

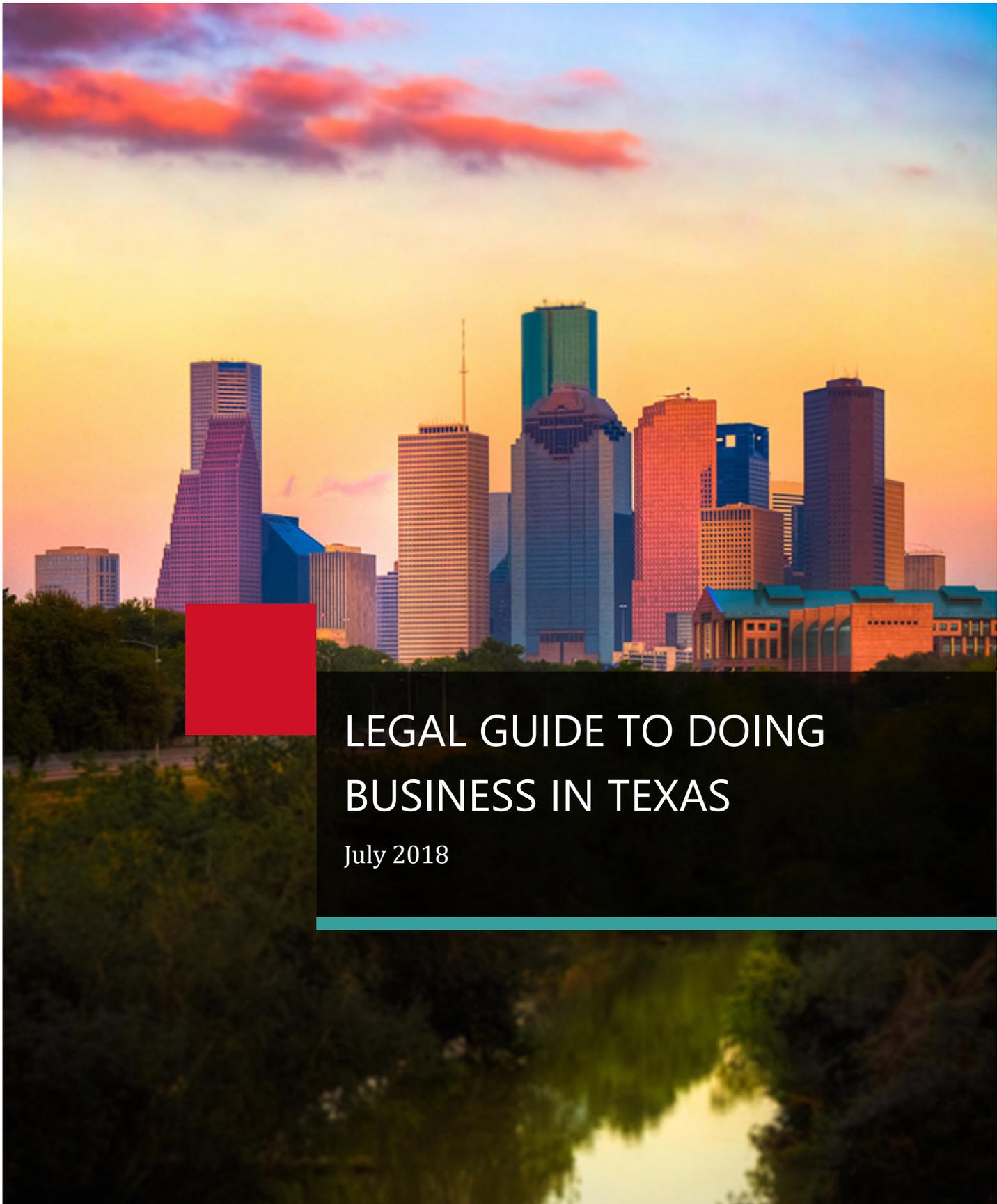
# Texas

Prepared by Lex Mundi member firm,  
Baker Botts L.L.P.

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# LEGAL GUIDE TO DOING BUSINESS IN TEXAS

July 2018

**BAKER BOTTS**



# Baker Botts LLP

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Baker Botts is a full-service, leading global law firm, widely recognized for our keen appreciation and understanding of the various legal, economic and other challenges facing the various clients we serve.

Our firm has a long and distinguished tradition of service to clients, tracing our history from 1840. From the earliest days of Houston and the Republic of Texas, Baker Botts represented the burgeoning agricultural and real estate interests of the greater Gulf Coast, including farming and ranching organizations and families, cotton merchants and brokers, railroads that carried production to markets across the South and into the Northeast and the banks that financed their construction and operation. When oil was discovered at Spindletop, near Houston, in 1901, the firm moved to the forefront of legal developments relating to the oil and gas business in Texas, and our work in that arena still endures. Today, with offices around the world, our clients include leading companies and individuals in an array of leading industries, including technology, energy, life sciences and finance.

Providing excellent lawyering over a period exceeding 175 years has consistently allowed us the privilege of working on some of the most fascinating and important legal matters in the world. Our heritage creates a strong sense of stewardship and ensures that our lawyers and staff alike look at generations past and consider future generations when making decisions about our practice

Our adherence to the highest ethical standards is grounded in the knowledge that our reputation for high quality legal services and integrity is our most valued asset. We maintain an approach to our practice that enhances our ability to identify and resolve ethical issues as they arise, and we pride ourselves in having the fortitude to do what is right.

We believe in giving back to the communities in which we live and work. We encourage our lawyers and staff to be actively involved in pro bono, charitable, diversity and other community activities because it helps them to develop better as both people and professionals and because, quite simply, it's the right thing to do.

Finally, we enjoy being colleagues; we respect one another and enjoy working together in a collegial atmosphere. We believe this attitude is reflected in the quality of our work and in the productive relationships we foster.

We have the experience, the knowledge and the people to solve our clients' most significant legal challenges, and for more than 175 years, we have demonstrated an unrelenting commitment to doing so.

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## DISCLAIMER

The information in this Legal Guide to Doing Business in Texas represents a general guide to certain Texas state laws applicable to the conduct of various business activities in Texas and is based on information available as of January 1, 2018. This summary does not address United States federal law issues or issues that may implicate conflicts of laws, and it should not be relied upon in any specific factual situation. This guide is not intended to cover all laws or regulations that may be applicable to a specific factual situation or legal question. If you have questions or specific issues to be resolved, please contact a lawyer authorized to practice in Texas.

## INTRODUCTION

**Geographic Description** Having gained full independence from Mexico in 1836, Texas became the 28th state of the United States in 1845 after 9 years as an independent republic. The state lies in the south-central segment of the North American continent, and it is the largest state in area except for Alaska, comprising about 7 percent of the total land and water area of the United States (261,914 square miles of land and 5,363 square miles of water).

The borders of Texas extend for more than 800 miles (1300 km) from the eastern edge at the Sabine River bordering the state of Louisiana and the Gulf of Mexico to the Guadalupe Mountains in far West Texas above El Paso, and for almost that distance from the High Plains of the northern Panhandle to the semitropical Lower Rio Grande Valley at the Mexican border. That expanse correspondingly demonstrates extremely broad diversity of topography, geology and climate.

**Demographics** The State's population was estimated at more than 27,860,000 million in 2016 by the U.S. Census Bureau, making Texas the second most populous state in the U.S. Texas has maintained broad ethnic diversity throughout its history, due to its original exploration by France and Spain and then its connection to Mexico, as well as to its settlement patterns during the mid-19<sup>th</sup> century, when large numbers of German, Czech, Scotch-Irish and Swedish settlers moved to what was then the Mexican state of Coahuila y Tejas in response to the prospect of free lands.

As of July 2017, the racial population distribution of the state was 79.4% Caucasian, approximately 12.6% African American, 4.8% Asian and 3% of mixed or another race. Hispanics or Latinos comprised roughly 39.1% of all Texans. Approximately 26% of the population is under the age of 18 and about 12% are older than 65 years. Roughly 80% of the population live in urban areas, and three of the ten most populous cities in the United States are in Texas: Houston, Dallas and San Antonio. <https://www.census.gov/quickfacts/TX>

**Investment and Business Climate** Texas offers one of the most favorable business climates in the U.S., with relatively low wage rates, taxes and property values. Texas has no personal or corporate income tax, and it is a right-to-work state, meaning that union membership cannot be made compulsory. In a May 2018 survey of CEOs by Chief Executive Magazine, Texas was ranked the best state for business development and job growth for the fourteenth year in a row. <https://chiefexecutive.net/best-worst-states-business-2018/>

Fifty-four Fortune 500 businesses are headquartered in Texas, including high-tech companies such as Dell Technologies, Texas Instruments and AT&T, two of the four largest national airlines (Southwest and American), for-profit health care companies such as Tenet Healthcare and, of course, multiple global energy and energy service companies including ExxonMobil, ConocoPhillips, Valero, Occidental, Halliburton and Baker Hughes. But beyond this concentration of headquarters talent, Texas is also home to significant facilities and investment across the spectrum of the global economy. From advanced technology and manufacturing to aerospace, aviation and

defense and from biotech and life sciences to information and computer technology, the economic vitality of the state is on display in a variety of institutions, facilities and contexts.

Other factors contributing to the favorable business climate of the state are its highly educated workforce of more than 13.5 million, an excellent transportation infrastructure system, a reasonable regulatory environment and affordable costs of living, housing and associated services, including outstanding educational and health care facilities.

**Infrastructure and Energy** Excellent transportation facilities and infrastructure contribute to the state's thriving business climate. Those resources include an extensive network of highways and rail systems, deep-water port facilities and several major airports, including two of the busiest airports in the nation at Dallas-Ft. Worth International Airport and George Bush Intercontinental Airport in Houston. Additionally, Fort Worth's Alliance Airport and San Antonio's Port San Antonio integrate high-capacity industrial airports, Class I rail terminals and direct interstate highway access to provide best in class intermodal facilities. The Port of Houston was ranked 15th in the world and 2nd in the United States for total cargo volume in 2017, and the Port ranked first in the nation in terms of its handling of foreign cargo. In addition to nuclear and gas-fired power plants and its extensive natural resource base, Texas had over 22,637 MW of installed wind power capacity at the end of 2017, far above every other state and more than five times that of California.

**Educational and Health Care Institutions** Texas strongly supports higher educational institutions with significant state assets permanently allocated to its colleges and universities. Several Texas universities and research institutions are leaders in electronics, medical, biotechnology, aerospace, advanced materials, and energy-related research. The state's flagship universities, The University of Texas at Austin and Texas A&M University in College Station together had a combined enrollment of more than 120,000 students in the fall of 2017, and more than 35 other public universities and state supported institutions of higher learning help to educate the state's growing workforce. And, of course, Texas is home to some of the nation's finest private colleges and universities. The State ranked third in the nation in 2016 for Engineering and Science doctorates awarded with 2,923, according to the National Science Foundation.

The 1345-acre Texas Medical Center ("TMC"), located in Houston, Texas, is the largest medical complex in the world with 21 hospitals, four medical schools and seven nursing schools. The TMC is home to both the largest children's hospital in the world ([Texas Children's Hospital](#)) and the largest cancer hospital in the world ([MD Anderson Cancer Center](#)). Twenty-thousand physicians, researchers and scientists with advanced degrees work with more than 85,000 other employees in this virtual stand-alone city.

# 01 BUSINESS ENTITIES

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## CORPORATIONS

**State of Incorporation.** The Texas Business Organizations Code (BOC) became effective on January 1, 2006. The BOC provides an updated, more uniform manner of creating various types of entities (for example, corporations, partnerships and limited liability companies) by, among other things: adopting a common system of naming formation documents; providing more uniform filing mechanics; and standardizing the entity formation process.

The BOC applies to (a) all Texas corporations, partnerships, limited liability companies and other domestic filing entities formed on and after January 1, 2006 and (b) all foreign filing entities registering to do business in Texas on or after January 1, 2006. Existing domestic and foreign entities automatically became subject to the BOC on January 1, 2010, unless those entities elected early adoption of the BOC.

**Corporate Formation.** A Texas corporation can be formed by filing its certificate of formation (Certificate) with the Secretary of State of the State of Texas (Texas SOS). The Certificate must be signed by an organizer and filed with the Texas SOS.

**Certificate of Formation.** The Certificate is a matter of public record. It must specify the name of the corporation, the period of duration (which may be perpetual), the purpose for which the corporation is organized, the name of the initial registered agent and the street address of the initial registered office, the name and address of the organizer, the number of directors constituting the initial board of directors, the names and addresses of the initial board of directors, the number of authorized shares, par values, and the designation of any classes of shares and their relative rights. Other provisions may be included which are not inconsistent with law such as limitations on the liability of directors, reservation of preemptive rights, granting of cumulative voting and voting requirements for written shareholder consents. The Certificate may include one or more social purposes in addition to the purpose required to be stated in the Certificate. After shares are issued, amendments to the Certificate may be made only with shareholder approval.

**Name.** The corporate name must contain the word "corporation," "incorporated," "company," or "limited," or an abbreviation of one of those words, and the name must not be deceptively similar to the names of other corporations doing business in Texas or contain language that would imply it is organized for any purpose other than the one(s) contained in its Certificate. The exclusive right to use of a name may be reserved for 120 days by filing an appropriate application with the Texas SOS.

**Bylaws.** The Bylaws are not a matter of public record. The Bylaws contain provisions for regulation and management of the affairs of the corporation, dealing with such matters as meetings of shareholders, meetings of directors, election and authority of officers, and indemnification of directors and officers. The Bylaws may be

amended by the directors or the shareholders unless that power is reserved only to the shareholders in the Certificate or Bylaw provisions.

**Authorized Shares.** Shares of capital stock may be issued for any consideration deemed sufficient by the Board, including cash, services performed or contracts for services to be performed, promissory notes, securities of the corporation or other securities, a tangible or intangible benefit to the corporation, and any other property of any kind or nature. The number of authorized shares specified in the Certificate is the maximum number of shares which may be issued, with no obligation for a corporation to issue all authorized shares. A corporation may issue one or more classes of shares having different rights and preferences, and any such class may be divided into one or more series. Shares having a par value may not be issued for less than the par value thereof.

**Meetings of Shareholders and Directors.** Texas law provides for annual meetings and special meetings of shareholders. Failure to hold the annual meeting at the time designated does not result in a dissolution of the corporation. Shareholders may also act by written consent in lieu of a meeting. Shareholders elect the Board of Directors at the annual shareholders meeting. The Board of Directors, which may consist of one or more directors, elects officers and manages the business and affairs of the corporation. Directors need not be citizens or residents of the State of Texas or of the United States unless the Certificate so requires. Directors may act by unanimous written consent in lieu of a meeting. Notice requirements for shareholders and directors meetings are set forth; however attendance by a director at a meeting constitutes a waiver of notice in most circumstances.

**Authority of Shareholders, Directors and Officers.** The shareholders must vote or consent to approve certain corporate actions such as mergers, amendments to the Certificate, the sale of all, or substantially all, the property and assets of the corporation, if not made in the usual course of its business, and dissolution. Other matters are voted on by the Board, including most types of amendments to the Bylaws, payments of dividends, issuance of shares, corporate loans and other significant transactions outside the ordinary scope of the day-to-day business. The Board also elects officers, which must include a President and a Secretary and usually also includes one or more Vice Presidents and a Treasurer. There may also be a Chairman of the Board, a Chief Executive Officer, a Chief Operating Officer, a Chief Financial Officer and one or more Assistant Secretaries and Assistant Treasurers. Two or more offices may be held by the same person. Officers need not be citizens or residents of the State of Texas, or of the United States.

**Limited Liability.** Corporate shareholders, as such, are generally not liable for corporate obligations unless they agree to guarantee such obligations or unless a court finds that the corporate form should be pierced because the corporation did not maintain formal corporate practices.

