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**To:** Clients and Friends

**From:** David F. Dulock

**Subject:** 2017 Legislative Update IV from 85th Regular Session of the Texas Legislature – Miscellaneous Bills

This legislative update summarizes additional bills from the 2017 Legislative Session that we consider of interest to our clients. The effective dates of these bills are noted in the applicable bill summary. Previous to this legislative update, we issued Legislative Update I, summarizing proposed constitutional amendments and their enabling legislation, Legislative Update II, summarizing three bills that substantially affect durable powers of attorney, and Legislative Update III, summarizing bills relating to real property. Legislative Updates I, II and III are found on the Articles page of the firm's website [www.bmandg.com](http://www.bmandg.com).

1. CHOICE OF LAW AND VENUE FOR CERTAIN CONSTRUCTION CONTRACTS ([SB 807](#))

Since April 1, 2009, Chapter 272, Business & Commerce Code, has provided protection for a general contractor and a subcontractor under a contract that is “principally for the construction or repair of an improvement to real property located in this state,” by giving the contractor or subcontractor the ability to void a provision in the contract “making the contract or any conflict arising under the contract subject to another state’s law, litigation in the courts of another state, or arbitration in another state,” if the contract obligates the general contractor or subcontractor, as the general contractor’s or subcontractor’s principal obligation under the contract, to provide labor and/or labor and materials for said construction or repair.

Effective September 1, 2017, Senate Bill 807 (SB 807) broadens the scope of Chapter 272 to include all project participants, including architects, engineers, suppliers, and equipment rental companies, by adding Section 272.0001 and amending Sections 272.001 and 272.002.

SECTION 1 of SB 807 amends the heading of Chapter 272 to read LAW APPLICABLE TO CERTAIN CONSTRUCTION CONTRACTS.

SECTION 2 of SB 807 adds Section 272.0001 and amends Sections 272.001 and 272.002 to read as follows:

Sec. 272.0001. DEFINITION. In this chapter, “construction contract” means a contract, subcontract, or agreement entered into or made by an owner, architect, engineer, contractor, construction manager, subcontractor, supplier, or material or equipment lessor for the design, construction, alteration, renovation, remodeling, or repair of, or for the furnishing of material or equipment for, a building, structure, appurtenance, or other improvement to or on public or private real property, including moving, demolition, and excavation connected with the real property. The term includes an agreement to which an architect, engineer, or contractor and an owner’s lender are parties regarding an assignment of the construction contract or other modifications thereto.

Sec. 272.001. **AVOIDABLE CONTRACT PROVISION.** (a) This section applies only to a construction contract concerning real property located in this state.

(b) If a construction contract or an agreement collateral to or affecting the construction contract contains a provision making the contract or agreement or any conflict arising under the contract or agreement subject to another state's law, litigation in the courts of another state, or arbitration in another state, that provision is voidable by a party obligated by the contract or agreement to perform the work that is the subject of the construction contract.

Sec. 272.002. **INAPPLICABILITY OF CHAPTER.** This chapter does not apply to a construction contract that:

- (1) is a partnership agreement or other agreement governing an entity or trust;
- (2) provides for a loan or other extension of credit and the party promising to perform the work that is the subject of the construction contract is doing so as part of the party's agreements with the lender or other person who extends credit; or
- (3) is for the management of real property or improvements and the obligation to perform the work that is the subject of the construction contract is part of that management.

SECTION 3 of SB 807 provides that the changes in law made by SB 807 apply only to a construction contract, or an agreement collateral to or affecting a construction contract, entered into on or after September 1, 2017 (the effective date of SB 807) and further provides that a construction contract, or an agreement collateral to or affecting a construction contract, entered into before September 1, 2017, is governed by the law as it existed immediately before September 1, 2017, and that law is continued in effect for that purpose.

## 2. **ADOPTION OF THE UNIFORM PARTITION OF HEIRS' PROPERTY ACT** ([SB 499](#))

Effective September 1, 2017, Senate Bill 499 (SB 499) amends the Texas Property Code by creating the Uniform Partition of Heirs' Property Act. The bill defines heirs' property, provides for independent appraisal of fair market value (or alternative means of reaching fair market value if all cotenants agree to that value), permits one cotenant to buy out the others if that cotenant is not the one who requested the partition, sets out factors to be considered by the court in determining whether to order partition in kind of some or all of the property, and establishes procedures under which any sales of the property are to be conducted.

SECTION 1 of SB 499 amends Title 4, Property Code, by adding Chapter 23A, entitled "Uniform Partition of Heirs' Property Act."

