2012 SUPPLEMENT to Texas Collections Manual

Fourth Edition

DANIEL J. GOLDBERG

Chair, Manual Committee

This supplement updates the practice notes and forms to conform to changes from the Eighty-second Texas legislative session and changes to the Texas Rules of Civil Procedure and incorporates relevant case law handed down since 2011.

Digital Product Download

This supplement's complete digital product, containing the entire text of the manual in PDF and all State Bar of Texas–copyrighted forms in Word, can be securely downloaded from our Web site at **http://www.texasbarcle.com/collections-2012** (for details, go to **http://texasbarbooks.net/download-tips/** or see the section titled 'Digital Product Documentation' in volume 1).

How to Use This Supplement

This supplement consists of loose-leaf pages that replace or add to material in the manual. The pages following these instructions are to be inserted in the *Texas Collections Manual*, fourth edition.

1. BE SURE that your manual is the fourth edition. Check the back of the title page in any volume; the final line on that page should state 'Fourth Edition, 2011. If you do not have the fourth edition, you should obtain it and return this supplement for a refund. Current purchases of the fourth edition automatically include a copy of this supplement. To order the fourth edition, you may write to State Bar of Texas, Sales Desk, P.O. Box 12487. Austin, TX 78711, order online at **http://www.texasbarcle.com**, or call 1-800-204-2222 ext. 1411 (8:00 A.M.–5:00 P.M. Monday through Friday).

2. Use the instructions following this list of steps to remove outdated pages and insert new ones. Set the removed pages aside.

3. When all the listed pages have been inserted and all superseded pages have been removed, the List of Effective Pages will remain. Use the List of Effective Pages to check each page in the manual to ensure that the manual is complete and that the correct version of each page is in place. (Note that the pages comprising the List of Effective Pages should not be in the manual at this stage, because they will be used to check all other pages.)

4. After the pages have been checked, insert pages xiii–xvi (the List of Effective Pages) in their proper place, immediately after page xii (reserved) and before the tab divider for Summary of Contents.

5. Occasionally the printer accidentally omits some pages from the supplement, and sometimes pages from the original manual will have been lost during use. We will be happy to provide new supplement pages and replacements for 'old' pages. If you don't find your missing pages in the stack of superseded pages you've removed and set aside, photocopy the List of Effective Pages, indicate which pages you're missing, and send the list, together with a label containing your complete mailing address, to: State Bar of Texas, TexasBarBooks, Missing Pages, P.O. Box 12487. Austin, TX 78711-2487: you may also send your request via e-mail to **books@texasbar .com** or fax to (512) 427-4404.

6. When steps 1–4 have been completed, discard the superseded pages. These instructions may be discarded or filed for future reference.

INSTRUCTIONS FOR REMOVING AND INSERTING PAGES

REMOVE OLD PAGES	*INSERT NEW PAGES*
VOLUME 1	
Title page – xii	Title page – xii
Behind tab DIGITAL PRODUCT DOCUMENTATION	
entire contents behind tab	Doc-1 – Doc-6
Behind tab INTRODUCTION	
entire contents behind tab	Intro-1 – Intro-4
Behind tab CHAPTER 1	
1-i – 1-iv	1-i – 1-iv
1-7 – 1-16	1-7 – 1-16
Behind tab CHAPTER 2	
2-i – 2-x	2-i – 2-x
2-15 – 2-16	2-15 – 2-16
2-25 – 2-64	2-25 – 2-64
Behind tab CHAPTER 3	
3-i – 3-ii	3-i – 3-ii
3-5 – 3-10	3-5 – 3-10
Behind tab CHAPTER 5	
5-17 – 5-18	5-17 – 5-18
Behind tab CHAPTER 6	
6-11 – 6-14	6-11 – 6-14