**Foreign Corporations.** No foreign corporation is entitled to transact business in Texas until it has filed with the Texas SOS an application for registration to transact business in the State of Texas. Each foreign corporation authorized to transact business in Texas must maintain a registered office and a registered agent in the state. The registered agent of a foreign corporation authorized to transact business in Texas is the agent of such corporation upon whom process, notice or demand required or permitted by law to be served on the corporation may be served. A foreign corporation which transacts business in Texas without having filed a registration to do so shall be liable for all fees and franchise taxes which would have been payable if such registration had been obtained, plus all applicable penalties.

**Annual Reports/Franchise Tax.** A franchise tax is imposed on each taxable entity that does business in Texas or that is chartered or organized in Texas. Taxable entities include partnerships, limited liability partnerships, corporations, limited liability companies, and other legal entities. Corporations organized in Texas or otherwise authorized to do business in Texas must file an Annual Franchise Tax Report with the Comptroller of Public Accounts each year setting forth certain financial information relating to calculation of the Texas franchise tax and other information including the names and addresses of its officers and directors.

**Nonprofit Corporations.** Many nonprofit corporations are exempt from the annual franchise tax under Chapter 172 of the Texas Tax Code. However, nonprofit corporations are required to provide periodic reports to the Texas SOS, upon notice from the Texas SOS that the report is due. The report must state the name of the corporation, the state or country under the laws of which the corporation is incorporated, the address of the registered office of the corporation in Texas and the name of the registered agent at the address, the names and addresses of the directors and officers of the corporation, and, if the corporation is a foreign corporation, the address of the principal office of the corporation in the state or country under the laws of which the corporation is incorporated.

## GENERAL PARTNERSHIPS

A partnership is an association of two or more persons to carry on a business for profit as owners. The persons may be individuals, corporations and other entities. Texas partnerships (general and limited) are governed generally by Title 4 of the BOC. A partnership is an entity distinct from its partners.

**Partnership Agreement.** Except as prohibited by law, a partnership agreement governs the relations of the partners and between partners and the partnership. If not addressed by the partnership agreement, the applicable provisions of the BOC govern those relations.

**Partners as Agents of the Partnership.** Each partner is an agent of the partnership for the purpose of its business. Unless a third party knows that a partner does not have authority to act for the partnership in a particular matter, an act of a partner binds the partnership if the act is for apparently carrying on the partnership business in the ordinary course. Generally, all partners are liable jointly and severally for all debts and obligations of the partnership.

**Limited Liability Partnerships.** A general partnership may become a limited liability partnership by filing an appropriate application with the Texas SOS. An annual renewal application must be filed in order to maintain the effectiveness of the registration. A limited liability partnership's name must contain the phrase "limited liability partnership" or an abbreviation of the phrase. The exclusive right to use of a name may be reserved for 120 days by filing an appropriate application with the Texas SOS. Limited liability partnerships are required to file an annual report with the Texas SOS that contains the name of the partnership and the number of partners of the partnership. A partner in a limited liability partnership is not personally liable for obligations of such partnership.

**Franchise Tax Exemption.** A general partnership, the direct ownership of which is entirely composed of natural persons, except for limited liability partnerships, are exempt from the franchise tax.

**Inadvertent Partnerships.** In determining whether a partnership has been created, courts look at the five factors listed in Title 4 of the BOC: the right to share in profits; the parties' intent to be bound; the right to participate in or control the business; the obligation to share losses or liabilities; and, an agreement to contribute money or property to the business. Because the statute does not specify whether there must be proof of all or only some of

the factors, the Texas Supreme Court adopted a “totality-of-the-circumstances” test in 2009. *Ingram v. Deere*, 288 S.W.3d 886 (Tex. 2009). In 2014, a judgment in excess of \$535 million was rendered in the 298<sup>th</sup> District Court of Dallas County in *Energy Transfer Partners, L.P. v. Enterprise Products Partners, L.P.* after a jury found that the plaintiff and defendant formed a partnership by conduct and that the defendant breached its duty of loyalty to the plaintiff. Although the parties exchanged non-binding letters of intent and other writings that explicitly stated that the parties were not legally bound to each other and did not create a partnership, based on the factors in the BOC and the totality of the circumstances, the jury found that the conduct of the parties had created a partnership. Enterprise appealed the trial court’s decision and on July 18, 2017, the Dallas Court of Appeals unanimously reversed the trial court’s judgment in favor of Enterprise, finding that no partnership was formed under Texas law.

## LIMITED PARTNERSHIPS

A limited partnership is a partnership formed by two or more persons under the laws of Texas and having one or more general partners and one or more limited partners. A person may be an individual, corporation, partnership or other entity. Texas partnerships (general and limited) are governed generally by Title 4 of the BOC. A partnership is an entity distinct from its partners.

**Name.** The name of a limited partnership must contain the word “limited,” the phrase “limited partnership,” or an abbreviation of that word or phrase. The exclusive right to use of a name may be reserved for 120 days by filing an appropriate application with the Texas SOS.

**Formation.** To form a limited partnership, the partners must enter into a partnership agreement and each general partner must execute a Certificate of Formation. The certificate must be filed with the Texas SOS. A limited partnership or a foreign limited partnership subject to the BOC must maintain a registered office and a registered agent for service of process in Texas.

**Rights and Liabilities of Partners.** Except as provided by the BOC, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to persons other than the partnership and the other partners. Except as provided by the BOC, a limited partner is not liable for the obligations of a limited partnership, unless the limited partner is also a general partner or, in addition to exercising the limited partner’s rights as a limited partner, the limited partner participates in the conduct of the business.

**Limited Liability Partnerships and Limited Liability Limited Partnerships.** A limited partnership may become a limited liability partnership or a limited liability limited partnership (LLLP) if it complies with the requirements of the BOC applicable to such entities.

**Foreign Limited Partnerships.** Before transacting business in Texas, a foreign limited partnership must file an appropriate application with the Texas SOS. A foreign limited partnership must maintain a registered office and a registered agent for service of process in Texas.

## LIMITED LIABILITY COMPANIES

**Name.** The name of a limited liability company must contain the phrase “limited liability company” or “limited company” or an abbreviation of one of those phrases. The exclusive right to the use of a limited liability company name may be reserved for 120 days by filing an appropriate application with the Texas SOS.

**Formation.** Title 3 of the BOC permits any person, which includes an individual, corporation, or other entity, to act as an organizer of a limited liability company by signing and filing a Certificate of Formation for such company with the Texas SOS. Each limited liability company or foreign limited liability company subject to the BOC must maintain a registered office and a registered agent in Texas.

**Members and Managers.** A limited liability company may have one or more members. The members normally adopt the Company Agreement of the limited liability company containing provisions for the regulation and management of the affairs of the limited liability company. Except to the extent reserved to the members by the Certificate of Formation, the business of the limited liability company may be managed by a manager or managers elected by the members. Generally, the Company Agreement contains provisions regarding the number and election of managers, the manner of filling a manager vacancy, committees of managers and meetings of managers. One or more persons, who may or may not be members or managers, may be designated as officers of the limited liability company.

**Liabilities for Obligations.** Except as otherwise may be provided in the Company Agreement, a member or manager is not liable for the debts, obligations or liabilities of a limited liability company.

**Nature of Membership Interest.** A membership interest is personal property and a member has no interest in specific limited liability company property. A membership interest may be community property under applicable law, but a member's right to participate in the management and conduct of the business of the limited liability company is not community property.

**Contributions.** A promise by a member to make a contribution to a limited liability company is not enforceable unless set out in writing and signed by the member. Except as otherwise may be provided in the Company Agreement, a member of a limited liability company is obligated to perform an enforceable promise to make a contribution or otherwise pay cash or transfer property to the company without regard to the death, disability, or other change in circumstances of the member.

**Allocations and Distributions.** Except as otherwise may be provided in the Company Agreement, the profits and losses of a limited liability company shall be allocated to each member of the company on the basis of the agreed value of the contributions made by each member, as stated in the company's records. Except as otherwise may be provided in the Company Agreement, distributions of cash and other assets of a limited liability company shall be made to each member of the company according to the agreed value of the member's contribution to the company as stated in the company's records.

**Foreign Limited Liability Companies.** No foreign limited liability company may transact business in Texas unless it files an appropriate application with the Texas SOS. A foreign limited liability company which transacts business in Texas and fails to file such application shall be liable for all fees and franchise taxes which would have been payable if an application had been filed.

## **ASSUMED BUSINESS NAMES**

Any individual, partnership or other entity, other than a corporation, limited partnership, registered limited liability partnership or limited liability company, which regularly conducts business in Texas under an assumed name must file an appropriate assumed name certificate with the county clerk in each county in which such person maintains business premises (or if there are no premises, in which business is conducted). Any corporation, limited

partnership, registered limited liability partnership or limited liability company which regularly conducts business in Texas under an assumed name must file an appropriate assumed name certificate with the Texas SOS and with the county clerk in each county designated by statute. If information in a previously filed certificate becomes materially misleading, a new certificate must be filed. A certificate remains effective for a term not exceeding ten years from the filing date and may be renewed for successive ten-year terms. See generally Title 5 of the BOC.

## **TEXAS MERGER PROVISIONS**

The Texas BOC provides unique merger provisions that offer a range of possibilities for the reorganization of domestic entities, including multi-survivor mergers. The BOC provides that a merger means (a) the division of a domestic entity into two or more new domestic entities or other organizations or into a surviving domestic entity and one or more new domestic or foreign entities or non-code organizations; or (b) the combination of one or more domestic entities with one or more domestic entities or non-code organizations resulting in (i) one or more surviving domestic entities or non-code organizations, (ii) the creation of one or more new domestic entities or non-code organizations, or (iii) one or more surviving domestic entities or non-code organizations and the creation of one or more new domestic entities or non-code organizations. To effect a merger, each domestic entity that is a party to the merger must act on and approve the plan of merger, which must be in writing and must include the names of each organization that is a party to the merger, will survive the merger, or will be created by the merger; the manner and basis for allocating ownership interests, assets and liabilities; and the required documents for the formation of any new entities. After approval of a plan of merger, a certificate of merger must be filed with the Texas SOS for a merger to become effective if any domestic entity that is a party to the merger is a filing entity or any domestic entity to be created under the plan of merger is a filing entity. See generally Title 1 of the BOC.

# 02 STATE TRADE REGULATION

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## TEXAS ANTITRUST LAW

The Texas Free Enterprise and Antitrust Act is part of the Texas Business and Commerce Code. This antitrust statute is similar to the federal Sherman Act, and Section 15.05 has provisions much like Sherman Act §§ 1 and 2 and Clayton Act § 7. There is no requirement for premerger notification akin to the federal Hart-Scott-Rodino Act. Additionally, the Act does not have a provision specifically prohibiting price discrimination, and there is no equivalent of the federal Robinson-Patman Act.

The Texas statute covers trade and commerce occurring wholly or partly within Texas. It explicitly requires that it be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes, to the extent that this can be done consistent with its purpose to provide the benefits of competition to consumers in Texas. The express language and legislative history of the Act demonstrate that the Texas legislature was taking a “deliberate step toward uniformity with federal antitrust law.”<sup>1</sup> Texas courts appear to follow the federal practice of designating certain restraints as per se unlawful, while designating others as subject to rule of reason analysis.<sup>2</sup> The statute also specifically maintains most explicit federal antitrust exemptions, does not prohibit actions approved or required by a governmental agency, and protects actions by providers of professional services that are designed to improve quality or cut costs.

For treatment of monopolist conduct under the statute, the relevant product market is determined by the availability of substitutes to which consumers can turn in response to price increases and other existing or potential producers’ ability to expand output.<sup>3</sup> The relevant geographic market is defined as the area in which consumers may obtain a given product.<sup>4</sup> Parameters of both the product and geographic markets are questions of fact.<sup>5</sup>

To establish that a defendant contracted, combined, or conspired in restraint of trade in violation of the Texas Free Enterprise and Antitrust Act, a plaintiff must show that the alleged contract, combination, or conspiracy is

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<sup>1</sup> Red Wing Shoe Co., Inc. v. Shearer’s, Inc., 769 S.W.2d 339, 343 (Tex. App.—Houston [1st Dist.] 1989).

<sup>2</sup> See, e.g., Times Herald Printing Co. v. A.H. Belo Corp., 820 S.W.2d 206, 211 (Tex. App.—Houston [14th Dist.] 1991) (“Because contracts, combinations, and conspiracies in restraint of trade come in different forms, courts require different standards of proof and different safeguards to promote and protect competitive conditions.”).

<sup>3</sup> Regal Entertainment Group v. iPic-Gold Class Entertainment, LLC, 507 S.W.3d 337 (Tex. App. Houston [1st Dist.] 2016).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

unreasonable and has an adverse effect on competition in the relevant market.<sup>6</sup> A plaintiff cannot demonstrate the unreasonableness of a restraint merely by showing that it caused him an economic injury. To establish that a defendant's conduct had an adverse effect on competition in the market under the statute, the plaintiff must prove what market it alleges was restrained, prove that the defendant played a significant role in the relevant market, and proffer evidence of a demonstrable economic effect.<sup>7</sup> Evidence of ill will among competitors, without more, is not evidence of anticompetitive behavior under the statute.<sup>8</sup> However, while an inference of a possible adverse effect of a practice on the relevant market is insufficient to establish a violation of the statute, a reasonable inference of demonstrable economic effect is sufficient to raise a fact issue that would preclude summary judgment on an unlawful restraint of trade claim under the statute.<sup>9</sup>

For one antitrust cause of action, predatory pricing, the Texas Supreme Court has developed a unique, specific standard. To prove that a seller's prices are predatory, a plaintiff must show that (1) the seller has an objectively reasonable expectation of recouping the losses it incurs while charging predatory prices, by charging higher prices later, and (2)(a) the seller's prices were below its average variable cost or (b)(i) there are substantial barriers to entry, (ii) the seller's prices were below its short-run profit-maximizing price and its average total cost, and (iii) the benefits of this pricing comes from its tendency to discipline or eliminate competition and thereby enhancing the seller's long-term ability to reap the benefits of monopoly power. In contrast, the federal standard is not so specific. Generally speaking, the federal courts have required that the seller's prices be below some appropriate measure of cost, usually marginal or average variable cost, and that the seller had a reasonable prospect of recouping its losses.

The Texas antitrust laws may be enforced by persons who have been injured by a violation of the statute or by the Attorney General of Texas. As under *Illinois Brick*, indirect purchasers lack standing to pursue antitrust claims. The statute of limitations is four years. A copy of the petition that initiates a private action must be sent to the attorney general. The attorney general also has the authority to investigate possible antitrust violations using civil investigative demands for documents and testimony. In an action brought by the attorney general to challenge a merger or acquisition that may lessen competition, a court may order divestiture.

## COVENANTS NOT TO COMPETE

Texas courts will enforce a covenant not to compete if it does not impose on the promisee a greater restraint than is reasonably necessary to protect the business and good will of the promisor. Texas courts generally will refuse to enforce a noncompete covenant rather than rewrite it. Aside from its enforceability under that standard, a covenant not to compete may violate the Texas antitrust law. However, a savings provision in the antitrust statute states that a noncompete covenant remains enforceable if it is part of an otherwise enforceable agreement and to the extent that its restrictions as to time, geographical area, and scope of activity are reasonable and do not

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<sup>6</sup> *Brooks v. Excellence Mortgage, Ltd.*, 486 S.W.3d 29 (Tex. App. San Antonio 2015), *petition for review filed*, (Apr. 20, 2016).

<sup>7</sup> Tex. Bus. & C. Code § 15.05(a). *Brooks v. Excellence Mortgage, Ltd.*, 486 S.W.3d 29 (Tex. App. San Antonio 2015), *petition for review filed*, (Apr. 20, 2016).