Section 23A.002 (Definition) defines "ascendant," "collateral," "descendant," "determination of value," "heirs' property," "partition by sale," "partition in kind," "record," and "relative."

Section 23A.003 (Applicability; Relation to Other Law). Subsection (a) requires the court, in an action to partition real property under Chapter 23 (Partition) of the Property Code, to determine whether the property is heirs' property and if the court determines that the property is heirs' property, requires that the property be partitioned unless all of the cotenants otherwise agree in a record.

Subsection (b) provides that Chapter 23A supplements Chapter 23 and the Texas Rules of Civil Procedure governing partition of real property and that if an action is governed by Chapter 23A, then Chapter 23A supersedes inconsistent provisions in Chapter 23 and the Texas Rules of Civil Procedure governing partition of real property.

Section 23A.004 (Service; Notice by Posting). Subsection (a) provides that Chapter 23A does not limit or affect the method by which service of a petition in a partition action may be made.

Subsection (b) provides that if the plaintiff in a partition action seeks citation by publication and the court determines that the property may be heirs' property, not later than the 10th day after the court's determination, the plaintiff must post, and maintain while the action is pending, a conspicuous sign on the subject property stating that the partition action has commenced and identify the name and address of the court and the common designation by which the property is known. Subsection (b) authorizes the court to require the plaintiff to publish on the sign the name of the plaintiff and the known defendants.

Section 23A.005 (Commissioners) provides that if the court appoints commissioners, each commissioner also must be impartial and is prohibited from being a party to or a participant in the action.

Section 23A.006 (Determination of Value). Subsection (a) requires the court, if the court determines that the property the subject of a partition action is heirs' property and except as provided by Subsection (b) or (c), to determine the fair market value of the property by ordering an appraisal.

Subsection (b) requires the court, if all cotenants have agreed to the value of the property or to another method of valuation, to adopt that value or the value produced by the agreed method of valuation.

Subsection (c) requires the court, if after an evidentiary hearing the court determines that the evidentiary value of an appraisal is outweighed by the cost of the appraisal, to determine the fair market value of the property and send notice to the parties of the value.

Subsection (d) requires the court, if the court orders an appraisal, to appoint a disinterested real estate appraiser to determine the fair market value of the property assuming sole ownership of the fee simple estate and further requires the appraiser, on completion of the appraisal, to file a sworn or verified appraisal with the court.

Subsection (e) requires the court, not later than the 10th day after the date the appraisal is filed, to send notice to each party with a known address, stating the appraised fair market value of the property, that the appraisal is available at the clerk's office, and that a party may file with the court an objection to the appraisal stating the grounds for the objection not later than the 30th day after the date notice is sent.

Subsection (f) requires the court to conduct a hearing to determine the fair market value of the property not earlier than the 30th day after a copy of the notice of the appraisal is sent to each party, whether or not an objection to the appraisal is filed, and authorizes the court, in

addition to the court-ordered appraisal, to consider any other evidence of value offered by a party.

Subsection (g) requires the court, after the hearing but before considering the merits of the partition action, to determine the fair market value of the property and send notice to the parties of the value.

Section 23A.007 (Cotenant Buyout). Subsection (a) provides that if any cotenant requested partition by sale, the court, after the court's determination of fair market value, must send notice to the parties that any cotenant, except a cotenant that requested partition by sale, may buy all the interests of the cotenant(s) that requested partition by sale.

Subsection (b) permits any cotenant except a cotenant that requested partition by sale, not later than the 45th day after the date notice is sent, to give notice to the court that the cotenant elects to buy all the interests of the cotenant(s) that requested partition by sale.

Subsection (c) provides that the purchase price for all the interest of a cotenant that requested partition by sale is the court's determination value of the entire parcel multiplied by the cotenant's fractional ownership of the entire parcel.

Subsection (d) requires the court, after the period provided by Subsection (b) expires, if only one cotenant elects to buy all the interests of the cotenants that requested partition by sale, to notify all the parties of that fact; if more than one cotenant elects to buy all the interests of the cotenants that requested partition by sale, to allocate the right to buy those interests among the electing cotenants based on certain existing fractional ownership criteria, and to send notice to all the parties of that fact and of the price to be paid by each electing cotenant; or, if no cotenant elects to buy all the interests of the cotenants that requested partition by sale, to send notice to all the parties of that fact and resolve the partition action under Section 23A.008(a) or (b).