REMOVE OLD PAGES	*INSERT NEW PAGES*
Behind tab CHAPTER 7	
7-i – 7-40	7-i – 7-42
7-4-1 – 7-4-2	7-4-1 – 7-4-2
7-14-1 – 7-14-2	7-14-1 – 7-14-2
7-17 1 7 18-2	7-17-1 7-18-2
——	7-24-1 – 7-27-2
VOLUME 2	
Title page – Copyright page	Title page – Copyright page
Behind tab CHAPTER 14	
14-v – 14-vi	14-v – 14-vi
14-23 – 14-28	14-23 – 14-28
14-33 – 14-34	14-33 – 14-34
14-12-1 – 14-12-2	14-12-1 – 14-12-2
Behind tab CHAPTER 15	
entire contents behind tab	15-i – 15-10
Behind tab CHAPTER 16	
16-i – 16-16	16-i – 16-18
16-5-1 – 16-5-2	16-5-1 – 16-5-2
Behind tab CHAPTER 17	
17-11 – 17-12	17-11 – 17-12
Behind tab CHAPTER 19	
19-1 – 19-18	19-1 – 19-18
Behind tab CHAPTER 20	
20-i – 20-10	20-i – 20-10
VOLUME 3	
Title page – Copyright page	Title page – Copyright page

REMOVE OLD PAGES	*INSERT NEW PAGES*
Behind tab CHAPTER 27	
27-i – 27-viii	27-i – 27-viii
27-23 – 27-52	27-23 – 27-52
27-14-1 – 27-14-2	27-14-1 – 27-14-2
Behind tab CHAPTER 28	
28-1 – 28-20	28-1 – 28-20
Behind tab CHAPTER 29	
29-i – 29-30	29-i – 29-30
Behind tab CHAPTER 35	
35-i – 35-28	35-i – 35-28
35-2-1 – 35-2-20	35-2-1 – 35-2-26
35-6-1 – 35-6-2	35-6-1 – 35-6-4
35-9-1 – 35-9-8	35-9-1 – 35-9-10
Behind tab BIBLIOGRAPHY	
entire contents behind tab	Biblio-1 – Biblio-6
Behind tab STATUTES & RULES CITED	
entire contents behind tab	Stat-1 – Stat-42
Behind tab CASES CITED	
entire contents behind tab	Cases-1 – Cases-24
Behind tab LIST OF FORMS BY TITLE	
entire contents behind tab	Forms-1 – Forms-10
Behind tab SUBJECT INDEX	
entire contents behind tab	Subj-1 – Subj-36

After checking the manual contents against the List of Effective Pages, insert the pages numbered xiii–xvi (the List of Effective Pages) immediately after page xii (reserved) and before the tab divider for Summary of Contents.

TEXAS COLLECTIONS MANUAL

Fourth Edition

Volume 1

Austin 2011

The State Bar of Texas, through its TexasBarBooks Department, publishes practice books prepared and edited by knowledgeable authors to give practicing lawyers and judges as much assistance as possible. The competence of the authors ensures outstanding professional products, but, of course, neither the State Bar of Texas, the editors, nor the authors make either express or implied warranties in regard to the use or freedom from error of this publication. In the use or modification of these materials, each lawyer must depend on his or her own expertise and knowledge of the law.

IRS CIRCULAR 230 NOTICE: To ensure compliance with requirements imposed by the IRS, we inform you that (1) this written material was not intended or written by the author(s) to be used for the purpose of avoiding federal penalties that may be imposed on a taxpayer; (2) this written material cannot be used by a taxpayer for the purpose of avoiding penalties that may be imposed on the taxpayer; (3) this written material cannot be used in promoting, marketing, or recommending to another party any tax-related transaction or matter; and (4) a taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

The use of the masculine gender in parts of this manual is purely for literary convenience and should, of course, be understood to include the feminine gender as well.