<sup>8</sup> *Better Business Bureau of Metropolitan Houston, Inc. v. John Moore Services, Inc.*, 500 S.W.3d 26 (Tex. App. Houston 1st Dist. 2016), *review denied*, (Oct. 21, 2016).

<sup>9</sup> Tex. Bus. & C. Code § 15.05(a). *Brooks v. Excellence Mortgage, Ltd.*, 486 S.W.3d 29 (Tex. App. San Antonio 2015), *petition for review filed*, (Apr. 20, 2016).

impose a restraint greater than is necessary to protect the business interests of the promisee. No noncompete covenant has been found to violate the Texas antitrust law, although various covenants have been found unenforceable on grounds that they exceeded reasonable limits, were unsupported by consideration, or were not ancillary to otherwise enforceable agreements. Even a worldwide noncompetition agreement was upheld under circumstances where the court found that determining the scope of the geographical area of the former employment was difficult.<sup>10</sup> In this case, a covenant not to compete without geographical limits was considered reasonable as the employee was not prevented from earning a living.<sup>11</sup>

## DECEPTIVE TRADE PRACTICES

Texas's Deceptive Trade Practices-Consumer Protection Act (DTPA) is designed to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty. The DTPA provides a cause of action for deceptive trade practices and reduces the burdens of proof and the defenses that are part of common law fraud and breach of warranty claims. A claim under the DTPA has three elements: (1) the plaintiff is a consumer; (2) the defendant engaged in false, misleading, or deceptive acts; and (3) these acts constituted a producing cause of the consumer's damages.<sup>12</sup> The "laundry list" of conduct that may violate the DTPA includes making misleading statements about the origin or quality of goods or services, passing off, false advertising, disparaging the goods or services of others, and misrepresenting warranties. However, mere breach of contract does not constitute a cause of action under the DTPA without something more. For example, misrepresentation made during contractual negotiations may form the basis of a DTPA claim only if the defendant misrepresents a material fact about the goods or services sold to the plaintiff.<sup>13</sup> Under the DTPA, conduct may be "unconscionable" if, to a consumer's detriment, it takes advantage of the consumer's lack of knowledge, ability, experience, or capacity to a grossly unfair degree.

The DTPA provides remedies that go beyond the common law remedies for similar wrongful conduct. A consumer who prevails in a DTPA action may obtain actual damages, damages for mental anguish, additional damages where the violation was knowing, attorney fees, and injunctive relief.

## UNIFORM TRADE SECRETS ACT

Texas has its own Texas Uniform Trade Secrets Act (TUTSA), which codifies Texas's current trade secret law while strengthening trade secret protections and providing greater certainty to misappropriation claims, providing for a cause of action for misappropriation or improper use of trade secrets. TUTSA altered Texas common law in several significant ways: it created an unambiguous and expansive definition of trade secrets; provided a different formulation of the secrecy requirement for trade secret protection; eliminated a "continuous use" requirement for information deemed a "trade secret;" provided for injunctive relief for threatened trade secret misappropriation;

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<sup>10</sup> Daily Instruments Corp. v. Heidt, 998 F. Supp. 2d 553 (S.D. Tex. 2014), *appeal dismissed*, (5th Cir 14-20388) (Sept. 11, 2014) (applying Texas law).

<sup>11</sup> *Id.*

<sup>12</sup> Villarreal v. Wells Fargo Bank, N.A., 814 F.3d 763 (5th Cir. 2016).

<sup>13</sup> V.T.C.A., Bus. & C. § 17.41 et seq. Drury Southwest, Inc. v. Louie Ledeaux #1, Inc., 350 S.W.3d 287 (Tex. App. San Antonio 2011), *reh'g overruled*, (Aug. 30, 2011).

and granted courts discretion to award attorneys' fees to the prevailing party in certain cases.<sup>14</sup> Furthermore, TUTSA specifically defines the conduct that constitutes misappropriation of a trade secret, which provides for a significant improvement over existing Texas common law and the Texas Theft Liability Act. First, TUTSA specifies that prohibited conduct includes: (1) acquiring a trade secret by an improper means; or (2) disclosing a trade secret without consent. Second, the definition makes clear that liability applies only to those who know or have reason to know a trade secret was acquired by improper means, which was not previously the case. TUTSA also modernizes the Texas Theft Liability Act by including theft in its definition of "improper means." Additionally, TUTSA provides a "presumption in favor of granting protective orders to preserve the secrecy of trade secrets," thereby tasking the courts with protecting the secrecy inherent in trade secrets.

Texas recently amended the TUTSA to expand and clarify its definitions, define "clear and convincing" as part of the evidentiary standard under the TUTSA, and codify a balancing test to determine whether to exclude people from a courtroom when trade secrets are discussed.

## **BUSINESS OPPORTUNITIES**

Texas has a Business Opportunity Act designed to protect against false, misleading, or deceptive practices in the marketing and sale of business opportunities. A "business opportunity" is the sale or lease of products, equipment, supplies, or services for the purpose of enabling the purchaser to start a business and in which the seller represents that the purchaser will profit from the business opportunity or for which the seller will provide a marketing program or assist in finding a location for the business. The Act requires registration with the Texas Secretary of State prior to offering the business opportunity and disclosure of certain information to the potential purchaser before the sale. Some business opportunities are exempt from these requirements.

Texas does not regulate the sale of franchises as such. The Business Opportunity Act exempts from its coverage the sale of arrangements qualifying as franchises under federal regulations, provided the seller files a prescribed notice with the Texas Secretary of State.

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<sup>14</sup>Joseph F. Cleveland, Jr., J. Heath Coffman, *The Texas Uniform Trade Secrets Act*, TEX. J. BUS. L., Fall 2013, at 323, 323-25.

# 03 TAXATION

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## STATE AND LOCAL TAXATION

Businesses operating in Texas may be subject to a variety of taxes and fees imposed by the state of Texas, as well as by various localities. The most important generally applicable Texas state and local taxes are as follows:

**Sales and Use Tax.** Texas imposes a sales tax of 6.25% on retail sales of tangible personal property, as well as on a number of services. Local sales taxes may also be imposed, up to a maximum combined state and local rate of 8.25%. The sales tax is collected by the seller at the point of the sale or service. Taxpayers who purchase tangible property or taxable services outside of Texas for use in Texas are liable for a corresponding use tax.

Taxable services include amusement services, cable television services, personal services, motor vehicle parking and storage services, the repair, remodeling, maintenance, and restoration of tangible personal property, telecommunications services, credit reporting services, debt collection services, insurance services, information services, internet access services, real property services, data processing services, real property repair and remodeling, security services, and telephone answering services.

Important exemptions from the sales tax are available for occasional sales and sales of a business, purchases of manufacturing equipment, sales for resale, purchases by exempt entities, certain medical and food items, and certain uses of gas and electricity. Other exemptions are also available.

Motor vehicles are not subject to the general sales and use tax. Rather, these sales are subject to a separate motor vehicle sales and use tax at a rate of 6.25%.

**Property Tax.** Cities, counties, school districts, and other Texas local governments are funded primarily through the property tax, which is imposed on real property and business personal property. On January 1 of each year, taxable property is valued by the central appraisal district for the country in which the property is located. Taxpayers may protest property valuations before the central appraisal district's appraisal review board.

Each taxing unit (e.g., city, county, school district) adopts a rate each year and applies that rate to the value of each taxpayer's property as determined by the central appraisal district. Property taxes are generally payable by January 31 of the year following the tax year.

**Franchise Tax.** The franchise tax is imposed at a rate of 0.75% of taxable margin (0.375% for certain entities primarily engaged in retail or wholesale trade). To determine taxable margin, the taxpayer will deduct from its "total revenue" (gross income for federal tax purposes with certain modifications) the greater of (i) cost of goods sold, (ii) compensation, (iii) 30% of total revenue, or (iv) \$1 million. The tax is imposed only on the portion of taxable margin apportioned to Texas. The apportionment process involves determining the fraction of the

taxpayer's overall receipts which are Texas receipts, and multiplying taxable margin by that fraction. Receipts are characterized as Texas or non-Texas receipts using rules prescribed by the Texas Comptroller of Public Accounts.

Franchise tax is imposed on all entities, including but not limited to corporations, partnerships, limited liability companies, and trusts, unless specifically exempted. Exemptions are available for sole proprietorships, general partnerships owned entirely by individual persons, "passive entities," and certain other entity types. In order to qualify for the "passive" entity exemption, an entity must be a general or limited partnership or trust (other than a business trust), and 90% of its gross income for federal tax purposes must consist of certain types of income (including but not limited to dividends, interest, distributive income from a partnership or limited liability company, and capital gains from real property sales).

Taxpayers that are part of an affiliated group engaged in a unitary business must file a combined group report and are treated as a single taxpayer. An affiliated group is a group of entities that is commonly owned (>50% direct or indirect common ownership is required) and with respect to which there is a synergy of operations. A synergy of operations may be evidenced by horizontal integration, vertical integration, or strong centralized management.

**Other Taxes.** Other state and local taxes which may impact a business operating in Texas may be motor fuel taxes, severance taxes, and utility gross receipts taxes.

**No Personal Income Tax.** Texas currently has no personal income tax.

# 04 LABOR & EMPLOYMENT

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Texas remains an employment-at-will state, which means that an employee without a contract for a definite term may quit or be discharged without liability at any time for any reason that does not violate a statute. A very narrow, judicially-created exception to the employment-at-will doctrine prohibits an employer from discharging an employee solely because the employee refuses to perform an illegal act that carries criminal penalties. The Texas Legislature has enacted the following statutes which govern labor and employment relationships within the State:

## **CHAPTER 21 OF THE TEXAS LABOR CODE**

This statute prohibits employers with fifteen or more employees from discriminating on the basis of race, color, disability, sex, religion, national origin or age. Chapter 21, which also applies to employment agencies and labor organizations, contains a retaliation provision similar to that in the federal Title VII statute, and it imposes a duty similar to that of the federal Americans with Disabilities Act (“ADA”) to reasonably accommodate an employee’s disability. The statute gives employees a private cause of action, but also requires the employee to exhaust administrative remedies by filing an administrative complaint with the Texas Workforce Commission – Civil Rights Division and receiving a right-to-sue notice. Texas courts frequently rely on federal case law interpreting Title VII, the ADA and the ADEA in adjudicating Chapter 21 claims. One difference between the Texas statute and federal law is that Texas law does not follow the Lilly Ledbetter Fair Pay Act with respect to pay discrimination claims.

## **DISCRIMINATION BASED ON GENETIC INFORMATION**

An employer, labor organization or employment agency commits an unlawful employment practice if it discriminates against an employee or applicant on the basis of genetic information or requires employees or applicants to submit to genetic testing. Texas law also regulates the procedures and confidentiality of genetic testing.

## **RELIGIOUS ACCOMMODATION**

Similar to federal law, Texas law requires an employer to accommodate the religious beliefs and practices of an employee unless doing so would constitute an undue hardship on the employer’s business. In addition, an employee may not be required to work during a period that the employee requests to be off to attend one regular weekly religious worship service.

## **NON-COMPETITION AGREEMENTS**

Section 15.50(a) of the Texas Business & Commerce Code provides that an employee covenant not to compete is enforceable if it meets two basic requirements: (a) the covenant is “ancillary to or part of an otherwise enforceable agreement at the time the agreement is made,” and (b) the covenant must contain “limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.” Texas courts have made clear that for the covenant not to compete to be “ancillary to or part of an otherwise enforceable agreement,” the employer must provide consideration to the employee that gives rise to its interest in restraining the employee (for example, a promise to provide the employee with specialized training, access to employer confidential information or trade secrets, or stock options), and that the non-compete covenant is designed to enforce the employee’s promise or consideration. Texas courts interpret agreements that call for non-solicitation of clients using the same standard as noncompetition agreements, under Section 15.50.

## **ARBITRATION AGREEMENTS**

Section 171 of the Texas Civil Practice & Remedies Code, known as the Texas Arbitration Act, provides for the validity of written agreements to arbitrate claims rather than litigating them in court, and sets out procedures for arbitration.

## **UNEMPLOYMENT COMPENSATION ACT**

This statute sets forth the rules governing the unemployment system in Texas. A totally or partially unemployed individual is eligible to receive benefits for a specified period if he or she is available for work, is able to work, and has registered at a Texas Workforce Commission (TWC) office and met the TWC’s reporting and other requirements. An employee who was discharged for misconduct connected with the work or who voluntarily resigned from employment is not eligible for benefits. Unemployment benefits are paid out of an Unemployment Compensation Fund administered by the State’s comptroller, into which state employers pay taxes based on rates set by the Texas Workforce Commission. The TWC also provides training programs, employment services and child care benefits to eligible individuals. The right to apply for unemployment benefits may not be waived.

## **DISCLOSURE OF INFORMATION ABOUT EMPLOYEES: REFERENCES**

The Texas Labor Code specifically provides that an employer whose authorized employee discloses certain work-related information about a current or former employee to a prospective employer is not civilly liable for damages proximately caused by that disclosure unless it is proven by clear and convincing evidence that the information disclosed was known by that employer to be false at the time the disclosure was made or that the disclosure was made with malice or in reckless disregard for the truth or falsity of the information disclosed.

## **WAGE AND HOUR LAW**

The Texas Labor Code sets the minimum wage and maximum hour regulations for Texas employers not covered by the FLSA. The Act also contains requirements for all Texas employers regarding the manner and time for payment of wages and the setting of paydays, post-termination wage payments, penalties for failure to pay wages, nonexclusive administrative procedures for filing of wage claims, and rules governing deductions from

wages. The Texas Family Code sets out the obligations of employers with regard to deducting child support obligations from employees' wages.

## **WORKERS' COMPENSATION ACT**

Workers' compensation benefits include the payment of medical bills and partial replacement of lost wages for employees who are injured at work or who have work-related diseases or illnesses. Texas is unusual in that it allows private employers to choose whether to maintain workers' compensation insurance. Employers who choose not to maintain coverage must notify the Workers' Compensation Division of the Texas Department of Insurance and their employees, and such employers are then subject to personal injury lawsuits from injured workers but cannot assert certain defenses available in most personal injury lawsuits, such as assumption of the risk, contributory negligence, "last clear chance," and co-worker negligence. If the employer chooses to maintain workers' compensation coverage, such coverage is the exclusive remedy for employees injured on the job without regard to the fault of the employer. However, at the time of employment, an individual employee may elect to retain his or her common law right of action for future on-the-job injuries rather than accepting workers' compensation coverage. The Act specifies requirements for reporting accidents, provisions for maintaining workplace safety, procedures for compensating employees, and an administrative process for resolving disputes regarding eligibility or compensation. The Act also prohibits discrimination or retaliatory action against employees who have filed workers' compensation claims or are in the process of doing so.

## **"RIGHT-TO-WORK" LAW**

Texas is a "right-to-work" state that guarantees the right to work without regard to membership or non-membership in a union. Employers may not require employees or applicants to join or remain members of a labor union, nor can they prohibit employees from seeking or maintaining union membership. The Texas Labor Code also contains regulations governing labor unions, organizing activities and the arbitration of labor disputes and grievances. Picketers are prohibited from physically obstructing the free entrance or exit from any premises, and picketers may not use insulting, threatening or obscene language.

## **EMPLOYMENT OF CHILDREN**

The Texas Labor Code contains detailed guidelines for the employment of children under the age of 14, limiting the occupations and hours in which children may be employed.

