead, vacates the award and directs that the dispute be arbitrated anew. See § 44.08[2].

Forum selection clauses. Two Texas Supreme Court cases, *In re ADM Investor Servs., Inc.*, 304 S.W.3d 371 (Tex. 2010) and *In re Laibe Corp.*, 307 S.W.3d 314 (Tex. 2010), reaffirm the principle that forum selection clauses in favor of a non-Texas forum are regularly enforceable through writ of mandamus, as a trial court

that improperly refuses to enforce such a clause has clearly abused its discretion, and there is no adequate remedy by appeal. See § 61.22.

Statutes of limitation. The Texas Supreme Court ruled that the **10-year statute of repose applicable to medical malpractice claims is not unconstitutional** under the open courts provision of the Texas Constitution. In a companion case, the Court reaffirmed its former rule that the open courts provision *does* apply to the "absolute" 2-year statute of limitation, so that medical malpractice claims are not barred by the statute of limitation if the claimant could not reasonably have discovered the wrong and filed suit within the 2-year period, but are barred by the statute of repose if not brought within 10 years regardless of when discovered. See *Methodist Healthcare Sys. of San Antonio, Ltd., L.L.P., v. Rankin*, ___ S.W.3d ___, 2010 Tex. LEXIS 362 (Tex. 2010); *Walters v. Cleveland Regional Med. Ctr.* 307 S.W.3d 292 (Tex. 2010); see § 72.02A[1], [5]; § 72.03[3][d][ii].

Tolling statute. The Texas Supreme Court ruled that Tex. Civ. Prac. & Rem. Code § 16.064, the statute allowing a plaintiff who files in a court lacking in jurisdiction to refile within 60 days in a proper court, applies to plaintiffs who initially choose the wrong court because of a mistake of either jurisdictional facts or law, but not when the original filing was part of a deliberate strategy. See *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 53 Tex. Sup. Ct. J. 485 (Tex. 2010); see § 72.04[7].

Discovery. The Texas Supreme Court ruled that an agreement of the parties that is intended to extend the statutorily mandated 120-day deadline for an expert report in medical malpractice cases must explicitly state that the agreement is for that purpose

and must reference the specific deadline. See *Spectrum Healthcare Resources, Inc. v. McDaniel*, 306 S.W.3d 249 (Tex. 2010); see §§ 92.01[5], 92.03[6].

Commercial Litigation

Significant cases in the area of commercial litigation include:

Employer's promise to pay bonus is not illusory. The Texas Supreme Court has held that an employer's alleged promise to pay a specified percentage of the proceeds of a sale or merger of the company to employees who are employed at the time of the sale or merger is not illusory, and therefore unenforceable, merely because the employees are at-will employees, such that the employer could avoid the promise by terminating their employment at any time. Such a promise represents a unilateral contract, and by staying on with the company until its acquisition, the employees performed on the contract, making it enforceable. See *Vanegas v. American Energy Services*, 302 S.W.3d 299 (Tex. 2009); see § 203.10[1].

Exclusion of changing time under FLSA. The time employees spend changing clothes is to be excluded from the measured working time, for purposes of both the minimum wage and overtime compensation requirements of the FLSA, if this time has been excluded by custom or practice under a bona fide collective bargaining agreement. Even when negotiations never included the issue of non-compensation for changing time, a policy of non-compensation for this time that has been in effect for a prolonged period of time, and that was in effect when the collective bargaining agreement was executed, satisfies the statutory requirement of "a custom or practice under a bona fide" collective bargaining agreement. See *Allen v. McWane, Inc.*, 593 F.3d 449, 457 (5th Cir. [Tex.]

2010); see § 203.22[1][c].

Statute of limitations in action under FLSA. In *Valcho v. Dallas County Hosp. Dist.*, 658 F. Supp. 2d 802, 808–810 (N.D. Tex. 2009), the district court held that an employer did not willfully violate the Fair Labor Standards Act by using a biweekly pay period, when use of this pay period was consistent with its classification of the employee as an exempt learned professional who was paid a salary. In addition, requiring the employee to use paid time off for absences requested by the employer, e.g., during slow periods, did not demonstrate a reckless disregard for the overtime requirements of the FLSA, as required for the application of the three-year, rather than the two-year, limitations period. See § 203.22[1][g][i].