International Standard Book Number: 978-1-892542-78-6
International Standard Book Number: 978-1-892542-93-9 (2012 Supplement)
Library of Congress Control Number: 2011920779

State Bar of Texas
Austin, Texas 78711

Printed in the United States of America

Fourth Edition, 2011

TEXAS COLLECTIONS MANUAL

Fourth Edition

MANUAL COMMITTEE

DANIEL J. GOLDBERG, *Chair*

EDITORIAL COMMITTEE

BRUCE A. ATKINS

DONNA BROWN

DANIEL J. GOLDBERG

STUART R. SCHWARTZ

CONTRIBUTING AUTHORS

BARBARA M. BARRON

ROGER A. BARTLETT

MIKE BERNSTEIN

MARK BLENDEN

C.A. (JOE) DAVIS

MATIAS EDUARDO GARCIA

W. DEAN HESTER

JAMES LOMBARDI

MANUEL H. NEWBURGER

RACHEL L. NOFFKE

RALPH MARTIN NOVAK, JR.

STEPHEN SATHER

DARLENE PAYNE SMITH

STATE BAR OF TEXAS

2010–2011

F.R. 'BUCK' FILES, JR., *President*

FRANK E. STEVENSON II, *Chair of the Board*

SYLVIA CARDONA, *Chair, Board Professional Development Subcommittee*

DEBORAH J. BULLION, *Chair, Continuing Legal Education Committee*

MICHELLE HUNTER, *Executive Director*

TexasBarBooks

SHARON SANDLE, *Director*

LISA T. CHAMBERLAIN, *Project Publications Attorney*

DAVID W. ASHMORE, *Publications Attorney*

ELMA E. GARCIA, *Publications Attorney*

SUSANNAH R. MILLS, *Publications Attorney*

SHERRY PRIEST, *Publications Attorney*

VICKIE TATUM, *Publications Attorney*

DIANE MORRISON, *Senior Editor*

MICHAEL AMBROSE, *Editor*

COURTNEY CAVALIERE, *Editor*

ROGER SIEBERT, *Production Supervisor*

CONOR JENSEN, *Production and Editorial Assistant*

ISABELLE JOHNSON, *Production and Editorial Assistant*

JENNIFER PEREZ, *Production and Editorial Assistant*

JILL HOEFLING, *Budget and Financial Manager*

CHRISTOPHER SHARPE, *Web Content Specialist*

CYNTHIA AKER, *Meeting Coordinator*

LARA TALKINGTON, *Marketing Coordinator*

Contents

VOLUME 3

STATE BAR OF TEXAS

TERRY O. TOTTENHAM
PRESIDENT

Direct Correspondence to:
600 CONGRESS AVE. STE. 2400
AUSTIN, TX 78701-2978
TEL: (512) 474-5201
FAX: (512) 536-4598
ttottenham@fulbright.com

The State Bar of Texas is proud to present this fourth edition of the *Texas Collections Manual*. Since its initial publication in 1980, the manual has been an excellent resource for all Texas lawyers. This edition will continue that tradition. It covers a number of topics in expanded detail and substantially refines subjects addressed in earlier editions. Also, the digital version has been enhanced to assist attorneys with the use of its forms.

The members of the Texas Collections Manual Committee have volunteered much of their time and effort to this project. The Bar is especially grateful for the dedication and invaluable service of the editorial committee and its chair, Daniel J. Goldberg, who has been involved with this manual since its inception.

Terry O. Tottenham
President, State Bar of Texas

Preface

The fourth edition of the *Texas Collections Manual* is the product of countless hours of work by Texas attorneys who volunteered their time, effort, and expertise as members of the Texas Collections Manual Committee. The manual is, we believe, an indispensible resource for Texas attorneys in widely varying practice situations and is a resource made available through the hard work of many people.

As part of the continuing effort to increase the utility of the manual, the digital version uses new publishing software that enhances functionality of the accompanying work-processing forms. Custom toolbars allow you to show, hide, print, and delete all instructional material in the forms as needed, whether you prefer to create forms on screen or print out a draft to work on paper. Other new features include prompts to facilitate completing the forms.