# 05 INTELLECTUAL PROPERTY

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## TRADEMARKS AND SERVICE MARKS

**Statute.** Any person who has used a mark in connection with goods or services in Texas may apply for registration upon application with the Secretary of State and payment of a fee of \$50. The items excluded from registration parallel those found in the Federal Trademark Act. Registration is for a term of ten years, with successive ten-year renewal periods available. Registration of the mark is constructive notice of the registrant's claimed rights in the mark and is prima facie proof of ownership, validity, and the exclusive right to use the mark in Texas. Registration entitles the registrant to damages and an injunction for any infringement of the mark. There is no provision in the statute allowing the recovery of attorneys' fees or costs.

**Common Law.** In Texas, palming off, which falls within the realm of unfair competition, is similar to, but broader than, trademark infringement. It is the use or simulation by someone of the name, symbol, or device of a business rival in such a manner as is calculated to deceive and cause the public to trade with the second when they intended to have traded with the first. The scope of this protection is broader than that provided by statutory trademark law because it considers the total physical image of the product and the name together. Statutory trademark law only provides the holder of the trademark an exclusive right to use the mark to identify and distinguish his product or service. The remedies for unfair competition include injunctions and monetary damages including lost profits and punitive damages.

**Anti-dilution Statute.** Although Texas' anti-dilution statute follows the Model State Trademark Act, it offers broader protection than federal law because it allows injunctive relief regardless of whether there is competition between the parties or a likelihood of confusion as to the source of goods or services. The owner of a distinctive mark may seek to enjoin any act likely to dilute the distinctive quality of a mark, regardless of whether the mark is registered or whether there is competition between the parties or confusion between the marks.

## TRADE NAMES

Any person, including individuals, corporations, partnerships, and other legal entities, doing business under an assumed name must file a certificate with the county clerk, and entities created by filing with the Secretary of State (e.g., corporations, limited liability companies or limited partnerships) must file an additional certificate with the Secretary of State. The certificate provides information such as the true name and address of the person and the business to be conducted. A new certificate must be filed within 60 days of any material change of the information contained in the existing certificate.

## TRADE SECRETS

**Statute.** The Texas Uniform Trade Secrets Act provides protection against misappropriations of trade secrets that occur on or after September 1, 2013. The Act's definition of trade secrets includes formulas, patterns, compilations, programs, devices, methods, techniques, processes, financial data, or lists of actual or potential customers or suppliers. Both use and disclosure of a trade secret are permissible grounds for misappropriation claims. Remedies for misappropriation include injunctive relief, actual and exemplary damages, and attorneys' fees. Injunctive relief is also available for threatened misappropriation when proof of actual use or disclosure is not available. In addition, the Act affords preservation of trade secrecy during litigation, and provides a presumption in favor of granting protective orders to preserve trade secret status.

**Criminal Statute.** A person commits a third-degree felony in Texas if the person knowingly steals a trade secret, makes a copy of an article representing a trade secret, or communicates or transmits the trade secret without the owner's consent. Under the criminal statute, a trade secret is defined as any scientific or technical information, design, process, procedure, formula, or improvement that has value and that the owner has taken measures to prevent from becoming available to persons other than those selected by the owner to have access for limited purposes.

**Common Law.** Common law continues to govern misappropriations of trade secrets made before September 1, 2013, as well as continuing misappropriations beginning before that date. Moreover, the Texas Uniform Trade Secret Act does not affect contractual remedies. The owner of a trade secret may make the trade secret known to others subject to the contractual duty not to use or disclose the secret.

## OWNERSHIP OF EMPLOYEE-DEVELOPED INVENTIONS

**Statute.** There is no Texas statute governing ownership of inventions made by employees.

**Common Law.** If an employee is employed to devise or perfect a particular invention, then the rights in the results of the work for which the employee was employed are the property of the employer. Even where the employee was hired merely to "invent," without specifying a particular result, the employer is likely to be treated as owner of the rights in inventions made in the scope of employment. With respect to patents, even where the employer is found not to own the patent in the invention, as when the invention is made outside the scope of employment and not subject to an implied agreement to assign, the employer will receive a "shop right," a royalty free license to use any inventions of employees made on the employer's time, or with the employer's facilities and materials. It is unclear whether the "shop right" applies to trade secrets.

## VENUE IN PATENT SUITS

The 2017 Supreme Court decision in *TC Heartland* altered where venue is proper for patent suits. Before the decision, plaintiffs could file suit where defendants were subject to personal jurisdiction, which amounted to virtually anywhere in the United States. After *TC Heartland*, venue is proper for a defendant in (1) its state of incorporation, or (2) where the defendant has committed acts of infringement and has a regular and established place of business. Courts will focus on the "regular and established place of business" inquiry to satisfy venue where defendants are not incorporated. Prior to *TC Heartland*, the Eastern District of Texas (EDTX) was the most popular venue for the filing of patent cases. *TC Heartland* is expected to substantially reduce the number of cases

being filed in that venue. Businesses will have to assess the level and extent of their activities in EDTX and other venues in the state in view of the standard set forth in TC Heartland if they wish to avoid being sued in any particular venue within the state.

## PATENT AGENT PRIVILEGE

The 2016 decision from the Fifth District Court of Appeals at Dallas in *In re Silver* refused to adopt an attorney-client privilege for communications between inventors and patent agents. The decision conflicts with the Federal Circuit's decision earlier that year, which recognized patent agent privilege. If the holding in *In re Silver* remains intact upon review from the Texas Supreme Court, then patent agent privilege will not exist in Texas state court cases, but will apply in federal court for patent infringement cases.

## RIGHT OF PUBLICITY

**Statute.** Texas provides statutory protection for the use of a deceased individual's name, voice, signature, photograph, or likeness. Under the statute, an individual has a freely transferable, survivable property right in the use of the individual's name, voice, signature, photograph, or likeness after the death of the individual. The statute excepts noncommercial uses and certain media enterprises. Individuals may register the property right, and registration is deemed prima facie evidence of a valid claim to a property right. Only the registered owners of the right, executors, administrators, or court-appointed guardians may exercise the property right during the first year following the death of the individual. The right expires on the fiftieth anniversary of the death of the individual, but if the individual has not transferred the right and there is no surviving spouse, child, grandchild, or parent, the right expires on the first anniversary of death. Liability includes actual damages, or \$2,500, whichever is greater; profits from the unauthorized use; exemplary damages; and attorney's fees, expenses, and costs.

**Common Law.** Texas courts have recognized a common law right of privacy, including the commercial appropriation of a person's name or likeness without consent. Actual damages are recoverable for mental suffering and anguish resulting from intentional invasion of the right of privacy, regardless of the absence of physical injury. Exemplary damages may be awarded if the tort was committed with malice.

# 06 DISPUTE RESOLUTION

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## STATE COURT SYSTEM

In the Texas state court system, there are two basic types of courts: trial courts and appellate courts. A trial court has one judge. By contrast, appellate courts sit in panels and hear appeals in cases that have been previously tried in the trial courts. Texas is divided into nine administrative judicial regions. Each region has a presiding judge appointed by the Governor for a four-year term. The presiding judge's duties include promulgating and implementing regional rules of administration, advising local judges on judicial management, recommending changes to the Texas Supreme Court for the improvement of judicial administration, and acting for local administrative judges in their absence. The presiding judge also has the authority to assign visiting judges to hold court when necessary to dispose of accumulated business in the region.

## STATE TRIAL COURTS

Five different types of trial courts exist in Texas: (1) municipal courts; (2) justice of the peace courts; (3) constitutional county courts; (4) statutory county courts; and (5) district courts. Which trial court has jurisdiction depends on the subject matter of the case, the amount in controversy, and the relief sought. In some instances, there is concurrent jurisdiction among courts.

**Texas Municipal Courts.** The Texas Legislature has created municipal courts in each of the incorporated cities of the State. Municipal courts operate in more than 900 Texas cities and towns. These courts have (1) original and exclusive jurisdiction over criminal violations of certain municipal ordinances and airport board rules, orders, or resolutions that do not exceed certain statutory limits; (2) concurrent jurisdiction with justice of the peace courts over Class C misdemeanor criminal cases where the punishment upon conviction is by small fine only; and (3) concurrent jurisdiction over truancy cases. Municipal judges may issue search or arrest warrants. These courts do not have jurisdiction in most civil cases, but do have limited civil jurisdiction in cases that involve owners of dangerous dogs. Trials in municipal courts are not generally "of record;" many appeals go to the county court, county court at law, or district court by a trial de novo.

In lieu of a municipal court created by the Legislature, municipalities may choose to establish municipal courts of record. These courts have additional jurisdiction over criminal cases arising under ordinances authorized by certain provisions of the Local Government Code. The municipality may also provide by ordinance that a municipal court of record have additional jurisdiction in certain civil and criminal matters. Appeals from municipal courts of record are generally heard in the county criminal courts, county criminal courts of appeal, or municipal courts of appeal.

**Texas Justice of the Peace Courts.** The Texas Constitution requires that each county in the State establish between one and eight justice of the peace precincts, based on the population of the county. Depending on the population of the precinct, either one or two justice of the peace courts are established in each precinct. There are approximately 803 justice of the peace courts in Texas. Justices of the peace are elected in partisan elections and serve four-year terms.

Justice of the peace courts have (1) original jurisdiction in misdemeanor criminal cases where punishment upon conviction may be by fine only; (2) exclusive jurisdiction over civil matters where the amount in controversy is \$200 or less; (3) concurrent jurisdiction with the county courts when the amount in controversy is between \$200 and \$10,000, exclusive of interest; (4) exclusive jurisdiction over forcible entry and detainer cases; (5) concurrent jurisdiction over repair and remedy cases; and (6) concurrent jurisdiction over truancy cases.

Trials in justice of the peace courts are not "of record." Appeals from these courts are by trial *de novo* in the constitutional county court, the county court at law, or the district court. A justice court, however, has no authority to issue injunctive relief. A justice of the peace may issue search or arrest warrants and may serve as the coroner in counties where there is no provision for a medical examiner. These courts also function as small-claims courts.

**Constitutional County Courts.** The Texas Constitution provides that each of the 254 counties of the State has a single county court presided over by a county judge. In populous counties, the "county judge" may devote his full attention to the administration of county government. These judges are elected in partisan elections and serve four-year terms. Unless a case is specifically assigned to another court because of its subject matter, a constitutional county court generally has the following jurisdiction: (1) concurrent jurisdiction with justice of the peace courts in civil cases where the amount in controversy is between \$200 and \$10,000, exclusive of interest; (2) concurrent jurisdiction with the district courts in civil cases where the amount in controversy is between \$500 and \$5,000; (3) general jurisdiction over probate and guardianship cases; (4) jurisdiction over juveniles; and (5) exclusive original jurisdiction over all misdemeanor criminal cases, other than those involving official misconduct, with fines greater than \$500 or involving a jail sentence not greater than one year. In 36 counties, the county court, by special statute, has been given concurrent jurisdiction with the justice courts in all civil matters over which the justice courts have jurisdiction. In counties with a population of 1.75 million or more, the county court has jurisdiction over truancy cases.

Texas statutes deny constitutional county courts jurisdiction in the following types of suits: (1) to recover damages for slander or defamation of character; (2) to enforce liens on land; (3) on behalf of the state of Texas for escheat; (4) for divorce; (5) for forfeiture of corporate charters; (6) for the trial of rights to property valued at \$500 or more and levied on under a writ of execution, sequestration, or attachment; (7) regarding eminent domain; or (8) for recovery of land.

Constitutional county courts have appellate jurisdiction in cases appealed from justice of the peace courts where the judgment rendered exceeds \$250, except in counties where county courts at law have been established. Unless the appeal is one from a designated municipal court of record (trial proceedings are recorded by a court reporter), the appeal takes the form of a trial *de novo* (a completely new trial).

**Statutory County Courts.** Because the Texas Constitution limits each county to a single county court, the Legislature has created statutory county courts in the larger counties to aid the single constitutional county court

in its judicial functions. These include county courts at law, county civil courts at law, county criminal courts at law, county criminal courts, and county criminal courts of appeal. There are currently 243 statutory county courts. Judges sitting in the county courts at law are elected in partisan elections and serve four-year terms.

The legal jurisdiction of these special county-level trial courts varies considerably and is established by the statute that creates the particular court. In order to determine the exact contours of a particular statutory court's jurisdiction, counsel must first consult the specific statute to determine what it provides about a statutory county court's jurisdictional role in the county in which it operates. If a specific provision creating a county court at law conflicts with a general provision in the Government Code concerning county courts at law, the specific provision controls.

Generally, statutory county courts have (1) concurrent jurisdiction with district courts in civil cases where the amount in controversy exceeds \$500 but does not exceed \$200,000 (excluding interest, statutory or punitive damages and penalties, and attorney's fees and costs); (2) concurrent jurisdiction with district courts over appeals of final rulings and decisions of the Texas Workers' Compensation Commission, regardless of the amount in controversy; and (3) concurrent jurisdiction with district courts in eminent domain cases. Also, unless a county has a statutory probate court, a statutory county court has concurrent jurisdiction with the constitutional county court over probate matters. Statutory county courts have appellate jurisdiction in cases appealed from justice of the peace courts where the judgment rendered exceeds \$250. Unless the appeal is one from a designated municipal court of record the appeal takes the form of a trial *de novo*.

Unless otherwise provided by statute, however, statutory county courts have no jurisdiction in the following cases: (1) a suit to recover damages for slander or defamation of character; (2) a suit for enforcement of a lien on land; (3) a suit on behalf of the state of Texas for escheat; (4) a suit for divorce; (5) a suit for the forfeiture of a corporate charter; (6) a suit for the trial of a right to property valued at \$500 or more and levied on under a writ of execution, sequestration, or attachment; (7) an eminent domain suit; or (8) a suit for recovery of land.

**Texas District Courts.** The district courts, approximately 467 in number, are Texas' trial courts of general jurisdiction. They are the primary trial courts in Texas. The geographical area served by each court is established by the Legislature, but each county must be served by at least one district court. These judges are elected in partisan elections and serve four-year terms. In sparsely populated areas of the State, several counties may be served by a single district court, while an urban county may be served by many district courts.

The district court is the preeminent Texas trial court. District courts generally have the following jurisdiction: (1) original jurisdiction in all felony criminal cases and misdemeanors involving official misconduct; (2) divorce cases or other family law disputes; (3) suits for title to land or enforcement of liens on land; (4) contested elections; (5) suits for slander and defamation; (6) suits on behalf of the State for penalties, forfeitures, and escheat; (6) civil matters in which the amount in controversy (the amount of money or damages involved) is \$200<sup>15</sup> or more; and

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<sup>15</sup> The amount of the lower limit has for many years been the subject of controversy, with differing opinions from the courts of appeal. House Bill 79 from the 82nd Legislature, 1st Called Session (2011), included a provision in Section 24.007(b) of the Government Code which was intended to resolve the dispute and to set the minimum jurisdiction of district courts at \$500. However, there is still a potential conflict between Article V, Section 8 of the Texas Constitution and the amendment. Therefore, there are still differing opinions as to whether the minimum monetary jurisdiction of the district courts is \$200 or \$500.

(7) any matters where jurisdiction is not placed in another trial court. While most district courts try both criminal and civil cases, in the more populated counties the courts may specialize in civil, criminal, juvenile, or family-law matters. In counties having statutory county courts, the district courts generally have exclusive jurisdiction in civil cases where the amount in controversy is \$200,000 or more, and concurrent jurisdiction with the statutory county courts in cases where the amount in controversy is between \$500 and \$200,000.

Jury trials are available in civil cases upon demand. Defendants in criminal cases or the parties in civil lawsuits have the right to a trial by either six or twelve local citizens. Except in capital-murder cases, the right to a trial by jury may be waived.

## **CIVIL PROCEDURE**

The Texas Rules of Civil Procedure govern all civil proceedings in the justice, county, and district courts. The Texas Supreme Court promulgates those Rules, which have the same legal effect as statutes. Also, judicial regions and individual courts have adopted local rules that vary extensively.