Subsection (e) requires the court, if the court sends notice to the parties of one or more cotenant's election to buy, to set a date, not earlier than the 60th day after the date notice was sent, by which an electing cotenant must pay the cotenant's apportioned price into the court. After that date, if all electing cotenants timely pay their apportioned price into court, Subsection (e) requires the court to issue an order reallocating all the interests of the cotenants and disburse the amounts held by the court to the persons entitled to them. If no electing cotenant pays its apportioned price, Subsection (e) requires the court to resolve the partition action under Section 23A.008 (a) or (b) as if the interests of the cotenants that requested partition by sale were not purchased. If one or more but not all of the electing cotenants fail to pay their apportioned price on time, Subsection (e) requires the court to give notice to the electing cotenants that paid their apportioned price of the interest remaining and the price for all that interest.

Subsection (f) permits any cotenant that paid, not later than the 20th day after the date the court gives notice that some but not all of the electing cotenants failed to timely pay their apportioned price, to elect to purchase all of the remaining interest by paying the entire price into the court. After that period expires, if only one cotenant pays the entire price for the remaining interest, Subsection (f) requires the court to issue an order reallocating the remaining interest to that cotenant; to issue an order reallocating the interests of all of the cotenants; and to disburse the amounts held by the court to the persons entitled to the amounts. If no cotenant pays the entire

price for the remaining interest, Subsection (f) requires the court to resolve the partition action under Section 23A.008(a) or (b) as if the interests of the cotenants that requested partition by sale were not purchased. If more than one cotenant pays the entire price for the remaining interest, Subsection (f) requires the court to reapportion the remaining interest among those paying cotenants based on certain original fractional ownership criteria; to issue an order reallocating all of the cotenants' interests; to disburse the amounts held by the court to the persons entitled to the amounts and to refund any excess payment held by the court.

Subsection (g) permits any cotenant entitled to buy an interest, not later than the 45th day after the date the court sends notice to the parties under Subsection (a), to request the court to authorize (as part of the pending action) the sale of the interests of cotenants named as defendants and served with the complaint but that did not appear in the action.

Subsection (h) provides that if the court receives a timely request, the court, after hearing, may deny the request or authorize the requested additional sale on such terms as the court determines are fair and reasonable, subject to the following limitations: (1) the additional sale may occur only after the purchase prices for all interests subject to sale under Subsections (a) through (f) have been paid into court and those interests have been reallocated among the cotenants as provided in those Subsections; and (2) the purchase price for the interest of a nonappearing cotenant is based on the court's determination of value under Section 23A.006.

Section 23A.008 (Partition Alternatives). Subsection (a) requires the court, if all the interests of all cotenants that requested partition by sale are not purchased by other cotenants or if after conclusion of the buyout a cotenant remains that has requested partition in kind, to order partition in kind unless the court, after consideration of the factors listed in Section 23A.009, finds that partition in kind will result in substantial prejudice to the cotenants as a group. In considering whether to order partition in kind, Subsection (a) requires the court to approve a request by two or more parties to have the requesting parties' individual interests aggregated.

Subsection (b) requires the court, if the court does not order partition in kind, to order partition by sale under Section 23A.010 or, if no cotenant requested partition by sale, to dismiss the action.

Subsection (c) authorizes the court, if the court orders partition in kind, to require that one or more cotenants pay one or more other cotenants amounts so that the payments, taken together with the value of the in-kind distributions to the cotenants, will make the partition in kind just and proportionate in value to the fractional interests held. (*Note: i.e., ovelty of partition*)

Subsection (d) requires the court, if the court orders partition in kind, to allocate to the cotenants that are unknown, unlocatable, or are the subject of a default judgment, if those cotenants' interests were not bought out under Section 23A.007, a part of the property representing the combined interests of those cotenants as determined by the court, and that part of the property is to remain undivided.

Section 23A.009 (Considerations for Partition in Kind). Subsection (a) requires the court, in determining whether partition in kind would result in substantial prejudice to the cotenants as a group, to consider seven specific factors.

Subsection (b) prohibits the court from considering any one factor under Subsection (a) to be dispositive without weighing the totality of all relevant factors and circumstances.

Section 23A.010 (Open-Market Sale, Sealed Bids, or Auction). Subsection (a) requires, if the court orders a partition by sale, that the sale be an open-market sale unless the court finds that a sale by sealed bids or at an auction would be more economically advantageous and in the best interest of the cotenants as a group.