The editorial committee would like to thank Jim Lombardi for his contributions to the chapter on landlord-tenant law, Mark Blenden for contributing receivership forms, and Mike Bernstein for his contribution to the turnover discussion in the practice notes, along with accompanying forms. The committee would also like to thank Judge Bill Parker for allowing us to reprint the excellent practice guide used in the U.S. Bankruptcy Court for the Eastern District of Texas and the Texas Real Estate Forms Manual Committee for the contribution of several forms for use in the manual. Without the hard work and dedication of these people and others too numerous to name, this book would not exist.

Finally, the committee would like to express its deep appreciation to Lisa Chamberlain, Sharon Sandle, and the TexasBarBooks Department of the State Bar of Texas for their support and dedication in producing this publication.

—Daniel J. Goldberg, *Chair*

[Reserved]

License and Limited Warranty

Grant of license: The material in the digital product and in the documentation is copyrighted by the State Bar of Texas ("State Bar"). The State Bar grants you a nonexclusive license to use this material as long as you abide by the terms of this agreement.

Ownership: The State Bar retains title and ownership of the material in the digital files and in the documentation and all subsequent copies of the material regardless of the form or media in which or on which the original and other copies may exist. This license is not a sale of the material or any copy. The terms of this agreement apply to derivative works.

Permitted users: The material in these files is licensed to you for use by one lawyer and that lawyer's support team only. At any given time, the material in these files may be installed only on the computers used by that lawyer and that lawyer's support team. That lawyer may be the individual purchaser or the lawyer designated by the firm that purchased this product. You may not permit other lawyers to use this material unless you purchase additional licenses. **Lawyers, law firms, and law firm librarians are specifically prohibited from distributing these materials to more than one lawyer. A separate license must be purchased for each lawyer who uses these materials.** For information about special bulk discount pricing for law firms, please call 1-800-204-2222, ext. 1402, or 512-427-1402. Libraries not affiliated with firms may permit reading of this material by patrons of the library through installation on one or more computers owned by the library but may not lend or sell the files themselves. The library may not allow patrons to print or copy any of this material in any way.

Copies: You may make a copy of the files for backup purposes. Otherwise, you may copy the material in the files only as necessary to allow use by the users permitted under the license you purchased. Copyright notices should be included on copies. You may copy the documentation, including any copyright notices, as needed for reference by authorized users, but not otherwise.

Transfer: You may not transfer any copy of the material in the files or in the documentation to any other person or entity unless the transferee first accepts this agreement in writing and you transfer all copies, wherever located or installed, of the material and documentation, including the original provided with this agreement. You may not rent, loan, lease, sublicense, or otherwise make the material available for use by any person other than the permitted users except as provided in this paragraph.

Limited warranty and limited liability: THE STATE BAR MAKES NO WARRANTIES, EXPRESS OR IMPLIED, CONCERNING THE MATERIAL IN THESE FILES, THE DOCUMENTATION, OR THIS AGREEMENT. THE STATE BAR EXPRESSLY DISCLAIMS ALL IMPLIED WARRANTIES, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY AND OF FITNESS FOR A PARTICULAR PURPOSE. THE MATERIAL IN THE FILES AND IN THE DOCUMENTATION IS PROVIDED "AS IS."

THE STATE BAR SHALL NOT BE LIABLE FOR THE LEGAL SUFFICIENCY OR LEGAL ACCURACY OF ANY OF THE MATERIAL CONTAINED IN THESE FILES. NEITHER THE STATE BAR NOR ANY OF THE CONTRIBUTORS TO THE MATERIAL MAKES EITHER EXPRESS OR IMPLIED WARRANTIES WITH REGARD TO THE USE OR FREEDOM FROM ERROR OF THE MATERIAL. EACH USER IS SOLELY RESPONSIBLE FOR THE LEGAL EFFECT OF ANY USE OR MODIFICATION OF THE MATERIAL.