In Texas, a suit commences when a plaintiff files a petition. After the plaintiff files that petition, the clerk of the court issues a citation. The plaintiff is responsible for delivering both the citation and a copy of the petition to the defendant, thereby ensuring that the defendant receives his constitutionally-required right of notice. There are strict rules governing this procedure. In Texas, one can serve process on individuals by (1) delivering to the defendant, in person, a true copy of the citation with the date of delivery endorsed thereon with a copy of the petition attached or (2) mailing to the defendant by registered or certified mail, return receipt requested, a true copy of the citation with a copy of the petition attached thereto. Also, upon motion supported by an affidavit stating the location of defendant's business, usual place of abode, or other place where defendant can be found, and stating specific facts showing that the above mentioned methods have not been successful at the address mentioned in the affidavit, the court may authorize service: (1) by leaving a true copy of the citation and a copy of the petition with anyone over sixteen years of age at the location specified in such affidavit; or (2) in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit. Service upon partnerships, domestic and foreign corporations, state agencies, and county and city political bodies have similarly detailed rules for service of process to follow to ensure valid service of process.

Once the defendant receives proper service, he must make an appearance by 10:00 am on the Monday following the expiration of 20 days after service (10 days in justice court.) To preserve objections to personal jurisdiction a defendant must file a special appearance before any other pleading. Also, challenges to venue must be filed before any other pleading except a special appearance. Generally though, the first pleading filed by a defendant is an answer. Unlike federal court, in Texas the answer can take the form of a general denial. A general denial denies all of the plaintiff's allegations and places the burden of proof on the plaintiff. In some instances though a defendant must make a special denial, such as when plaintiff has claimed that all condition precedents have been met or when a verified denial is required by Texas Rule of Civil Procedure 93.

The defendant at this time should also assert any defenses to plaintiff's allegations and allege any counter-claims that may exist against the plaintiff. The plaintiff need not file a general denial in response to defendant's counter-claims, but must file a reply if he seeks to assert the verified denials contained in TRCP 93, challenge whether a condition precedent to defendant's counter-claims has been met, or assert affirmative defenses.

Once this process, called “pleading,” is completed, the parties engage in discovery. The purpose of modern discovery is to eliminate any surprise in the adversarial process. Thus, anything relevant to the subject matter of the suit that is not privileged is within the scope of discovery. Information obtained through discovery need not be admissible at trial as long as it is reasonably calculated to lead to admissible evidence.

## STATE APPELLATE COURTS

In Texas, there are three levels of appellate courts: the courts of appeals; the Court of Criminal Appeals; and the Texas Supreme Court. The 14 courts of appeals have intermediate jurisdiction in both civil and criminal cases appealed from district and county courts. There are presently eighty justices authorized for these courts, each elected for a six-year term by voters in their court of appeals district. The Court of Criminal Appeals is the highest state appellate court for criminal matters. It is composed of 9 judges each elected to a six-year term in a statewide election. It sits in Austin and has the power to take discretionary review of all criminal cases decided by the courts of appeals. The Texas Supreme Court is the highest state appellate court for civil and juvenile matters. The Supreme Court is composed of 9 justices elected in statewide election for six-year terms. The jurisdiction of the Texas Supreme Court is limited by the Texas Constitution and by statute. There are specific instances when the Texas Supreme Court can exercise its appellate jurisdiction.

**Texas Courts of Appeals.** Each of the fourteen courts of appeals has jurisdiction in a specific geographical region of the State. Each court is presided over by a chief justice and has at least two other justices. The specific number of justices on each court is set by statute and ranges from three to thirteen. A panel of three justices usually hears appeals in the courts of appeals, unless an *en banc* hearing is ordered. In an *en banc* hearing, all the justices of that court hear and consider the case.

The courts of appeals have appellate jurisdiction in criminal cases, except in criminal cases in which the death penalty has been assessed. The appellate jurisdiction does not, however, embrace any case appealed from an inferior court (municipal court or justice of the peace court) to a county court where the fine imposed by the county court in question does not exceed \$100, unless the sole issue is the constitutionality of the statute or ordinance on which the conviction was based.

A court of appeals has appellate jurisdiction within its territorial limits over final judgments in civil cases where the county or district courts have or assume original jurisdiction and the judgment or the amount in controversy exceeds \$250. In the following instances the decisions of the courts of appeals are final and not appealable to the Texas Supreme Court: (1) all cases of contested elections other than those for statewide offices, except when the validity of a statute is questioned by the decision; (2) all appeals from interlocutory orders appointing receivers or trustees, or such other interlocutory appeals allowed by law, except an interlocutory order denying a media defendant’s motion for summary judgment concerning a prior restraint; (3) all civil cases appealed from the county court or from a district court when under the Texas Constitution a county court would have had original or appellate jurisdiction to try it, except in probate matters, in cases involving the revenue laws of the state, or in cases involving the validity or construction of a statute; (4) all appeals from orders or judgments in suits in which a temporary injunction has been granted or refused or when a motion to dissolve has been granted or overruled; and (5) all other cases except when appellate jurisdiction is specifically given to the Texas Supreme Court by statute and is not made final in the court of appeals.

If, however, the justices of a court of appeals disagree on a question of law material to the decision, or if one court of appeals holds differently from a prior decision of another court of appeals or from the Texas Supreme Court, the Texas Supreme Court has jurisdiction in cases that the courts of appeals otherwise have final judgment.

A court of appeals may issue writs for the general supervision and control over proceedings of lower courts in its own jurisdiction.

**Court of Criminal Appeals.** The Court of Criminal Appeals is Texas' highest state court for criminal cases. The Court has statewide final appellate jurisdiction of criminal cases and makes rules of post-trial and appellate procedure for criminal cases. Most of the cases heard by this Court are appeals from one of the fourteen intermediate courts of appeals, over which the Court has discretionary review. An important exception is that all cases resulting in the death penalty are automatically directed to this Court from the trial level. The Court of Criminal Appeals has the authority to issue such orders as may be necessary to enforce its jurisdiction and judgments.

**Texas Supreme Court.** The Texas Supreme Court is the highest court for civil and juvenile cases in Texas. The Court has original jurisdiction to determine certain legal questions involving a violation of a legal duty by any officer of the state government, except the governor or certain judicial officers. The Court's appellate jurisdiction extends to questions of law, but does not encompass questions of fact. Accordingly, the Court is precluded from reviewing questions of "insufficient evidence." The Court is limited to reviewing "no evidence" or "as a matter of law" points of error, but may consider questions of fact that are necessary for it to determine whether it has jurisdiction.

The Court may act only if a court of appeals has exercised its appellate jurisdiction, and then only in the following cases: (1) where the justices on a court of appeals disagree on any question of law material to the decision; (2) where one of the courts of appeals holds differently from a prior decision of the Supreme Court or another court of appeals on any question of law material to a decision of the case; (3) involving the validity or construction of a statute necessary to a determination of the case; (4) involving the revenue of the state; (5) where the Railroad Commission is a party; and (6) where it appears that an error of law was committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the Supreme Court, it requires correction, but excluding cases in which the jurisdiction of the court of appeals is made final by statute.

The Court may hear a direct appeal from any order of any trial court granting or denying an interlocutory appeal or permanent injunction on the ground of constitutionality or unconstitutionality of any Texas statute. The Court also has the power to issue all writs necessary to enforce its jurisdiction as well as writs of mandamus against any district judge, statutory or constitutional county judge, statutory probate judge, a court of appeals or justice thereof, and any state officer, except the governor. The Court's mandamus jurisdiction extends to cases over which it would not have appellate jurisdiction.

In addition to its adjudicative functions, the Texas Supreme Court has many administrative duties. It is responsible for the efficient operation of the Texas judicial system. The court makes the rules of practice and procedure governing trials and appeals in civil and juvenile cases in the State, the rules of administration for the Texas judicial system, and the rules for the operation of judicial agencies.

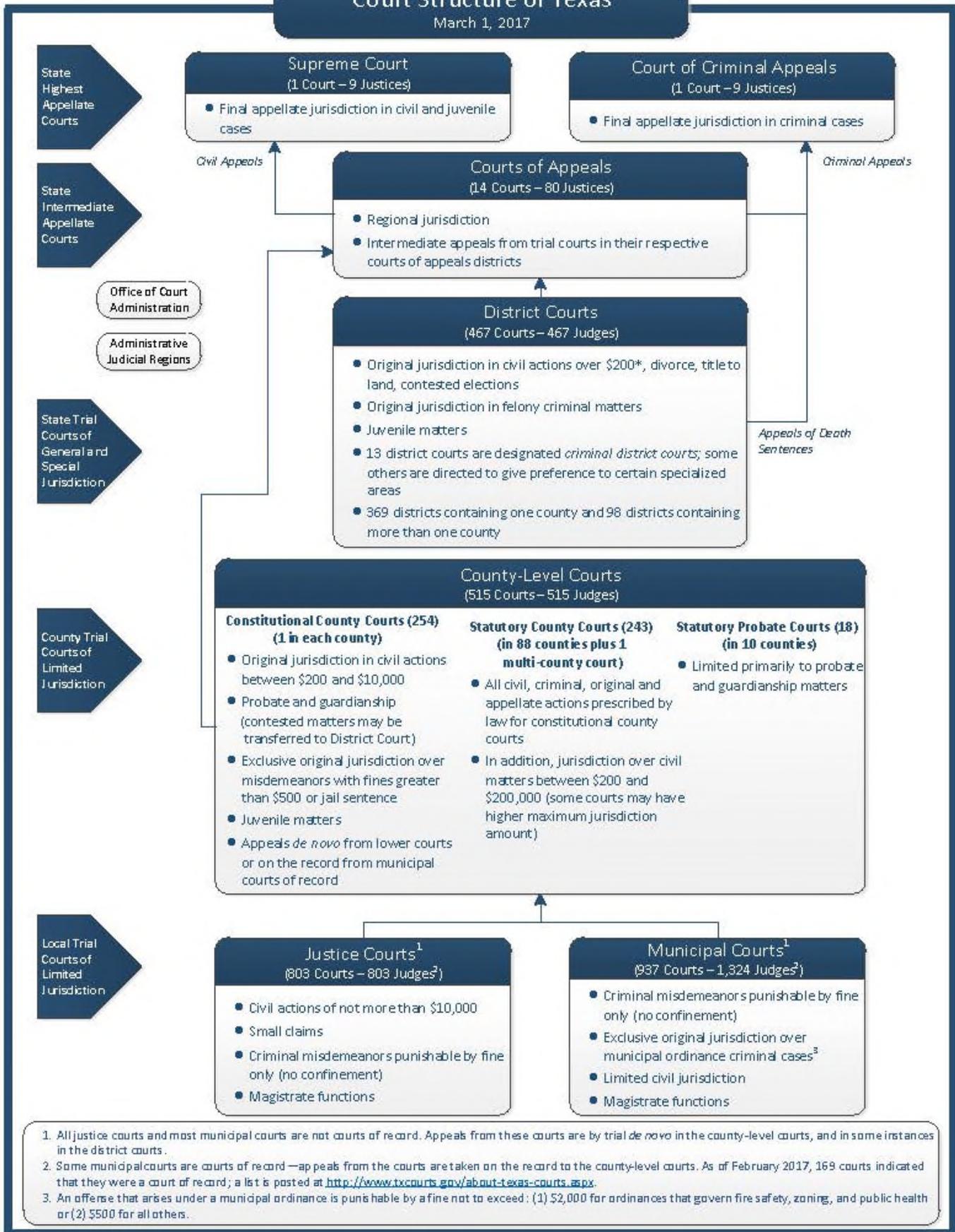
## ALTERNATIVE DISPUTE RESOLUTION IN TEXAS

Parties seeking alternative dispute resolution have a myriad of options in Texas. In the state's effort to support alternative dispute resolution, Texas passed the Alternative Dispute Resolution Procedures Act, thereby allowing a court, upon its own motion or upon a motion of a party, to refer a pending dispute to alternative dispute resolution. Texas has also passed statutes providing for the judicial enforcement of arbitration agreements and awards.

There is not currently mandatory alternative dispute resolution or arbitration in Texas. The Alternative Dispute Resolution Act, however, makes it the responsibility of all trial and appellate court judges and administrators to encourage the peaceable resolution of disputes and the early settlement of pending litigation through voluntary settlement procedures. When the court or the parties do choose to engage in alternative dispute resolution, five options exist: mediation; mini-trial; moderated settlement conference; summary jury trial; and arbitration. Parties engaging in court-ordered arbitration must decide before arbitration begins whether the arbitrator's ruling will be binding. If the parties so decide, the arbitrator's award is enforceable in the same manner as any other contractual obligation. Also, if the parties engaging in alternative dispute resolution reach a settlement, the settlement is enforceable as a contractual obligation and can be incorporated into the court's final decree.

# Court Structure of Texas

March 1, 2017



Source: [txcourts.gov](http://txcourts.gov)

# 07 COMMERCIAL FINANCING

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## QUALIFICATION, REGISTRATION AND LICENSING

A non-Texas lender does not need to qualify to do business if the lender's activities in Texas are limited to:

- (1) creating, as a lender, or acquiring indebtedness or a mortgage or other security interest in real or personal property;
- (2) securing or collecting a debt due the creditor or enforcing a right in property that secures a debt due the creditor; or
- (3) regarding a debt secured by a mortgage or lien on real or personal property in Texas:
  - (A) acquiring the debt in a transaction outside this state or in interstate commerce;
  - (B) collecting or adjusting a principal or interest payment on the debt;
  - (C) enforcing or adjusting a right or property securing the debt;
  - (D) taking an action necessary to preserve and protect the interest of the mortgagee in the security; or
  - (E) engaging in any combination of the above transactions.

This section deals with commercial financing (any credit made primarily for business, commercial, investment, agricultural or similar purposes). As a general rule, the provision of commercial credit does not subject the creditor to any requirement of special registration or licensing in Texas. Any creditor providing consumer credit (any credit primarily for personal, family or household use) in Texas may need to become licensed or registered with the appropriate Texas governmental authority. Texas law may require or otherwise limit the terms of any consumer credit.

## CHOICE OF LAW; USURY

In contrast to the laws of several other states, commercial loans are subject to Texas usury law if Texas law is applicable to the transaction. The parties may agree that a loan transaction will be governed by the laws of another jurisdiction, and (subject to certain exceptions) that choice will be enforced by a court applying Texas law if either (a) under the common law, the chosen jurisdiction has the "most significant relationship" to the transaction, evaluated in light of the Restatement (Second) of Conflicts of Laws or (b) under a Texas statute, a party lends, advances, borrows or receives funds or credit with an aggregate value of at least \$1,000,000 and the transaction bears a "reasonable relation" (as defined by statute) to the chosen jurisdiction.

The "most significant relationship" test of the Restatement (Second) of Conflict of Laws considers:

- (1) the place of contracting;
- (2) the place of negotiation of the contract;
- (3) the place of performance;
- (4) the location of the subject matter of the contract; and
- (5) the domicile, residence, nationality, place of incorporation and place of business of the parties.

In contrast to the approach of the Restatement (Second) of Contracts, which involves a multi-factor analysis where the result may not be clear, Texas law establishes a "safe harbor;" if the transaction qualifies under the statute and the chosen jurisdiction bears a "reasonable relation" (as defined in the statute) to the transaction. In such circumstances, (subject to certain exceptions) the parties' choice of governing law will be enforced. The parties may elect for a document to be governed by the laws of one jurisdiction, or for different provisions in the document to be governed by the laws of different jurisdictions.

