Dorsaneo, Texas Litigation Guide

Publication 719 Release 106 August 2012

HIGHLIGHTS

• NEW Chapter on Trade Secrets Added. New Ch. 200B discusses liability for misappropriation of trade secrets under Texas law.

• Trademarks Chapter Completely Revised. Ch. 200 has been completely revised to reflect the newly overhauled Texas Trademark Act and other recent developments.

• Divorce Chapter Completely Revised. Ch. 362 has been thoroughly revised, updated and reorganized to provide updated and expanded coverage of several topics including agreements incident to divorce and alternative dispute resolution in family law.


Trademarks Chapter Completely Revised to Reflect Major Amendments to Texas Trademark Act. Ch. 200, Trademarks, has been completely revised to reflect the major changes to Texas trademark law made by Acts 2011, 82nd Leg., ch. 563 (HB 3141), which amends the Texas Trademark Act, as set forth in Chapter 16 of the Texas Business and Commerce Code. (Coverage of trade secrets has been moved to the new Ch. 200B, Trade Secrets, as described below.)

The changes to the Texas Trademark Act are effective September 1, 2012, and are intended conform Texas trademark law to the most recent version of the model state trademark legislation. The revised Texas Trademark Act also brings Texas trademark law into alignment with federal trademark infringement and dilution laws. Significant provisions of the newly revised Act include:

• An expanded definition of “service mark” [Tex. Bus. & Com.
Code § 16.001(8); see § 200.01[3]).

- A provision specifying that registration under the Texas Trademark Act does not adversely affect common law rights acquired before registration [Tex. Bus. & Com. Code § 16.108; see § 200.04[4]].


The chapter also incorporates recent case law concerning federal and state trademark law, including:

- When Designation Is Trade Name. A designation is not a trade name until it has in fact become in the market the name for a particular business [Funes v. Villatoro, 352 S.W.3d 200 (Tex. App.—Houston [14th Dist.] 2011, no pet. h.); see § 200.01[4]].

- Distinctiveness of Trade Dress. In determining whether a trade dress is inherently distinctive, courts may consider whether it is a common basic shape or design, whether it is unique or unusual in its particular field, and whether it is capable of creating a commercial impression distinct from any accompanying words [Shell Trademark Mgmt. B.V. v. Warren Unilube, Inc., 765 F. Supp. 2d 884 (S.D. Tex. 2011); see § 200.03[1]].

- Attorney’s Fees in Infringement Action. In Lanham Act cases, courts may award attorney’s fees to the prevailing party if the case is “exceptional,” irrespective of whether the plaintiff or the defendant is the prevailing party [Poly-America, L.P. v. Stego Industries, L.L.C., 790 F. Supp. 2d 546 (N.D. Tex. 2011); see § 200.64[1]].

New Chapter on Trade Secrets Added.
This release includes a new Ch. 200B, Trade Secrets, which replaces the coverage of this topic formerly included in Ch. 200. The new chapter contains reorganized and expanded coverage and is updated to include recent case law on topics including the following:

- Effect of Patent Law on Trade Secrets. A published patent application destroys the secrecy of its contents for trade secret purposes, because a published application, like a patent, is readily available; however, the applicant may have a protectable interest in unique combinations of technologies or processes disclosed in the application [Tewari De-Ox Systems v. Mountain States/Rosen, 637 F.3d 604 (5th Cir. [Tex.] 2011); see § 200B.02[2][b][iii]].

- Scope of Texas Theft Liability Act. The information, design, process, formula, or improvement that is the subject of a claim for
theft of trade secrets under the Act must not only be a secret, but must be generally unavailable to the public, and must give the person who uses it an advantage over competitors that do not know of or use the trade secret [Downing v. Burns, 348 S.W.3d 415 (Tex. App.—Houston [14th Dist.] 2011, no pet. h.); see § 200B.21(8)].

**Divorce Chapter Completely Revised.** Ch. 362, *Divorce*, has been revised in its entirety to reflect the increasingly important role of agreements incident to divorce and alternative dispute resolution in family law. The chapter now includes a discussion of divorce based on an informal or common-law marriage. The coverage of spousal support has been expanded to include both spousal maintenance and contractual alimony. The general principles applicable to all agreements incident to divorce are discussed. The expanded coverage of alternative dispute resolution now includes more in-depth discussion of mediated settlement agreements and the collaborative family law process. (This release also contains conforming revisions to Ch. 360A, *Temporary Orders*, Ch. 361, *Annulment and Suit to Declare Marriage Void*, and Ch. 363, *Division of Property*).

**Maritime Injuries Chapter Revised to Reflect Recent Case Law.** Ch. 351, *Injuries to Seamen* has been updated to reflect recent federal case law, including Pac. Operators Offshore, LLP v. Valladolid, ___ U.S. __, 132 S. Ct. 680, 181 L. Ed. 2d 675 (2012), clarifying the causation standard for establishing liability for injuries to employees under the Outer Continental Shelf Lands Act (OCSLA), and Manderson v. Chet Morrison Contractors, Inc., 666 F.3d 373 (5th Cir. [La.] 2012) discussing the scope of a ship owner’s liability to maritime employees for “maintenance and cure” under federal maritime law.

**Completely Revised Index.** This release also contains a complete revision of the subject matter index to reflect the revisions to *Texas Litigation Guide* made in this release and in Releases 103 to 105.
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DORSANEO, TEXAS
LITIGATION GUIDE

Publication 719   Release 106   August 2012

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