IN NO EVENT SHALL THE STATE BAR BE LIABLE FOR LOSS OF PROFITS OR FOR INDIRECT, SPECIAL, CONSEQUENTIAL, OR PUNITIVE DAMAGES, EVEN IF THE STATE BAR HAS BEEN ADVISED OF THE POSSIBILITY OF THOSE DAMAGES. THE STATE BAR'S AGGREGATE LIABILITY ARISING FROM OR RELATING TO THIS AGREEMENT OR THE MATERIAL IN THE FILES OR IN THE DOCUMENTATION IS LIMITED TO THE PURCHASE PRICE YOU PAID FOR THE LICENSED COPYRIGHTED PRODUCT. THIS AGREEMENT DEFINES YOUR SOLE REMEDY.

General provisions: This agreement contains the entire agreement between you and the State Bar concerning the license to use the material in the files. The waiver of any breach of any provision of this agreement does not waive any other breach of that or any other provision. If any provision is for any reason found to be unenforceable, all other provisions nonetheless remain enforceable.

Texas Collections Manual (4th Ed.) Digital Product 2012

The digital product version of *Texas Collections Manual*, fourth edition, contains the entire text of the printed manual. If you have questions or problems with this product not covered in the documentation available via the URLs below, please contact TexasBarBooks at (800) 204-2222, ext. 1499, or e-mail **books@texasbar.com**.

Additional and Entity Licenses

The current owner of this manual may purchase additional and entity licenses for the digital product. Each additional license is for one additional lawyer and that lawyer's support team only. Additional and entity licenses are subject to the terms of the original license concerning permitted users of the printed manual and digital product. Please visit **http://texasbarbooks.net/additional-licenses/** for details.

Frequently Asked Questions

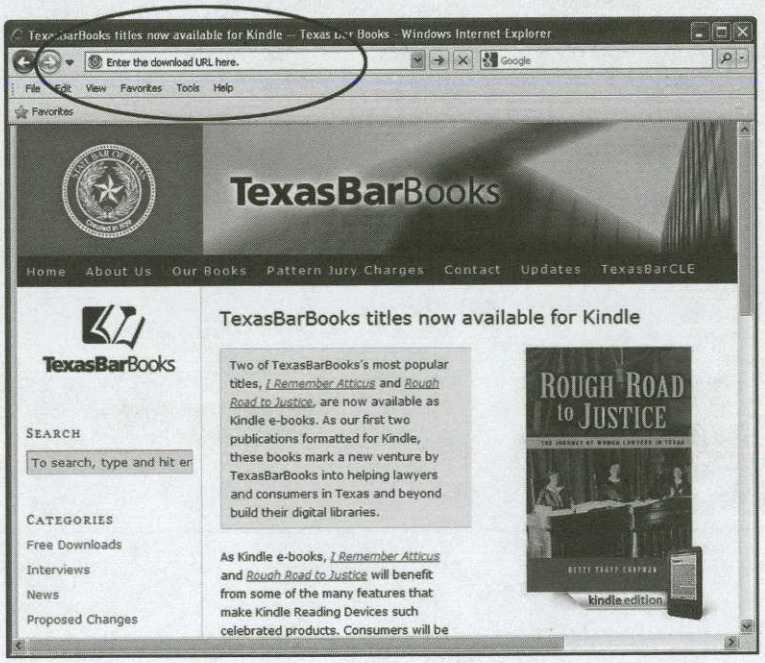
For answers to digital product licensing, download, installation, and usage questions, visit TexasBarBooks Digital Product FAQs online at **http://texasbarbooks.net/f-a-q/**.