A transaction is subject to the statute if a party (1) pays or receives or is obligated to pay or is entitled to receive, consideration with an aggregate value of at least \$1 million; or (2) lends, advances, borrows, or receives, or is obligated to lend or advance or is entitled to borrow or receive, money or credit with an aggregate value of at least \$1 million. A transaction bearing a reasonable relation to a particular jurisdiction includes:

- (1) a transaction in which:
  - (A) a party to the transaction is a resident of that jurisdiction;
  - (B) a party to the transaction has the party's place of business or, if that party has more than one place of business, the party's chief executive office or an office from which the party conducts a substantial part of the negotiations relating to the transaction, in that jurisdiction;
  - (C) all or part of the subject matter of the transaction is located in that jurisdiction;
  - (D) a party to the transaction is required to perform in that jurisdiction a substantial part of the party's obligations relating to the transaction, such as delivering payments;
  - (E) a substantial part of the negotiations relating to the transaction occurred in or from that jurisdiction and an agreement relating to the transaction was signed in that jurisdiction by a party to the transaction;or
  - (F) all or part of the subject matter of the transaction is related to the governing documents or internal affairs of an entity formed under the laws of that jurisdiction, such as:
    - (i) an agreement among members or owners of the entity, an agreement or option to acquire a membership or ownership interest in the entity, and the conversion of debt or other securities into an ownership interest in the entity; and
    - (ii) any other matter relating to rights or obligations with respect to the entity's membership or ownership interests; and
- (2) a transaction in which:
  - (A) all or part of the subject matter of the transaction is a loan or other extension of credit in which a party lends, advances, borrows, or receives, or is obligated to lend or advance or entitled to borrow or receive, money or credit with an aggregate value of at least \$25 million;

- (B) at least three financial institutions or other lenders or providers of credit are parties to the transaction;
- (C) the particular jurisdiction is in the United States; and
- (D) a party to the transaction has more than one place of business and has an office in that particular jurisdiction.

There are exceptions to the statute, the most relevant for lenders being the determination of the law that governs (1) whether a transaction transfers or creates an interest in real property for security purposes or otherwise; (2) the nature of an interest in real property that is transferred or created by a transaction; (3) the method for foreclosure of a lien on real property; (4) the nature of an interest in real property that results from foreclosure; or (5) the manner and effect of recording or failing to record evidence of a transaction that transfers or creates an interest in real property.

While the contractual choice of law (if any, and to the extent enforceable) is potentially relevant to many different issues, it may be particularly relevant to the issue of usury. If Texas usury law is relevant to the transaction, then a Texas usury analysis is appropriate. A transaction is usurious if it involves three elements: (1) a loan of money, (2) an absolute obligation to repay principal, and (3) the contracting for, charging or receipt of interest greater than allowed by law. Usurious contracts are deemed contrary to public policy, and are subject to civil and criminal penalties.

In Texas, "interest" is any compensation for the use, forbearance or detention of money, and--subject to statutory provisions resulting in a contrary determination--includes any charges imposed in connection with the loan, such as origination fees, points, closing fees, service charges and documentation fees. Any charge by the lender for a bona fide service separate from the loan transaction will not be considered interest. For purposes of the usury statutes, the interest rate is calculated by using the actuarial method to amortize all of the charges over the stated term of the loan.

If a loan is a commercial loan, then Texas law excludes from "interest" for the purposes of the usury statutes (a) prepayment premiums, make-whole premiums and similar fees as "interest" for purposes of the usury statutes, (b) delinquency fees of not more than 5% of an installment in default for at least ten days and (c) returned check fees in an amount specified by statute. If a commercial loan (other than a loan to a motor vehicle dealer) is either (x) \$3 million or more and secured by real property or (y) \$500 thousand (\$250 thousand, subject to certain documentation requirements) or more, then Texas law excludes from interest for the purposes of the usury statutes:

- (1) a discount or commission that an obligor has paid or agreed to pay to one or more underwriters of securities issued by the obligor;
- (2) an option or right to exchange, redeem, or convert all or a portion of the principal amount of the loan, or interest on the principal amount, for or into capital stock or other equity securities of an obligor or of an affiliate of an obligor;
- (3) an option or right to purchase capital stock or other equity securities of an obligor or of an affiliate of an obligor;

- (4) an option or other right created by contract, conveyance, or otherwise, to participate in or own a share of the income, revenues, production, or profits:
- (A) of an obligor or of an affiliate of an obligor;
  - (B) of any segment of the business or operations of an obligor or of an affiliate of an obligor; or
  - (C) derived or to be derived from ownership rights of an obligor or of an affiliate of an obligor in property, including any proceeds of the sale or other disposition of ownership rights; or
- (5) compensation realized as a result of the receipt, exercise, sale, or other disposition of an option or other right described by this subsection.

Texas law also excludes from “interest” for purposes of the usury statutes (a) amounts paid to the holders of certain asset-backed securities or (b) any discount in, or charged under, an agreement under which a person engaged in a commercial enterprise sells accounts, instruments, documents or chattel paper at a discount, regardless of whether the person has a repurchase obligation related to the transaction.

If subject to Texas usury laws, then the parties to a commercial loan may agree on an annual interest rate (including all charges characterized as “interest” under Texas law) not to exceed two times the 26-week United States Treasury Bill rate, rounded to the nearest 1/4%, with a floor of 18% and a ceiling of 24% (if the loan is for less than \$250 thousand) or 28% (in all other cases). Unless the 26-week United States Treasury Bill rate exceeds 9%, the Texas usury limit for commercial loans is 18%. At the time of preparation of these materials, the maximum non-usurious rate in Texas for commercial loans last exceeded 18% on April 9, 1989.

## LEASES

In general, a “true lease” under Chapter 2A of the Texas Uniform Commercial Code will not be subject to the usury provisions of Texas law, while a “lease intended as security” under its Chapter 9 will be subject to those usury provisions. The usury provision will be applicable to certain provisions, such as those for past-due rent, in either case. The economic terms of the lease at its inception will generally dictate the treatment of the lease.

## PREPAYMENTS

Without an explicit agreement to the contrary, an obligor has no right to voluntarily prepay an obligation. Prepayment premiums (however denominated) are generally enforceable. The obligation to pay a premium upon the acceleration of the maturity of an obligation, or upon a mandatory prepayment resulting from the occurrence of an event, must be explicit and will not be inferred by the requirement to pay a premium upon a voluntary prepayment.

## DEMAND NOTES; WAIVER OF CERTAIN NOTICES

Demand notes are generally enforceable, and the lender’s decision to make demand is not subject to an obligation of good faith. Demand notes are subject to a six-year statute of limitations, beginning on the date of demand, but an action on a demand note is barred if neither principal nor interest has been paid for a continuous period of ten years; a different statute of limitations applies to the enforcement of liens securing a demand note.

Unless explicitly waived, an obligor has a right to a notice of the intent to accelerate the maturity of the obligation and of the acceleration of such maturity.

## STATUTORY LIENS

Texas law provides for many different statutory liens. No agreement is necessary for the creation of such liens, some may be perfected without notice and some may have priority over contractual liens. Among others, statutory liens exist in favor of (a) taxing authorities, including for ad valorem taxes, other taxes and "trust fund" taxes (taxes held by one person for taxes to be paid by another person), (b) artisans, mechanics and materialmen for the improvement of real or personal property (in the case of real property, the inception of the mechanic's lien is the commencement of construction of improvements or the delivery of materials by any party, and not when indebtedness first accrued to the individual lien claimant), (c) commercial property landlords, (d) oil and gas "interest owners" (any person owning an interest in oil and gas production at the time of severance) and (e) employees.

## GUARANTIES

Unless waived, a guarantor has the right to require that the obligee bring suit against the primary obligor and prosecute the suit to judgment and execution; such waivers are both common and explicit. Unless otherwise provided in its organizational documents, a Texas domestic entity may "(1) make a guaranty on behalf of parent, subsidiary, or affiliate of the entity; or (2) make a guaranty of the indebtedness of another person if the guaranty may reasonably be expected to directly or indirectly benefit the entity." Further, and subject to certain statutory exceptions such as fraud, the decision of the governing body (e.g., board of directors) of the Texas domestic entity is conclusive, so the general practice is for creditors to require evidence of such determination as a condition precedent. If the proceeds from the foreclosure on real estate are less than the secured debt, any obligation for the deficiency may be reduced by the amount that the fair market value of the collateral exceeded the foreclosure price unless the primary obligor or any guarantor, as the case may be, has waived such right.

## SPECIAL STATUTE OF FRAUDS

Texas law provides a special statute of frauds with respect to any agreement, promise or commitment to loan more than \$50 thousand, and the same will not be enforced unless it is in writing and signed by the party to be bound or such party's representative. For this special statute of frauds to be in effect, the debtor or obligor must receive a conspicuous notice stating substantially the following:

THIS WRITTEN LOAN AGREEMENT REPRESENTS THE FINAL AGREEMENT BETWEEN THE PARTIES AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES.

THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES.

## MISCELLANEOUS

A confession of judgment before the filing of a lawsuit will not be recognized by Texas law. Texas law does not have a “one form of action” or similar rule regarding an election of remedies. If a party is to have contractual relief for the effects of its own negligence, the other party must have fair notice of this relief; fair notice generally means that the agreement must expressly state that the indemnitee will be indemnified from the consequences of its own negligence, and that such provision is conspicuous.

# 08 REAL ESTATE

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## OWNERSHIP

Under Texas law, aliens have the same real property rights as United States citizens. Tex. Prop. Code Ann. §5.005 (West 2014). Ownership can be acquired through adverse possession if a claimant establishes (1) the actual and visible possession of the disputed property, (2) that is adverse and hostile to the claim of the owner of record title, (3) that is open and notorious, (4) that is peaceable, (5) that is exclusive, and (6) that involves continuous cultivation, use, or enjoyment throughout the ten-year statutory period. *NAC Tex Hotel Co., Inc. v. Greak*, 481 S.W.3d 327, 331-32 (Tex. App.—Tyler 2015, no pet.); Tex. Civ. Prac. & Rem. Code Ann. § 16.023 (West 2015).

## CONCURRENT OWNERSHIP

**Tenancy in Common.** Texas law recognizes tenancies in common, a form of common ownership through which each owner has an undivided possessory interest in the property. Tex. Est. Code § 101.002 (West 2014). Texas law presumes that if non-spouses are co-owners, they hold the property as tenants in common. *Id.* Tenancy in common does not include a right of survivorship. *Id.* When one tenant in common dies, the decedent's undivided interest passes by will or intestacy as if his interest had been severed. *Id.*

**Joint Tenancy.** Owners of property can also hold title as joint tenants in Texas. Tex. Est. Code § 111.001 (West 2014). Co-owners may become joint tenants by jointly agreeing in writing that the interest of a joint owner who dies survives to the other joint tenant(s). *Id.* If such an agreement exists, the property interest of the decedent passes to the surviving joint tenant(s). *Id.* Texas law has special provisions for how property is distributed in the event that one or more of the joint tenants dies within 120 hours of each other. Tex. Est. Code § 121.152 (West 2014). If there are two joint tenants and they die within 120 hours of each other, then one-half of the property is distributed as if one joint owner had survived and the other one-half is distributed as if the other joint owner had survived. *Id.* If there are more than two and they all die within 120 hours of each other, the property is divided into as many equal portions as there are owners and each portion is distributed to whoever would have taken it if each joint owner had survived. *Id.*

**Tenancy by the Entirety.** Unlike many other states, Texas does not recognize a tenancy by the entirety. *In re Garrett*, 435 B.R. 434, 455 (Bankr. S.D. Tex. 2010). In the event that spouses attempt to create a tenancy by the entirety, their property will be treated as community property. *Id.*

## SPOUSAL RIGHTS

Texas is a community property state, which means that all property is classified as either "community" or "separate." Community property includes all property acquired during the marriage. Tex. Fam. Code § 3.002

(West 2014). Separate property consists of all property owned by a spouse before the marriage and property acquired during the marriage by gift, devise, or descent. Tex. Fam. Code § 3.001 (West 2014). It also includes recovery for personal injury actions, with the exception of recovery for loss of earning capacity. *Id.* Spouses may also agree to classify property acquired after the marriage as separate. Tex. Fam. Code § 4.202 (West 2014). Upon the dissolution of a marriage, all property is presumed to be community property, and the party attempting to prove otherwise must do so by clear and convincing evidence. Tex. Fam. Code § 3.003 (West 2014). Community property is divided in a manner that the court considers to be “just and right.” Tex. Fam. Code § 7.001 (West 2014).

## PURCHASE AND SALE OF PROPERTY

An agreement for the purchase and sale of real property must be in writing and signed by both parties. Tex. Bus. & Com. Code § 26.01 (West 2012). Title 2 of the Texas Property Code includes a template for the necessary language to convey a fee simple. Tex. Prop. Code Ann. § 5.022 (West 2014). Unless the written agreement states otherwise, the use of the term “grant” or “convey” in a conveyance implies that the grantor has not already conveyed the estate and that, at the time of the conveyance, the estate is free of any encumbrances. Tex. Prop. Code Ann. § 5.023 (West 2014). A valid contract for the sale of real property should include all material terms of the agreement such that the contract can be interpreted from the written document alone. *Garrod Investments, Inc. v. Schlegel*, 139 S.W.3d 759, 763 (Tex. App.—Corpus Christi 2004, no pet.). There are no real estate transfer taxes imposed on the transfer of title of real property in Texas.

## FORECLOSURES

Foreclosure may be initiated by either the mortgagee or the mortgage servicer under certain circumstances outlined in Title 5 of the Texas Property Code. Tex. Prop. Code Ann. § 51.0025 (West 2014). Lenders may foreclose on deeds of trusts or mortgages through either a judicial or a non-judicial process in Texas. Tex. Prop. Code Ann. § 51.002 (West 2014). The judicial process of foreclosure, which involves filing a lawsuit to obtain a court order to foreclose, is used when no power of sale is present in the mortgage or deed of trust. Generally, the property will be auctioned off to the highest bidder after the court declares a foreclosure. The non-judicial process of foreclosure is used when a power of sale clause exists in a mortgage or deed of trust whereby the borrower pre-authorizes the sale of the property to pay off the balance of the loan in the event of a default. Most residential mortgages are foreclosed by power of sale. *Id.* The statute of limitations for such a sale is four years after the cause of action accrues. Tex. Civ. Prac. & Rem. Code § 16.035(a) (West 2015). If a series of obligations payable in installments is secured by a real property lien, the cause of action does not accrue until the maturity date of the last installment. *Id.*

In Texas, if the price at which real property is sold at a foreclosure sale is less than the unpaid balance of the indebtedness secured by the real property, resulting in a deficiency, the lender may obtain a deficiency judgment by filing a lawsuit within two years after the foreclosure sale. Tex. Prop. Code Ann. § 51.003 (West 2014). Any person against whom such a recovery is sought may request that the court determine the fair market value of the real property as of the date of the foreclosure sale. If the court determines that the fair market value is greater than the sale price of the real property at the foreclosure sale, then the deficiency judgment will be limited to the difference between the fair market value at the time of sale and the balance of the loan in default.

Texas has no statutory right of redemption after the foreclosure.

## TITLE INSURANCE

Purchasers of real property ordinarily obtain a title commitment from a title company. TEXAS DEPT. OF INS., TITLE INSURANCE (2017). The title commitment sets forth the state of title to the property, including the record owner, any recorded encumbrances such as easements and restrictive covenants, and any recorded liens affecting the property. *Id.* With the payment of the premium to the title company and the satisfaction of any requirements of the title company, purchasers may obtain a title policy that insures the purchaser against certain losses that occur if the state of title is not as set forth in the policy, up to the policy limit. *Id.* A title insurance policy insures “good and indefeasible” title which is a slightly lesser standard than “good and marketable” title. The use of standardized title policy forms is required in Texas. The cost of title insurance is set by the Texas Department of Insurance which regulates this industry pursuant to Title XI of the Texas Insurance Code. It is customary in Texas for the seller to pay the cost of the owner’s policy, but it is negotiable.