Collective and class actions under FLSA. To be entitled to conditional certification of the class, plaintiffs merely must make, through their pleadings and any affidavits, substantial allegations that putative class members were together the victims of a single decision, policy, or plan. A court may deny a plaintiff's right to proceed collectively only if the action arises from circumstances that are purely personal to the plaintiff, and not from any generally applicable rule, policy, or practice. See *Pedigo v. 3003 South Lamar, LLP*, 666 F. Supp. 2d 693, 698–700 (W.D. Tex. 2009); see § 203.22[1][g][ii].

ERISA preemption. A state law claim that implicates the *rate* of payment set out in a contract between an ERISA plan administrator and a medical provider, rather than the *right* to payment under the terms of the benefit plan, is not preempted by ERISA. See *Lone Star Ob/Gyn Associates v. Aetna Health Inc.*, 579 F.3d 525, 529–531 (5th Cir. [Tex.] 2009); see § 203.24[2].

Denial of ERISA plan benefits. A court must defer to a plan administrator's denial of benefits if the denial is supported by substantial evidence. A court is not required to rule in favor of an ERISA plaintiff merely because the plaintiff has supported his or her claim with substantial evidence or even with a preponderance of the evidence. See *Cooper v. Hewlett-Packard Co.*, 592 F.3d 645, 656 (5th Cir. [Tex.] 2009); see § 203.24[3].

ERISA-estoppel claim. The omission of certain disclosures, even required disclosures, without an accompanying allegation that the omission was made with the intent to deceive, is not a "material misrepresentation" giving rise to an ERISA-estoppel claim. See *Khan v. American Intern. Group, Inc.*, 654 F. Supp. 2d 617, 629 (S.D. Tex. 2009); see § 203.24[4].

Arbitration of employee's claims for personal injury or wrongful death. The Texas Supreme Court had held that Tex. Labor Code § 406.033(e), which prohibits pre-injury waivers of personal injury or death claims, does not invalidate an arbitration agreement that requires the employee to arbitrate any personal injury or wrongful death claims against the employer. An agreement to arbitrate is a waiver of neither a cause of action nor the rights provided under that statute, but is an agreement that those claims should be tried in a specific forum. See *In re Golden Peanut Co., LLC*, 298 S.W.3d 629, 630–631 (Tex. 2009); see § 203.48[7].

Jurisdiction on Whistleblower Act case. The Texas Supreme Court has reaffirmed in two decisions that the elements of Tex. Gov't Code § 554.002(a) can be considered when determining both jurisdiction and liability in cases under the Whistleblower Act. See *University of Texas Southwestern Medical Center v. Gentilello*, 300

S.W.3d 753 (Tex. 2010), and *Galveston Indep. Sch. Dist. v. Jaco*, 303 S.W.3d 699 (Tex. 2010); see § 203A.22[1][a].

Employee's slander claim against employer. A qualified privilege extends to any communication by an employer about an employee that is made to a person having a corresponding interest or duty in the subject matter of the communication. See *Frakes v. Crete Carrier Corp.*, 579 F.3d 426, 430 (5th Cir. [Tex.] 2009); see § 203A.25[3].

Reliance under DTPA. In *Bernstein v. Thomas*, 298 S.W.3d 817, 822 (Tex. App.—Dallas 2009, no pet. h.), the court held that the issue of whether home buyers relied on the sellers' lack of disclosures and assurance that there was nothing wrong with the house was an issue for the jury to decide in an action under the DTPA, arising from the purchase of a house that was found to require extensive foundation repairs. Although the buyers were advised by their home inspector to consult with a structural engineer about the condition of the foundation, the buyers testified that they relied on the sellers' statements to allay any concerns about the condition of the house, including the foundation, before they purchased it. See § 220.02[2][c].

Causation under DTPA. A case based on a claimed failure to procure insurance requires proof of the availability of some insurance that would have covered the plaintiff's damages. The plaintiff must present legally sufficient evidence that the coverage the plaintiff sought is obtainable in order to show causation. See *Metro Allied Ins. Agency, Inc. v. Lin*, ___ S.W.3d ___, 2010 Tex. LEXIS 139 (Tex. 2010); see § 220.02[5][a][ii].