Downloading and Installing

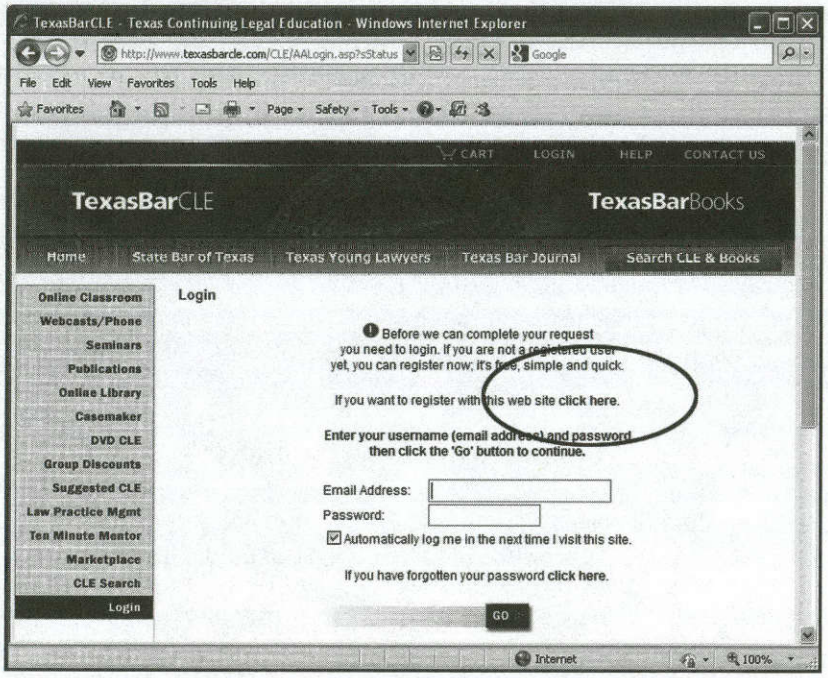
Use of the digital product is subject to the terms of the license and limited warranty included in this documentation and on the digital product download Web pages. By downloading the digital product, you waive all refund privileges for this publication.

To download this manual's complete digital product, follow the instructions below:

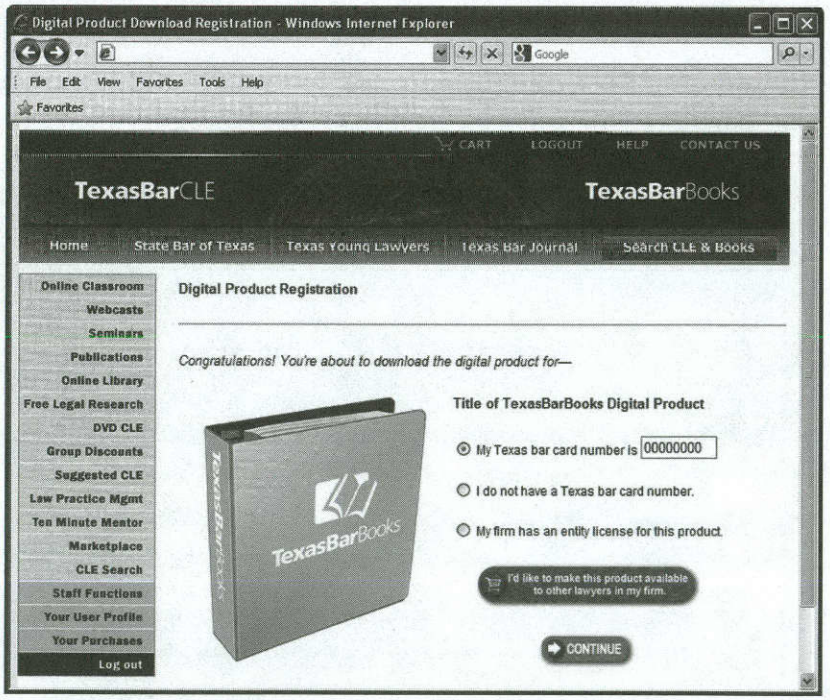
1. Type **http://www.texasbarcle.com/collections-2012/** into your browser's address bar and press your keyboard's "Enter" key.



2. If you are not yet a registered user of TexasBarCLE's Web site, use the "click here" link to complete the quick, free registration. Otherwise, simply log in.