Subsection (b) requires the court, if the court orders an open-market sale and not later than the 10th day after the date the order is entered the parties agree on a real estate broker to offer the property for sale, to appoint the broker and to establish a reasonable commission. If the parties do not agree on a broker, Subsection (b) requires the court to appoint a disinterested real estate broker to offer the property for sale and to establish a reasonable commission. Subsection (b) requires the broker to offer the property for sale in a commercially reasonable manner at a price no lower than the determination of value and on terms and conditions established by the court.

Subsection (c) requires the court-appointed broker, if the broker obtains within a reasonable time an offer to purchase the property for at least the determination of value, to comply with the reporting requirements of Section 23A.011 and authorizes the sale to be completed in accordance with state law other than Chapter 23A.

Subsection (d) authorizes the court, after hearing, if the broker does not obtain within a reasonable time an offer to purchase the property for at least the determination of value, to approve the highest outstanding offer, if any; to re-determine the value of the property and order that the property continue to be offered for an additional time; or to order that the property be sold by sealed bids or at an auction.

Subsection (e) requires the court, if the court orders a sale by sealed bids or at an auction, to set terms and conditions of the sale and, if the court orders an auction, requires that the auction be conducted in the manner provided by law for a sale made under execution.

Subsection (f) provides that if a purchaser is entitled to a share of the proceeds of the sale, the purchaser is entitled to a credit against the price in an amount equal to the purchaser's share of the proceeds.

Section 23A.011 (Report of Open-Market Sale). Subsection (a) provides that unless required to do so earlier by other law governing the partition of real property, the court-appointed broker must file a report with the court not later than the seventh day after the date an offer is received to purchase the property for at least the value determined under Section 23A.006 or 23A.010.

Subsection (b) requires that the broker's report contain the information specified in Subsection (b).

Section 23A.012 (Uniformity of Application and Construction) requires that in applying and construing Chapter 23A, consideration be given to the need to promote uniformity of the law

with respect to the Chapter's subject matter among states that enact a law based on the uniform act on which Chapter 23A is based.

Section 23A.013 (Relation to Electronic Signatures In Global and National Commerce Act) provides that Chapter 23A modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001 et seq.), but does not modify, limit, or supersede Section 7001(c) or authorize electronic delivery of any of the notices described in Section 7003(b).

SECTION 2 of SB 499 provides that Chapter 23A applies only to a partition action commenced on or after September 1, 2017 (the effective date of SB 499). It further provides that a partition action commenced before September 1, 2017, is governed by the law as it existed immediately before September 1, 2017, and that law is continued in effect for that purpose.

### 3. ADVERSE POSSESSION OF REAL PROPERTY BY A COTENANT HEIR AGAINST OTHER COTENANT HEIRS ([SB 1249](#))

Effective September 1, 2017, Senate Bill 1249 (SB 1249) amends Subchapter B (Limitations of Real Property Actions), Chapter 16, Civil Practice and Remedies Code, by adding Section 16.0265 relating to adverse possession of real property by a cotenant heir against other cotenant heirs.

Section 16.0265 (Adverse Possession by Cotenant Heir: 15-Year Combined Limitations Period). Subsection (a) defines "cotenant heir" for the purposes of Section 16.0265 as "one of two or more persons who simultaneously acquire identical, undivided ownership interests in, and rights to possession of, the same real property by operation of the applicable intestate succession laws of this state or a successor in interest of one of those persons." (**Note:** *This definition precludes the use of Section 16.025 by a cotenant who acquires an interest in the subject property by any other method.*)

Subsection (b) authorizes one or more cotenant heirs of real property to acquire the interests of other cotenant heirs in the property by adverse possession under Section 16.0265 if, for a continuous, uninterrupted 10-year period immediately preceding the filing of the affidavits required by Subsection (c):

(1) the possessing cotenant heir or heirs hold the property in peaceable and exclusive possession; cultivate, use, or enjoy the property; and pay all property taxes on the property not later than two years after the date the taxes become due; and

(2) no other cotenant heir has contributed to the property's taxes or maintenance; challenged a possessing cotenant heir's exclusive possession of the property; asserted any other claim against a possessing cotenant heir in connection with the property, such as the right to rental payments from a possessing cotenant heir; acted to preserve the cotenant heir's interest in the property by filing notice of the cotenant heir's claimed interest in the deed records of the county in which the property is located; or entered into a written agreement with the possessing cotenant heir under which the possessing cotenant heir is allowed to possess the property but the other cotenant heir does not forfeit that heir's ownership interest.

