

TEXAS CIVIL PROCEDURE UPDATE

Professor Elaine Grafton Carlson
Stanley J. Krist Distinguished Professor of Law
South Texas College of Law
1303 San Jacinto, Suite 755
Houston, Texas 77002
(713) 646-1870
ecarlson@stcl.edu

Courtney T. Carlson
Jackson Walker L.L.P.
1401 McKinney, Suite 1900
Houston, Texas 77010
(713) 752-4200
ccarlson@jw.com

41st Annual Page Keeton Civil Litigation Conference
Austin, Texas
November 2-3, 2017

*These materials are largely excerpted from McDonald & Carlson,
Texas Civil Practice
(2016 Supplement), West Publishing. Westlaw Database: “txcp”

TEXAS CIVIL PROCEDURE UPDATE	8
Arbitration	8
Attorneys	17
Courts	22
Subject Matter Jurisdiction.....	23
Personal Jurisdiction.....	32
Dominant Jurisdiction	40
Forum Non Conveniens.....	41
Venue.....	43
Declaratory Judgments	45
Class Actions	46
Multidistrict Litigation	47
Notice of Constitutional Challenges to Texas Attorney General.....	48
Pleadings.....	49
Pleading Amount In Controversy Range.....	49
Affirmative Defenses.....	50
Verified Denials.....	50
Amended Pleadings	51
Waiver of Pleading Defects	52
Parties	52
Compulsory Counterclaims	56
Severance.....	56
Immunity	57
In General	57
Immunity: Texas Tort Claims Act.....	62
Local Government Immunity	64
Default Judgments.....	66
Attacks on Defective Service	70
Early Dismissal On The Pleadings Under New Rule 91a.....	71
Dismissal Anti-SLAPP	79
Discovery.....	81
Scope of Discovery.....	81
Electronic Discovery	83
Depositions	86
Rule 202 Depositions	86

Apex Depositions	90
Request For Admissions.....	91
Court Order Physical Examination.....	92
Discovery of Expert and Expert Reports.....	93
Discovery Privileges.....	94
Work Product Privilege	94
Attorney Client Privilege	96
Medical Records.....	96
Fifth Amendment Privilege	97
Litigation Immunity	98
Trade Secrets	98
Court Ordered Shared Discovery	100
Discovery From Jurors	101
Post Judgment Discovery	101
Sealing Court Records.....	101
Res Judicata	102
Summary Judgments	103
Choice of Law	114
Law of the Case	114
Limitations & Repose.....	115
Daubert-Sufficiency of Expert Opinions.....	123
Injunctive Relief.....	125
Right to Jury	127
Jury Selection	127
In General	127
Batson Challenges to Peremptory Jury Strike	129
Right To Twelve Person Jury	132
Contractual Waiver of Right to Jury Trial.....	133
Jury Charge.....	133
Closing Argument to the Jury	139
Jury Misconduct	140
Nonjury Trial	141
Settlement.....	142
In General	142
Under Offer of Settlement Rule	142
Structured Settlements	144

Dismissal	145
For Want of Prosecution.....	145
Dismissal Due to Forum Selection Clause	145
Dismissal Due to Failure To Comply With Statutory Prerequisites to Bringing Suit.....	146
Contempt, Sanctions & Spoliation	152
Contempt.....	152
Sanctions.....	153
Spoliation.....	156
Non Suit.....	158
Judgments	159
In General	159
Rendition.....	161
Agreed Judgment	162
One Satisfaction Rule	162
The Economic Loss Rule.....	163
Reducing Damages Due To Settlement Credit.....	163
Reducing Judgment Due To Proportionate Responsibility	164
Reducing Judgment Due To Statutory Caps	165
Reducing Damages to Those Actually Paid or Incurred	165
Reducing Damages in Rule 169 Expedited Trials.....	165
Reducing Punitive Award Damages That are Excessive	166
Pre-judgment Interest	168
Post Judgment Interest.....	169
Costs	171
Attorney's Fees.....	172
In General	172
Segregation of Attorney Fees.....	181
Attorney Fees-Breach of Express Warranty	182
Appellate Attorney Fees.....	182
Attorney Fees for Legal Assistant's Work.....	183
Guardian Ad Litem Fees.....	183
Remittitur.....	184
Election of Remedies.....	184
Judgment Finality	185
Funds In The Registry of the Court.....	185
Motion For New Trial	186
Other Post-Judgment Motions.....	189
Supersedeas	190
Enforcement of Domestic Judgment.....	193

In General	193
Turnover Orders.....	194
Fraudulent Transfer	196
Enforcement of Foreign Judgments	196
Bill of Review.....	198
Restricted Appeal	199
Appellate Court Jurisdiction.....	200
Certified Question	208
Permissive Interlocutory Appeals	209
Appellate Record	211
Challenging the Sufficiency of the Evidence.....	212
Preservation of Error	218
Appellate Briefs	223
Summary Judgment Appeals.....	226
Raising Appellate Complaints.....	229
Alternate Grounds to Affirm Judgment.....	229
Cross Points To Support Judgment JNOV	230
Complaint Raised In Body of Brief But Not In Points.....	230
Appellate Court Obligation to Rule on Appellate Complaints	230
Appellate Authority	231
Challenging The Sufficiency of the Evidence	232
Remand vs Rendition	234
Frivolous Appeals.....	236
Mandamus	237
In General	237
Mandamus Review of Trial Court’s Grant of Motion for New Trial...	244
Mandamus Review of Trial Court Denial of a Motion for New Trial .	253
Writ of Prohibition	254
Habeas Corpus.....	255
2016-2017 Areas of Study for Potential Changes to Texas Rules of Civil and Appellate Rules of Procedure, Rules of Evidence, Disciplinary Rules, and Code of Judicial Conduct	255