Title insurance companies are not required to insure the mineral estate. Texas Insurance Code § 2703.0515. Optional endorsements are available that will protect against damage to the surface estate (T-19.2 or T-19.3).

## LANDLORD AND TENANT

Texas law recognizes four types of leaseholds: tenancies for a fixed term, periodic tenancies, tenancies at will, and tenancies at sufferance. *See, e.g., Effel v. Rosberg*, 360 S.W.3d 626, 630 (Tex. App.—Dallas 2012, no pet.); Tex. Prop. Code Ann. § 91.001 (West 2014); *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 915-16 (Tex. 2013). Holdovers, or tenants who do not relinquish possession of a property after the end of the lease term, may be treated as either tenants at sufferance, in which case their obligations under the original lease continue, or as trespassers. *Coinmach Corp.*, 417 S.W.3d at 916. Leases that do not specify an exact term are considered leases at will that can be terminated by either party. *Effel*, 360 S.W.3d at 630. Leases may be either written or oral and must include at least the parties’ names, a description of the property, a provision for possession by the lessee, the term of the lease, the price, and provisions for payment. Tex. Prop. Code Ann. § 92.001(3) (West 2014); *Castroville Airport, Inc. v. City of Castroville*, 974 S.W.2d 207, 212 (Tex. App.—San Antonio 1998, no pet.). Leases for terms longer than one year, however, are subject to the statute of frauds, so they must be in writing and signed by the party being charged with obligations under the agreement. Tex. Bus. & Com. Code Ann. § 26.01 (West 2012). A landlord’s duty regarding security deposits, security devices, utility cutoff, disclosure of ownership and management, and installation of smoke alarms may not be waived. Tex. Prop. Code Ann. § 92.006 (West 2014). Modifications to these duties requires a written agreement. *Id.*

## ZONING

Zoning in Texas is governed by the Zoning Enabling Act of the Local Government Code, which authorizes municipal governing bodies to divide municipalities into various districts and create regulations regarding the height and size of buildings, the percentage of lots that may be occupied, the size of yards, population density, and the location and use of buildings. Tex. Loc. Gov’t Code Ann. §§ 211.005, 211.003 (West 2016). The governing bodies are also authorized to make amendments to preexisting zoning regulations. Tex. Loc. Gov’t Code Ann. § 211.006, (West 2016). Zoning regulations must accord with a comprehensive plan. Tex. Loc. Gov’t Code Ann. § 211.004 (West 2016). Zoning boards may hear appeals, decide special exceptions, and authorize variances. Tex. Loc. Gov’t Code Ann. § 211.009 (West 2016).

## EMINENT DOMAIN

Article I of the Texas Constitution states that “[n]o person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made . . . and when taken, except for the use of the state, such compensation shall be first made . . .” Tex. Const. art. I, § 17. Unlike the federal takings clause, the Texas Constitution extends the protection against uncompensated takings to property damage. *Id.* Otherwise, eminent domain in Texas is similar to federal trends in eminent domain. Condemnation proceedings are governed by Chapter 21 of the Texas Property Code. Tex. Prop. Code §§ 21.001-025 (West 2014).

## EASEMENTS

Texas recognizes private easements created by express grant, implication, necessity, estoppel, and prescription. *Thompson v. Clayton*, 346 S.W.3d 650, 654 (Tex. App.—El Paso 2009, no pet.). Easements may be appurtenant, meaning they benefit a particular parcel of land regardless of ownership, or in gross, meaning they benefit an individual. *Daniel v. Fox*, 917 S.W.2d 106, 110 (Tex. App.—San Antonio 1996, writ. denied).

Texas law also recognizes conservation easements, which are designed to protect the natural and scenic values of real property, protect natural resources, maintain air and water quality, and preserve the historical, architectural, archeological, and cultural aspects of real property. Tex. Nat. Res. Code Ann. § 183.001 (West 2011). The duration of conservation easements is generally unlimited. Tex. Nat. Res. Code Ann. § 183.002(c) (West 2011).

## MINERAL RIGHTS

In Texas, a conveyance of land generally includes mineral rights. *Graham v. Prochaska*, 429 S.W.3d 650, 656 (Tex. App.—San Antonio 2013, pet. denied). Grantors may retain mineral rights by exception or reservation in the deed, but such intent needs to be clearly expressed. *Id.* Owners of land may also sever their mineral estates into several attributes and convey them to third parties. *Id.* They may also convey fractional interests in their mineral estates. *Id.* When such a conveyance occurs, the surface estate generally becomes the servient estate, and the mineral estate becomes the dominant estate. *Tarrant County Water Control and Imp.Dist. No. One v. Haupt, Inc.*, 854 S.W.2d 909, 911 (Tex. 1993). Accordingly, the owner of a mineral estate may use the surface estate as reasonably necessary. *Id.*

## WATER RIGHTS

In Texas, water rights depend on whether the water is groundwater or surface water. Generally, Texas groundwater belongs to the landowner. Groundwater is governed by the rule of capture, which grants landowners the right to capture the water beneath their property. The landowners do not own the water but have the right to capture whatever water is available. Surface water, on the other hand, belongs to the state of Texas and can be used by a landowner only with the state’s permission.

# 09 ENVIRONMENTAL

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The Texas Commission on Environmental Quality (“TCEQ”) is the primary state administrative agency responsible for environmental regulations, permitting, and enforcement in Texas. TCEQ administers most of the major federally delegated environmental programs, including programs under the federal Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act (RCRA). Other Texas agencies also have responsibility over certain aspects of environmental regulation. For instance, the Railroad Commission of Texas (“RRC”) regulates most aspects of oil and gas exploration and production activities, including several types of underground injection control wells under the federal Safe Drinking Water Act.

## AIR REGULATION

The United States Environmental Protection Agency (“EPA”) has delegated to TCEQ the authority for implementing and enforcing almost all major air pollution programs that may be delegated to the states under the federal Clean Air Act. Air regulation in Texas is governed by an EPA-approved State Implementation Plan, the Texas Clean Air Act (Tex. Health & Safety Code Ch. 382), and TCEQ-adopted implementing regulations. These laws establish permitting requirements and standards for constructing, modifying, and operating stationary sources in Texas. Prior to commencing construction of a “stationary source” or “facility” that emits air contaminants into the atmosphere, the owner or operator must obtain TCEQ authorization for the air emissions unless the facility or source meets the conditions for a *de minimus* facility/source set forth in TCEQ’s rules.

TCEQ issues permits for major sources as well as for minor sources of air emissions. Permit conditions are more stringent in areas of the state that are in nonattainment for National Ambient Air Quality Standards. For certain classes of facilities, TCEQ has also adopted standard permits for certain types of projects, including concrete batch plants and oil and gas facilities and over 100 permits by rule (“PBRs”), see 30 Tex. Admin Code Chapters 116 and 106, that allow facilities meeting specified criteria to obtain required permit coverage for specific operations with a limited standard permit registration application or by satisfying the terms of the applicable PBR, which may require registration with or approval by the TCEQ depending on the specific PBR.

In addition to issuing permits, TCEQ can require sources to measure, monitor, and report their emissions. TCEQ may also inspect facilities and bring enforcement actions for air emissions that exceed a facility’s air permit or otherwise violate Texas law. TCEQ also maintains several air-related programs that allow emissions sources to generate, bank, and trade air emissions credits or allowances in order to achieve an overall lower level of air emissions in the state or region.

## WATER REGULATION

EPA has generally delegated authority to TCEQ to administer the National Pollutant Discharge Elimination System (“NPDES”) program in Texas under the Clean Water Act, except for oil and gas activities that are regulated by the RRC, which are also subject to EPA regulation pending EPA’s delegation of the program to the RRC. The Texas Water Code and TCEQ regulations work in conjunction with the federal Clean Water Act to authorize wastewater discharges from point sources into state surface waters. Texas Pollutant Discharge Elimination (“TPDES”) permits set wastewater discharge volume and quality limits, sampling frequencies, and reporting requirements. In addition to granting individual TPDES permits for discharges from facilities, TCEQ also issues general TPDES wastewater discharge permits that cover certain classes of activities. TCEQ also administers the wastewater pretreatment program to authorize commercial and industrial facilities to discharge treated wastewater to publicly owned treatment works rather than to state surface waters.

Similarly, TCEQ issues general and individual permits under the TPDES program to authorize discharges of storm water from municipal and industrial sources. Many facilities qualify to use a general storm water permit, and coverage can be obtained simply by filing a notice of intent and a storm water pollution prevention plan (“SWPPP”), then complying with the general permit’s terms.

In addition to its various permitting functions, TCEQ also brings enforcement actions for violations of permit terms, TCEQ rules, Texas Water Code, or the Clean Water Act. TCEQ is also responsible for issuing and generally administering water rights in Texas.

EPA has granted TCEQ primacy under the Safe Drinking Water Act. This means that TCEQ is responsible for permitting, regulating, and enforcement of public water systems. TCEQ also has responsibility for ensuring that drinking water meets national drinking water standards, although TCEQ may also set standards that are more stringent than those set by EPA.

The Underground Injection Control (“UIC”) program under the Safe Drinking Water Act is designed to protect underground sources of drinking water from being contaminated with materials injected from the surface. TCEQ and the RRC have divided responsibility for overseeing the UIC program. For instance, UIC wells under the RRC’s jurisdiction include those related to enhanced oil recovery, oil and gas waste disposal, hydrocarbon storage, and brine mining. TCEQ issues permits for other non-energy-related UIC wells.

## REGULATION OF SOLID AND HAZARDOUS WASTES

TCEQ has adopted and has primary authority to implement and enforce most of the federal Resource Conservation and Recovery Act (“RCRA”) regulations regarding hazardous waste generation and management as well treatment, storage and disposal. TCEQ regulates solid waste management in Texas, including municipal, industrial and hazardous wastes, other than oil and gas wastes, which are regulated by the RRC and, pending delegation of RCRA authority to the RRC, the federal EPA. TCEQ overlays its own regulations for municipal and non-hazardous industrial waste. Generators of waste are responsible for properly characterizing their waste and ensuring the wastes are managed, transported, stored and disposed in a manner consistent with state and federal law.

Municipal solid waste is solid waste resulting from, or incidental to, municipal, community, commercial, institutional, and recreational activities; it includes garbage, rubbish, ashes, street cleanings, dead animals, medical

waste, and all other nonindustrial solid waste. It also includes electronic waste from municipal, commercial, and institutional sources. Commercial business operations most often would have municipal solid waste that could be accepted for management or disposal by a facility with appropriate authorizations.

Certain commonly generated wastes that could have been categorized as hazardous wastes have instead been given special treatment. Currently, Texas categorizes hazardous waste batteries, certain pesticides, mercury-containing thermostats, paint and paint-related waste, and lamps or bulbs as “universal waste” and regulates them in a manner intended to make it easier to collect this type of waste and to encourage the proper recycling or treatment of these wastes that might otherwise go into landfills.

Industrial solid waste, whether non-hazardous or hazardous, is subject to additional layers of regulation by the TCEQ. Non-hazardous industrial waste is further classified as Class 1, Class 2 or Class 3 waste and its classification affects applicable waste management requirements. There are several relevant permitting exceptions for on-site generation and management of a business’s own industrial solid waste. However, a business generally cannot accept another business’s hazardous or industrial non-hazardous waste for management without securing a permit from TCEQ. If contracting with another business to handle waste management, it is important to clearly allocate responsibility for relevant permits and other compliance obligations. Both hazardous and Class 1 non-hazardous waste trigger manifesting requirements for transport in Texas.

## **STORAGE TANK REGULATION**

TCEQ regulates certain underground storage tanks (“AST”) and aboveground storage tanks (“UST”) under authority provided in the Texas Water Code and delegation authority under RCRA for RCRA’s underground storage tank UST regulatory program. In Texas, USTs containing hazardous substances and petroleum substances, subject to certain exemptions and exclusions, are subject to a comprehensive regulatory program. The UST program includes tank registrations, technical standards, notifications, reporting and recordkeeping and financial assurance. Only ASTs containing petroleum product with a capacity greater than 1,100 gallons are subject to TCEQ regulation, and there are some further exemptions and exclusions. TCEQ regulated petroleum product ASTs are subject to registration, notification, and recordkeeping requirements, but are not subject to financial assurance requirements. The presence and certain details regarding USTs and ASTs are required to be disclosed prior to a real property conveyance.

Regulations specific to regulated USTs and ASTs specify 24-hour release reporting and a framework for appropriate investigation, corrective action, and, if necessary, longer term remediation plans. TCEQ has a program for the assessment and cleanup of leaking petroleum storage tanks, which include sites that are handled by the responsible party and by the state.

## **CONTAMINATED PROPERTY AND REMEDIATION**

Environmental cleanups and associated liability can pose significant risks and liabilities not only under the federal Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA” a/k/a Superfund) but also under the state analogue contained in the Texas Solid Waste Disposal Act. Joint and several liability for contamination of a property reaches owners and operators as well as businesses that arranged for or transported wastes to be managed or disposed at an impacted site that is designated as a state or federal Superfund site.

The Texas Superfund program is generally analogous to the federal program, but there are some significant differences. For example, Texas law does not include the bona fide prospective purchaser defense or the contiguous property owner defense to liability added to CERCLA by the Small Business Liability Relief and Brownfields Revitalization Act of 2002. However, Texas has its own innocent/operator program that affords the potential for immunity to innocent owners or operators of property contaminated as a result of a release or migration from an off-site source and who did not cause or contribute to the contamination source or sources. There are certain criteria the innocent owner or operator must meet to be eligible for immunity, which include granting site access for investigation and remediation and agreeing to the placement appropriate restrictions needed to protect health or the environment. In addition, to qualify for immunity, the owner or operator cannot have acquired the property prior to September 1, 1997 from the person causing the release. For later acquisitions from the party responsible for release, the owner or operator is required to demonstrate that at the time of acquisition, the owner or operator did not know and had no reason to know about the contamination, which effectively is the CERCLA “all appropriate inquiries” standard.

Even when a site is not designated as a state or federal Superfund site, other Texas laws and TCEQ regulations govern the obligation to address new or ongoing releases of contamination that pose a threat to the environment or human health and safety. The Texas Risk Reduction Program (“TRRP”) provides the regulatory framework for risk-based remediation of releases. Exposure pathways and land use restrictions are considered in applying risk-based cleanup standards, and remedies may vary from excavation, to capping, monitored natural attenuation, or simply the imposition of appropriate deed restrictions. TCEQ reviews and approves investigation plans and reports and the response action plan. TCEQ also reviews and approves completion reports that confirm no further remediation is required.

The Texas Voluntary Cleanup Program provides enforcement protection for current owners and operators and liability protection for prospective purchasers of contaminated property. The framework for this remediation program involves either self-implementation of a remedial action or remediation under TCEQ oversight. TCEQ provides specific reviews and approvals as part of the remediation process and ultimately issues a Certificate of Completion once remediation is complete.

The RRC generally has oversight over remediation of contaminated upstream oil and gas properties. The RRC also uses a risk-based approach to remediation and has its own voluntary cleanup program, but the RRC voluntary cleanup program is more limited in scope than the TCEQ program. The details of the division of jurisdiction between the RRC and the TCEQ is set forth in a Memorandum of Understanding between the agencies.

## **VOLUNTARY ENVIRONMENTAL, HEALTH, AND SAFETY SELF-AUDIT PRIVILEGE**

The Texas Environmental, Health, and Safety Audit Privilege Act (“Audit Act”) provides incentives for the regulated community to conduct self-audits. The Audit Act offers civil and administrative penalty immunity for certain violations and document privilege protection to facilities that undertake a voluntary environmental self-audit and promptly identify and correct violations discovered during the audit. In order to qualify for the audit privilege, the facility must adhere to various procedures, including submitting a notice of audit letter to applicable state agency or agencies (e.g., TCEQ, RRC) indicating the facility’s intent to perform an audit, and the audit must not be

conducted in bad faith. The Audit Privilege Act also covers pre-acquisition audits, which are exempt from the requirement to provide a notice of audit for an audit initiated before the closing date.