Standing under Texas Debt Collection Practices Act. A cardholder who is not a Texas resident has standing to maintain an

action against a collection agency under the DCPA, when the agency is a Texas corporation and conducted its collection efforts in Texas. Residency in Texas is not required to qualify as a “consumer” under the DCPA. See *Cushman v. GC Services, LP*, 657 F. Supp. 2d 834, 836 (S.D. Tex. 2009); see § 242.03[2][b].

Personal Injury Litigation

Significant cases in the area of personal injury litigation include:

Statute of repose. Two medical malpractice cases involving surgical sponges left inside patients in which the Texas Supreme Court applied the statutes of limitations and repose in Tex. Civ. Prac. & Rem. Code § 74.251, and held that: (1) the Open Courts provision of the Texas Constitution guarantees that foreign object claimants have a reasonable opportunity to discover their injuries and file suit, even if the 2-year statute of limitations has run; *Walters v. Cleveland Reg'l Med. Ctr.*, 307 S.W.3d 292, 53 Tex. Sup. Ct. J. 450, 452–455 (Tex. 2010); but (2) the 10-year statute of repose is constitutional, so discovery must occur before the repose period has run or the claim is barred; See *Methodist Healthcare Sys. v. Rankin*, 307 S.W.3d 283, 53 Tex. Sup. Ct. J. 455, 456–462 (Tex. 2010); see § 321.12[1], [3], [4].

Docket control order. *Spectrum Healthcare Resources, Inc. v. McDaniel*, 306 S.W.3d 249, 53 Tex. Sup. Ct. J. 444, 447–448 (Tex. 2010), in which the Texas Supreme Court held that for a docket control order or other agreed order to have the effect of extending the 120-day pretrial expert report deadline of Tex. Civ. Prac. & Rem. Code § 74.351, the order must specifically refer to either the deadline or the section. See § 321.15[6][a].

Anticipation of criminal conduct. *Del*

Lago Partners, Inc. v. Smith, ___ S.W.3d ___, 53 Tex. Sup. Ct. J. 514, 516–521 (Tex. 2010), a premises liability case involving a fight in a bar in which the Texas Supreme Court held that: (1) when a premises owner can reasonably anticipate criminal conduct by third persons, either generally or at some particular time, the owner may be under a duty to take precautions against it; (2) the nature and character of the premises can be a factor that makes such criminal activity more foreseeable; and (3) the sequence of events immediately leading to such criminal conduct may make it foreseeable, even in the absence of a history of prior criminal conduct. See §§ 310.01[2], 310.05[2], 310.06[4].

Immigration Status and Negligence. *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 53 Tex. Sup. Ct. J. 431, 438–441 (Tex. 2010), in which the Texas Supreme Court reversed a judgment for the plaintiff in a negligent entrustment of a vehicle case because the trial court permitted evidence of the driver’s status as an illegal immigrant. The Court held that: (1) the driver’s immigration status did not create a foreseeable risk of the driver’s negligence; (2) the evidence was not proper to impeach the driver’s trial testimony; and (3) admission was not harmless because it tacitly encouraged the jury to impose liability on the defendant for hiring an illegal immigrant when that hiring had no relation to the merits of the negligence claims at issue. See § 302.05.

Mandamus and exemplary damages. *Columbia Med. Ctr. v. Hogue*, 306 S.W.3d 246, 53 Tex. Sup. Ct. J. 462, 463–464 (Tex. 2010) (per curiam), in which the Texas Supreme Court held that when one component of economic damages is vacated on appeal, mandamus is proper to require the trial court to grant the defendant’s motion to make a corresponding reduction in the

amount of any exemplary damages to conform the award to the statutory cap of Tex. Civ. Prac. & Rem. Code § 41.008(b). See § 20.01[2][d]; see § 321.13[6].

Latent ambiguity. *Gallagher Headquarters Ranch Dev., Ltd. v. City of San Antonio*, 303 S.W.3d 700, 53 Tex. Sup. Ct. J. 301, 301–302 (Tex. 2010) (per curiam), in which the Texas Supreme Court held that a settlement contained a latent ambiguity as to whether it encompassed a case pending for review. The Court therefore abated the petition for review and remanded the action to the trial court to determine the scope of the settlement. See § 102.04[1].