TEXAS CIVIL PROCEDURE UPDATE

Arbitration

Hoskins v. Hoskins, 497 S.W.3d 490, 496 (Tex. 2016) (The Texas Supreme Court addressed, as a matter of first impression, whether the Texas General Arbitration Act (hereafter “TAA”) permits vacatur of an arbitration award on common-law grounds not enumerated in the statute. Resolving the split in the lower courts of appeals, the Court concludes that section 171.088 of the Texas Civil Practice and Remedies Code provides the *exclusive* grounds for vacatur of an arbitration award. Accordingly, manifest disregard and all other common-law vacatur doctrines are not viable grounds for vacating an arbitration award under the TAA. The Court notes:

In sum, the TAA mandates that, *unless* a statutory vacatur ground is offered, the court *shall* confirm the award. TEX. CIV. PRAC. & REM. CODE ANN. § 171.087 (West 2011). Thus, a party may avoid confirmation only by demonstrating a ground expressly listed in section 171.088. Leonard complains that “the TAA contains gaps that need [common-law] supplementation” in order to foreclose arbitration awards that are “unquestionably” improper. But we may not rewrite or supplement a statute to overcome its perceived deficiencies. The parties signed an agreement to arbitrate under the TAA, and that agreement contained no limitations on the arbitrator’s authority beyond those enumerated in the statute. Because manifest disregard is not an enumerated vacatur ground under section 171.088, the court of appeals correctly declined to consider it in affirming the trial court’s confirmation order.

The concurrence highlights the advantages in establishing the exclusivity of the TAA’s vacatur grounds. Not only does the Court’s decision provide lower courts with clear instruction, it also eradicates the ambiguity surrounding vacatur grounds that is still present in the Federal Arbitration Act. (at *6)

The American Arbitration Association adopted rules allowing parties to agree to submit commercial arbitration decisions to appellate review before an appellate arbitral panel. www.adr.org/ If the parties have not appointed an appeal tribunal nor not provided for any other method of appointment, the appeal tribunal will be appointed by the AAA. A notice of appeal must be filed with the AAA within thirty days of the arbitration agreement. The rules call for the filing of briefs and permit review of errors of law that are material and prejudicial, and determinations of fact that are clearly erroneous.

See also: <http://www.lexology.com/library/detail.aspx?g=1d466bd0-aeff-43e5-96b9-def338ff7baf>.

Good Times Stores, Inc. v. Macias, 355 S.W.3d 240, 244 (Tex. App.—El Paso 2011, pet. denied) (The grounds to vacate an arbitration award under the Federal Arbitration Act are exclusive under the U.S. Supreme Court decision of *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396, 1404, 170 L.Ed.2d 254 (2008) and forecloses any common law grounds for vacatur. The FAA applies to maritime transactions and actions involving interstate commerce.).

Nafta Traders, Inc. v. Quinn, 339 S.W.3d 84, 97 (Tex. 2011) (The Texas Arbitration Act presents no impediment to an agreement that limits the arbitrator's authority and allows for judicial review of an arbitration award for reversible error. When an arbitration agreement is covered by both state and federal law, state law is preempted to the extent that it actually conflicts with federal law. While acknowledging judicial review of an arbitration award is not allowed under the Federal Arbitration Act, Texas law does not conflict with that law).

Forest Oil Corp. v. El Rucio Land, 446 S.W. 3d 58, 73-74, 81-87 (Tex. App.—Houston [1st Dist.] 2014, aff'd, 518 S.W.3d 422 (Tex. 2017)) (The judicially created primary jurisdiction doctrine operates to allocate power between courts and agencies when both have authority to make initial determinations in a dispute. The Railroad Commission does not have primary jurisdiction over a landowner's non-regulatory based claims for injuries caused to the landowner's property by environmental contamination incident to oil and gas production. Simply because the Railroad Commission might have jurisdiction to determine some facts related to a controversy does not oust a court or the arbitrators of jurisdiction to make the underlying factual determinations. The parties' arbitration agreement provided: "The arbitrators will have the authority to award punitive damages where allowed by Texas substantive law". This does not support the argument the parties agreed to expanded judicial review of the sufficiency of the evidence to support the arbitrator's award of exemplary damages. The supreme court's decision in *Nafta Traders* is distinguished:

There, the supreme court determined that parties, by contract, may agree to allow for judicial review of an arbitration award for reversible error. See *Nafta Traders*, 339 S.W.3d at 101. In that case, the arbitration agreement stated, "The arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law." *Id.* at 88. The supreme court concluded this language meant that the arbitrator lacked the power to commit a reversible error of law and provided the

Also available as part of the eCourse

[2017 Page Keeton Civil Litigation eConference](#)

First appeared as part of the conference materials for the
41st Annual Page Keeton Civil Litigation Conference session
"Texas Civil Procedure Update"