Subsection (c) provides that in order to make a claim of adverse possession against a cotenant heir under Section 16.0265, the cotenant heir or heirs claiming adverse possession must

file in the deed records of the county in which the real property is located an affidavit of heirship in the form prescribed by Section 203.002, Estates Code, and an affidavit of adverse possession that complies with the requirements of Subsection (d); publish notice of the claim in a newspaper of general circulation in the county in which the property is located for the four consecutive weeks immediately following the date the above affidavits are filed; and provide written notice of the claim to the last known addresses of all other cotenant heirs by certified mail, return receipt requested.

Subsection (d) permits the affidavits to be filed separately or combined into a single instrument and requires that the affidavit of adverse possession include a legal description of the property; attestations that each affiant is a cotenant heir of the property who has been in peaceable and exclusive possession of the property for a continuous, uninterrupted period during the 10 years preceding the filing of the affidavit and during that 10-year period has cultivated, used, or enjoyed the property; evidence of payment by the affiant(s) during that 10-year period of all property taxes on the property as required by Subsection (b); and an attestation that there has been no action described by Subsection (b)(2) by another cotenant heir during that 10-year period.

Subsection (e) requires a cotenant heir to file a controverting affidavit or bring suit to recover the cotenant heir's interest in real property adversely possessed by another cotenant heir not later than the fifth anniversary of the date of filing of the affidavits required by Subsection (c). (**Note:** See Subsection (g) Note.)

Subsection (f) provides that if a controverting affidavit or judgment is not filed before the fifth anniversary of the date the affidavits required by Subsection (c) are filed and no notice described by Subsection (b)(2) (*i.e.*, filing notice of the cotenant heir's claimed interest in the deed records of the county in which the property is located) was filed in the 10-year period preceding the filing of the affidavits under Subsection (c), title vests in the adversely possessing cotenant heir or heirs in the manner provided by Section 16.030 (Title Through Adverse Possession), Civil Practice and Remedies Code, precluding all claims by other cotenant heirs. (**Note:** See Subsection (g) Note.)

Subsection (g) provides that a bona fide lender for value without notice who accepts a voluntary lien against the real property to secure the adversely possessing cotenant heir's indebtedness or a bona fide purchaser for value without notice may conclusively rely on the affidavits required by Subsection (c) if the affidavits have been filed of record for the period prescribed by Subsection (e) and a controverting affidavit or judgment has not been filed during that period. (**Note:** There appears to be an irreconcilable conflict in language between Subsection (e) and Subsections (f) and (g) regarding the five year limitation period for a suit to recover the cotenant heir's interest – Subsection (e) requires the suit to be brought within the five year period while Subsections (f) and (g) require the judgment to be filed within the five year period.)

Subsection (h) provides that without a title instrument, peaceable and adverse possession is limited to 160 acres, including improvements, unless the number of acres actually enclosed exceeds 160 acres. It further provides that if the number of enclosed acres exceeds 160 acres, peaceable and adverse possession extends to the real property actually enclosed. (**Note:** Subsection (h)'s language mirrors the language in Subsection (b) of Section 16.026. Adverse Possession: 10-Year Limitations Period.)



Subsection (i) provides that peaceable possession of real property held under a duly registered deed or other memorandum of title that fixes the boundaries of the possessor's claim extends to the boundaries specified in the instrument. *(Note: Subsection (i)'s language mirrors the language in Subsection (c) of Section 16.026. Adverse Possession: 10-Year Limitations Period.)*

#### 4. DESIGNATING BIG SPRING, TEXAS, AS THE LIGHTED POINSETTIA CAPITAL OF TEXAS ([HCR 72](#))

As an especially appropriate Christmas gift, the 85th Legislature of the State of Texas has graciously designated Big Spring as the Lighted Poinsettia Capital of Texas for the next ten years. Each year, Big Spring celebrates the holiday season with a spectacular display featuring more than 100 lighted poinsettias, some up to 150 feet tall, and this much-anticipated event has become well known throughout the Lone Star State and beyond and draws more than 20,000 visitors annually. Enthusiasm for this festival has prompted local residents to expand the event throughout the city. Every December, many private homes are decorated with illuminated poinsettias, further contributing to the magical holiday ambiance of this illuminating event.

No attempt was made by this legislative update to summarize all the bills that could affect mortgage lending or mortgage lenders or loan originators. This legislative update is simply an attempt to advise our clients as to those bills that we believe are of interest to our clients. The above summaries are not complete descriptions of these bills, and you are advised to review the entirety of any bill summarized above that you believe affects your business. You may request copies of these bills from us or you may click on the hyperlink in the title to each bill.

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