Texas Dep't of Ins. v. Reconveyance Servs., 306 S.W.3d 256, 53 Tex. Sup. Ct. J. 442, 443–444 (Tex. 2010) (per curiam), in which the Texas Supreme Court held that because the plaintiff pleaded an ultra vires cause of action to require a state agency to comply with the law, naming of the agency itself as the defendant instead of the appropriate agency officials required dismissal of the suit. See § 293.01[2].

Split of Authority. *Minton v. Gunn*, 301 S.W.3d 702, 708–710 (Tex. App.—Fort Worth 2009, no pet. h.), in which the court of appeals created a split of authority with the Federal Circuit by holding that a legal

malpractice claim arising from prior patent litigation is *not* within exclusive federal jurisdiction over patent actions. See § 322.02[1][c].

Family Law Litigation

Significant cases in the area of family law litigation include:

Appointment of counsel to assist attorney ad litem for ward. A probate court may authorize an attorney ad litem to enlist the assistance of additional counsel to represent the proposed ward when warranted by the circumstances, See *In re Guardianship of Glasser*, 297 S.W.3d 369, 375–376 (Tex. App.—San Antonio 2009, no pet. h.); see § 410.06[6].

Costs of involuntary commitment proceedings. A court does not have personal jurisdiction, in involuntary commitment proceedings, over a private mental health facility to which a patient has been involuntarily committed, and therefore does not have jurisdiction to require the facility to pay the court costs, including attorney's fees, for the patient's court-appointed counsel. See *In re Green Oaks Hosp. Subsidiary, L.P.*, 297 S.W.3d 452, 456 (Tex. App.—Dallas 2009, no pet. h.); see § 415.03[5].

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Publication 719 Release 98

August 2010

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<input type="checkbox"/>	252-83 thru 252-84.3	252-83 thru 252-84.3
<input type="checkbox"/>	254-9.	254-9 thru 254-10.1
<input type="checkbox"/>	254-23	254-23 thru 254-24.1
<input type="checkbox"/>	255-33 thru 255-34.1	255-33 thru 255-34.2(1)
<input type="checkbox"/>	255-49 thru 255-50.1	255-49 thru 255-50.1
<input type="checkbox"/>	257-13	257-13
<input type="checkbox"/>	257-27 thru 257-30.1	257-27 thru 257-30.1
<input type="checkbox"/>	261-7.	261-7 thru 261-8.1

VOLUME 18

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	271-31	271-31 thru 271-32.1
<input type="checkbox"/>	271-45 thru 271-48.3	271-45 thru 271-48.3
<input type="checkbox"/>	285-21 thru 285-24.1	285-21 thru 285-24.3

VOLUME 19

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	290-13 thru 290-15	290-13 thru 290-15
<input type="checkbox"/>	290-56.1 thru 290-56.5	290-56.1 thru 290-56.5
<input type="checkbox"/>	290-71 thru 290-87	290-71 thru 290-85
<input type="checkbox"/>	291-30.3 thru 291-30.7	291-30.3 thru 291-30.7
<input type="checkbox"/>	291-39 thru 291-40.3	291-39 thru 291-40.5
<input type="checkbox"/>	293-15	293-15 thru 293-16.1
<input type="checkbox"/>	293-93 thru 293-94.1	293-93 thru 293-94.1
<input type="checkbox"/>	293-101 thru 293-103	293-101 thru 293-104.1
<input type="checkbox"/>	293-116.1 thru 293-117	293-117 thru 293-118.1
<input type="checkbox"/>	293-131 thru 293-136.4(1).	293-131 thru 293-136.4(2)(a)
<input type="checkbox"/>	302-31 thru 302-32.1	302-31 thru 302-32.1
<input type="checkbox"/>	310-7.	310-7 thru 310-8.1
<input type="checkbox"/>	310-45 thru 310-56.3	310-45 thru 310-56.15
<input type="checkbox"/>	310-110.1 thru 310-115	310-111 thru 310-113