# 10 ENERGY

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The exploration and development of oil and gas resources has been an integral part of the landscape of the Texas energy industry since its inception. Oil was discovered in what is now Texas as early as 1543 by Native Americans, and it was utilized by early European explorers as caulking for boats or waterproofing for footwear. Texas oil and gas exploration boomed with the discovery of Spindletop in 1901, the first salt dome oil discovery in Texas. This first oil well spurred on many more, creating a rush on buying and selling the right to explore and develop oil and gas across the state. This trend made Texas courts an important player in determining the path of oil and gas law in the United States. See, History of Oil Discoveries in Texas, Texas Almanac, <http://texasalmanac.com/topics/business/history-oil-discoveries-texas>

According to the U.S. Energy Information Administration, in 2016, Texas led the country in oil production and produced more than one-third of the nation's crude oil. As of January 2017, the 29 petroleum refineries in Texas processed upwards of 5.6 million barrels of crude oil per day and accounted for 30% of total U.S. refining capacity. Texas produced more than 25% of U.S. marketed natural gas in 2016, leading the nation in natural gas production.

Notably, Texas also leads the nation in wind energy generating more than 21,450 megawatts. Texas, State Profile and Energy Estimates, EIA, <https://www.eia.gov/state/?sid=TX>, last visited February 25, 2018.

## OIL AND GAS

**Rule of Capture.** Texas follows the majority rule relating to oil and gas, namely, the ownership in place theory qualified by the rule of capture. This rule states that there is no liability for causing oil and gas to migrate across property lines or causing drainage from another's land. The reason for this rule is the doctrine of correlative rights. Each oil and gas owner has the right and the fair opportunity to produce oil and gas from a common reservoir under surface property.

**Severance of Surface and Mineral Estates.** Texas allows for severance of the mineral estate from the surface estate. Most surface owners no longer hold the mineral rights underneath their property due to the proliferation of oil and gas leases throughout recent Texas history. In Texas, the owner of the mineral estate can use the surface as is reasonably necessary to develop oil and gas. The only obligation of the mineral estate owner to the surface estate owner is the accommodation doctrine, unless otherwise contracted. The accommodation doctrine states that a mineral estate owner must accommodate the surface owner if (i) there is a preexisting use of the land by the surface owner, (ii) there is a reasonable alternative method for the mineral estate owner to accomplish their operations and (iii) the reasonable alternative method is available to the mineral estate owner. Texas also allows for non-participating interests in the mineral estate: the Non-Participating Royalty Interest ("**NPRI**") or the Non-Participating Mineral Interest ("**NPMI**"). The NPRI is an economic interest in the royalties received from the

production of the mineral estate. The NPMI is a property interest in the mineral estate that includes a right to the royalties, as well as to any bonus or delay rentals related to production from the mineral estate.

**Title and Conveyance Issues.** Generally, in an oil and gas lease, one party will be given the “executive right” to explore and develop the minerals to which the lease relates. This right, however, carries with it a corresponding duty of good faith to the lessor and a further (and higher) duty of utmost good faith and fair dealing to any non-participating interest holder, if any; in other words, a duty to act as a reasonably prudent operator. *Manges v. Guerra*, 673 S.W.2d 180, 183 (Tex. 1984). If the party holding the executive right engages in self-dealing to any extent, such activity would ordinarily give rise to a fiduciary duty between the executory party and the non-executory party, meaning that the executory party will have to put the interests of the non-executory parties ahead of its own. *Id.*

In addition to the executive right, landowners can devise additional mineral interests or royalty interests in the underlying property. Generally, the lease of a mineral interest also carries with it a right to develop the lease and the right to all economic benefits and burdens, including the cost of development, arising from such development. A royalty interest on the other hand is a purely economic interest related to receiving a certain portion of the production profit without any of the costs of exploration or development. Texas courts will look to the meaning of the interest given in the document when it is unclear what interest has been conveyed. *See, French v. Chevron U.S.A., Inc.*, 896 S.W.2d 795 (Tex. 1995) (finding that a mineral interest was conveyed even though it was described as a royalty because the description of the interest reflected a mineral right as opposed to a royalty right). Essentially, the courts will look to if the interest conveys a property right in the minerals or if it conveys merely an economic right.

Surface owners have legal title to all building stone, limestone, caliche, surface shale, sand, gravel, water, near-surface lignite and iron ore as a matter of law. *See Moser v. United States Steel Corporation*, 676 S.W.2d 99 (Tex. 1984). If the oil and gas lease used the term “other minerals”, the question becomes what minerals belong to either the surface or the mineral estate. The answer is that it depends on the date of conveyance. Before 1983, a mineral will belong to the surface estate if any reasonable method of extracting such mineral destroys the surface. *See Acker v. Guinn*, 464 S.W.2d 348 (Tex. 1971). After 1983, the language of the lease will be construed using the ordinary and natural meaning test, i.e., whether the substance in question is widely considered to be a “mineral” in the community at the time of conveyance. If it is thought of as a mineral it will be considered a mineral and belong to the mineral estate. *See Moser v. United States Steel Corporation*, 676 S.W.2d 99 (Tex. 1984).

Another issue in conveyancing is that of an over-conveyance. To the extent that a document purports to convey an interest that is greater than that which the grantor owns, the priority in construing the conveyance will be given to the interest granted. *Duhig v. Peavy-Moore Lumber Company*, 144 S.W.2d 878 (Tex. 1940). This rule essentially destroys the creation or recognition of a reserved interest if doing so would impede the granting of the interest created under the conveyance.

**Recording Oil and Gas Interests.** The Texas Property Code provides that a conveyance of all real property interests, including mineral interests, must be recorded in order to be valid against a subsequent purchaser or creditor without notice. *See* Tex. Prop. Code §13.001. Conveyances of mineral rights must be recorded in the local county clerk’s office.

## THE OIL AND GAS LEASE

The oil and gas lease is a common property interest document in Texas. There are three clauses that are essential in an oil and gas lease: (1) the granting clause, (2) the habendum clause, and (3) the royalty clause. The granting clause includes the description of the property that is subject to the lease, while the habendum clause defines the term of the lease. The royalty clause defines the parameters of how a landowner is paid based on the hydrocarbon production that results from the oil and gas lease.

## COMMON LEASE CLAUSES

The granting clause contains words of conveyance that defines the interest being conveyed. The oil and gas lease conveys a fee simple determinable estate with respect to the minerals in place beneath the surface.

The life of an oil and gas lease can be described in terms of the primary term and the secondary term that are defined in the habendum clause. Under the primary term, the lessor has a specified number of years (as described in the habendum clause) to commence production. During the primary term, the lessor may pay delay rentals to extend the time that it has to commence producing. However, if the lessor fails to commence operations that result in "actual production" prior to the expiration of the primary term, the oil and gas lease terminates unless a savings clause applies.

A common issue that arises with respect to an oil and gas lease, is whether the lessee has successfully "commenced" operations by the end of the primary term, which would allow the lease to enter into the secondary term. Texas courts take into consideration two factors when determining whether a lessor has satisfactorily "commenced" operations: (1) objective physical acts, such as building roads or drilling water wells and (2) a subjective good faith intent to pursue drilling.

If the oil and gas lease does reach production and so enters the secondary term, the oil and gas lease will last perpetually--generally, for a period "as long as hydrocarbons are produced". To have "production", there must be production in paying quantities. "Paying quantities" means that (i) the lessee's revenues exceed its operating costs, even if it will not recoup the costs of drilling the well; or (ii) a reasonably prudent operator would continue to operate the well. Unlike Oklahoma and other states that follow the minority rule, Texas courts require that for "actual production" to occur, the hydrocarbons must be "severed" from the ground. Gas must be marketed in paying quantities and oil must be severed from the ground with some marketing.

There are several exceptions to the requirement to have production in paying quantities including the doctrine of temporary cessation, the marginal well exception and the doctrine of repudiation. Under the temporary cessation doctrine, the oil and gas lease will not terminate in the event production should cease unless the cessation of production is for an unreasonable period of time. Such cessation must be due to a sudden stoppage or mechanical breakdown. Changes in the market that make it less profitable or viable to produce oil and gas are not covered under this doctrine. However, under this doctrine, production must have been previously attained; therefore, if production has not yet been obtained, the lessor cannot use this doctrine to save the lease to carry it over into the secondary term. Under the marginal well exception, Texas law understands that some wells only produce during certain times of the year, and if a reasonably prudent operator would continue to operate such well, then this doctrine may apply. The doctrine of repudiation is an equitable rule that allows for the extension of an oil and gas lease in circumstances where the lessor obstructs the lessee from developing the lease.

Unlike other states, Texas does not have a forced pooling statute or equitable pooling. Therefore, a tract or interest that is not located in the drill site but is within the relevant unit, is not entitled to share in the production. However, if a pooling clause is present in the oil and gas lease, the lessor grants limited authority (only as expressly allowed in the lease) to the lessee to effect a cross-conveyance of interests with other owners in the pooled unit.

The royalty clause is the main consideration in a lessor's granting mineral production rights to a lessee. A royalty is a share of profits or revenue from the sale of the hydrocarbons produced from the mineral estate free of the costs of production. Generally, in Texas, an oil and gas lease will provide for an in-kind royalty, which is a share of the oil itself. In contrast, a royalty on gas is a share of either the proceeds or amount realized from the gas sold. Royalty calculations frequently become subject to dispute between a lessee and a landowner.

## STATE REGULATION AND PERMITTING

***The Texas Railroad Commission.*** The Railroad Commission of Texas regulates the exploration, production, and transportation of oil and natural gas in Texas. Its statutory role is to prevent waste of the state's natural resources, to protect the correlative rights of different interest owners, to prevent pollution, and to provide safety in matters involving production or disposal of toxic by-products. The agency oversees hazardous materials pipelines and natural gas pipelines and distribution systems as well as those enabling the transportation of propane, butane, compressed natural gas, and liquefied natural gas. The Railroad Commission was originally established to address demands of the shipping public in the late 1880s that railroads be subject to regulation based on public interest. The Railroad Commission is a key element in the regulation of the energy industry in Texas (together with the Public Utilities Commission) with specific divisions related to the regulation of oil and gas and other aspects of the energy sector including renewable energy and alternative fuels.

***Drilling Permits and Spacing Rules.*** The Texas Railroad Commission sets forth the requirement that all wells must have a drilling permit to begin operations. Generally, under Statewide Rule 38 all drilling units must be at least 40 acres based on the default spacing rule. However, special field rules can abrogate these general density rules, such as where an exception may be made for a small tract owner to prevent drainage if subdivision of the property occurred prior to the discovery of oil and gas thereunder. The Texas Railroad Commission also regulates the amount of oil and gas that wells can produce to prevent waste due to premature dissipation of reservoir pressure and to protect the correlative rights of various landowners.

***Mineral Interest Pooling Act.*** The Mineral Interest Pooling Act was promulgated to give the Railroad Commission the power to impose compulsory pooling in very specific instances. This rule abrogates the default rule of capture in Texas oil and gas law as discussed above. The Mineral Interest Pooling Act applies, however, only to fields discovered after March 8, 1961. A party can apply for compulsory pooling if they can show that they made a fair and reasonable offer to pool the various tracts of land. The fairness of such an offer is judged from the standpoint of the party being compelled to pool.

## RENEWABLES

The Public Utility Commission of Texas adopted the state's renewable energy mandate in 1999. This mandate has been amended several times through the state legislature. Texas has already surpassed its 2025 legislative goal, primarily due to wind electricity generation. Renewable energy sources contributed almost one-seventh of the

state's net electricity generation in 2016 and provided more than one-sixth of the total U.S. electricity generation from all non-hydroelectric renewable sources.

Wind energy is by far the standout renewable resource in Texas. The state encouraged construction of wind farms on its wide plains by authorizing Competitive Renewable Energy Zones (CREZ), a \$7-billion project in which transmission lines were built to connect to future wind farms. Texas also has the potential to be a powerhouse in the solar energy space. In 2016, nearly one-third of Texas solar generation came from distributed (customer-sited, small-scale) facilities, and distributed capacity is increasing. Texas is also expanding the use of biomass as a potential fuel source in the Texas Panhandle, an agriculturally rich area of the state. Finally, Texas also has significant, though largely untapped, potential to create energy using geothermal sources from among the network of oil and gas wells already drilled throughout the state.

# 11 STATE AGENCIES

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The following provides a partial listing of various state agencies, their physical addresses and general switchboard phone listings. A more comprehensive index of state agencies and their respective phone numbers, physical addresses and contact coordinates may be accessed at the following website:

<https://www.tsl.texas.gov/apps/lrs/agencies/index.html>

## **Agriculture, Department of**

1700 N. Congress Avenue, 11th Floor  
Austin TX 78701  
Phone: 512-463-7476

## **Alcoholic Beverage Commission**

5806 Mesa Drive  
Austin, Texas 78731  
Phone: 512-206-3333

## **Attorney General, Office of the**

300 W. 15th Street  
Austin, Texas 78701  
Phone: 512-463-2100

## **Banking, Department of**

2601 N. Lamar Blvd.  
Austin, Texas 78705-4294  
Phone: 512-475-1300

## **Commission on Environmental Quality**

12100 Park 35 Circle  
Austin, Texas 78753  
Phone: 512-239-1000

## **Comptroller of Public Accounts**

LBJ Building, First Floor  
111 E. 17th Street  
Austin, Texas 78774-0100  
Phone: 512-463-4000

## **Economic Development Corporation**

P.O. Box 684702  
Austin, TX 78768  
Phone: 512-981-6736

## **General Land Office**

1700 Congress Avenue  
Austin, TX 78701-1495  
Phone: 512-463-5001

## **Governor, Office of the**

State Insurance Building  
1100 San Jacinto  
Austin, Texas 78701  
Phone: 512-463-2000

## **Insurance, Department of**

333 Guadalupe  
Austin, Texas 78701  
Phone: 1-800-578-4677

**Lottery Commission**

611 E. 6th Street  
Austin, Texas 78701  
Phone: 512-344-5000

**Medical Board**

333 Guadalupe  
Tower 3, Suite 610  
Austin, TX 78701  
Phone: 512-305-7030

**Parks and Wildlife, Department of**

4200 Smith School Road  
Austin, TX 78744  
Phone: 512-389-4800

**Public Utility Commission**

1701 N. Congress Avenue, 7th Floor  
Austin, TX 78701  
Phone: 512-936-7000

**Racing Commission**

8505 Cross Park Dr. #110  
Austin, TX 78754  
Phone: 512-833-6699

**Railroad Commission**

1701 N. Congress Avenue  
Austin, Texas 78701  
Phone: 512-463-7158

**Secretary of State, Office of the**

1100 Congress, Suite 1E.8  
Austin, Texas 78701  
Phone: 512-463-5770

**Securities Board**

208 E. 10th Street, 5th Floor  
Austin, Texas 78701  
Phone: 512-305-8300

**State Auditor, Office of the**

1501 N. Congress Avenue  
Austin, TX 78701  
Phone: 512-936-9500

**State Health Services, Department of**

1100 West 49th Street  
Austin, Texas 78756-3199  
Phone: 512-776-7111

**Supreme Court of Texas**

Supreme Court Building  
201 W. 14th Street, Room 104  
Austin, Texas 78701  
Phone: 512-463-1312

**Transportation, Department of**

125 East 11th Street  
Austin, Texas 78701  
Phone: 512-463-8588

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BEIJING  
BRUSSELS  
DALLAS  
DUBAI  
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NEW YORK  
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SAN FRANCISCO  
WASHINGTON

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