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VOLUME 20

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	320-7.	320-7 thru 320-8.1
<input type="checkbox"/>	320-49 thru 320-50.1	320-49 thru 320-50.1
<input type="checkbox"/>	321-15 thru 321-19	321-15 thru 321-20.1
<input type="checkbox"/>	321-69 thru 321-79	321-69 thru 321-80.3
<input type="checkbox"/>	321-89 thru 321-104.7	321-89 thru 321-104.8(3)
<input type="checkbox"/>	321-129 thru 321-132.1	321-129 thru 321-132.1
<input type="checkbox"/>	321-175	321-175
<input type="checkbox"/>	322-25	322-25 thru 322-26.1
<input type="checkbox"/>	322-34.1 thru 322-34.3	322-34.1 thru 322-34.3
<input type="checkbox"/>	334-5 thru 334-7	334-5 thru 334-8.1
<input type="checkbox"/>	336-19 thru 336-21	336-19 thru 336-22.1

VOLUME 21

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	340-77	340-77 thru 340-78.1
<input type="checkbox"/>	340-84.3 thru 340-84.5	340-84.3 thru 340-84.6(1)
<input type="checkbox"/>	341-113	341-113 thru 341-114.1

VOLUME 22

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	362-9 thru 362-24.1	362-9 thru 362-23
<input type="checkbox"/>	362-48.1 thru 362-55	362-49 thru 362-56.5
<input type="checkbox"/>	362-83 thru 362-85	362-83 thru 362-85
<input type="checkbox"/>	363-33 thru 363-36.1	363-33 thru 363-36.1
<input type="checkbox"/>	363-57 thru 363-63	363-57 thru 363-63
<input type="checkbox"/>	363-87 thru 363-93	363-87 thru 363-94.1
<input type="checkbox"/>	364-20.1 thru 364-28.1	364-21 thru 364-28.1
<input type="checkbox"/>	371-24.1 thru 371-29	371-25 thru 371-29
<input type="checkbox"/>	371A-31	371A-31 thru 371A-32.1
<input type="checkbox"/>	371A-41	371A-41 thru 371A-42.1

VOLUME 23

Revision

<input type="checkbox"/>	Title page.	Title page
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Check As Done	<i>Remove Old Pages Numbered</i>	<i>Insert New Pages Numbered</i>
<input type="checkbox"/>	372-19 thru 372-25	372-19 thru 372-26.1
<input type="checkbox"/>	372-45 thru 372-49	372-45 thru 372-49
<input type="checkbox"/>	372-97 thru 372-101.	372-97 thru 372-101
<input type="checkbox"/>	372-143 thru 372-165	372-143 thru 372-155
<input type="checkbox"/>	373-31 thru 373-35	373-31 thru 373-35
<input type="checkbox"/>	373-47	373-47 thru 373-48.1
<input type="checkbox"/>	373-81 thru 373-85	373-81 thru 373-86.1
<input type="checkbox"/>	374-11	374-11 thru 374-12.1
<input type="checkbox"/>	374-53 thru 374-55	374-53 thru 374-55
<input type="checkbox"/>	380-15 thru 380-22.7	380-15 thru 380-22.5
<input type="checkbox"/>	380-57	380-57
<input type="checkbox"/>	380-67 thru 380-68.1	380-67

VOLUME 24

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	392-89 thru 392-92.1	392-89 thru 392-92.1
<input type="checkbox"/>	392-173	392-173
<input type="checkbox"/>	410-31 thru 410-35	410-31 thru 410-36.1
<input type="checkbox"/>	411-45	411-45 thru 411-46.1
<input type="checkbox"/>	415-1 thru 415-2.1	415-1 thru 415-2.1
<input type="checkbox"/>	415-37	415-37 thru 415-38.1

VOLUME 25

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	423-20.1 thru 423-21	423-21 thru 423-22.1

VOLUME 26

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	I-37 thru I-83	I-37 thru I-84.3
<input type="checkbox"/>	I-123 thru I-129.	I-123 thru I-129
<input type="checkbox"/>	I-165 thru I-221.	I-165 thru I-222.1
<input type="checkbox"/>	I-259 thru I-309.	I-259 thru I-310.1
<input type="checkbox"/>	I-335 thru I-379.	I-335 thru I-380.1
<input type="checkbox"/>	I-463 thru I-495.	I-463 thru I-496.3
<input type="checkbox"/>	I-539 thru I-573.	I-539 thru I-574.1
<input type="checkbox"/>	I-623 thru I-715.	I-623 thru I-716.1
<input type="checkbox"/>	I-805 thru I-829.	I-805 thru I-830.1
<input type="checkbox"/>	I-869 thru I-891.	I-869 thru I-892.1

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I-923 thru I-939.

I-923 thru I-940.9

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