3. The initial download Web page should look similar to the one below.



See **http://texasbarbooks.net/download-tips/** for more download and installation tips.

TexasBarBooks Navigational Toolbar

When preparing forms in your office using this manual's editable text files, the TexasBarBooks Navigational Toolbar enables you to—

- view or hide the instructions embedded in the word-processing forms;
- find and highlight the next variable, instruction, or optional text;
- browse, select, and copy clause text from forms that are collections of clauses;
- retain the embedded instructions for viewing while you work on your hard drive but prevent them from printing on your hard copies; and
- delete the embedded instructions entirely on forms you plan to e-mail or file electronically.

View the video tutorial at **http://texasbarbooks.net/tutorials/**. (You may also open 'ToolbarTutorial' in the digital product's 'Forms' folder.)

[Reserved]

Introduction

The *Texas Collections Manual, Fourth Edition*, is more than a form book. It is a practice guide for attorneys in Texas who handle collections matters. This fourth edition of the manual reflects major changes in organization from the previous edition, with significant improvements for the user. The manual is organized by the logical sequence of events that would occur while following a collections matter from beginning to end. Each chapter contains a detailed table of contents; each contains practice notes concerning the topic of the chapter. The forms take up the greater part of most chapters. The uniform format of practice notes and forms, organized according to a simpler, more logical numbering scheme, is designed to enhance readability and ready reference and to accommodate easier word-processing use of the forms. The downloadable digital product version of the *Texas Collections Manual* contains the entire manual as an Adobe Acrobat PDF file, internally hyperlinked and fully word-searchable, allowing quick and easy launching of a desired form into word-processing software. See the material behind the tab titled 'Digital Product Documentation' in volume 1 for further information about the file and instructions for downloading it.

§ 1 Practice Notes

The practice notes are short synopses of the law, designed to serve as a primer to the very basic matters involved in a particular chapter. These notes are, at most, black-letter law and do not try to resolve questions in controversial areas. For the attorney experienced with collections matters, these notes should serve as a reminder of some of the basics; for the attorney not so experienced, they should provide an orientation to the major matters with which the attorney needs to be concerned when contemplating a particular cause of action.

Although the notes are not intended as a treatise on collections matters, they contain much important information that must be understood before the forms may be used responsibly.

§ 2 Forms

The forms (except those promulgated by the Office of the Secretary of State or bankruptcy courts and those derived from the Bankruptcy Code) were prepared by members of a committee of experts in the collections field, and great care has gone into their preparation. The forms represent the best thinking of the practicing attorneys on the committee. Perfection is hard to achieve, however, and each attorney using these materials must depend on his or her own expertise and knowledge of the law; there is no substitute in a particular case for the legal mind. Thus, care should be taken to ensure that any form used fits the case and treats the problems of that case.

1. Optional content

Within major sections of the text of forms, optional paragraphs or items are usually identified by boxed instructions. Because the manual can cover only relatively common situations in collections cases, language needed to address an atypical issue in a particular case may not appear in the form. The user must take care both to eliminate language appearing in the form that is not appropriate for the particular case and to add any language needed for the particular case that does not appear in the form.

2. Typeface conventions

Two typefaces are used in the forms. Material in Times Roman (like most of this page) is

appropriate for inclusion in a finished form. In contrast, Arial type is used for boxed instructions. When Arial type is used within the form itself (rather than in a box), it appears in **boldface** for emphasis.

3. Bracketed material

Several types of bracketed material appear in the forms.

Choice of terms. In a bracketed statement such as '[a writ of execution/an order of sale], the user must choose between the terms or phrases within the brackets. The choices are separated by forward slash marks.

Optional words. In a phrase such as 'Note [and Security Agreement], the user must determine whether to include the phrase 'and Security Agreement.

Substitution of terms. In a bracketed statement such as '[**name of judgment debtor**], the user is to substitute the name of the judgment debtor rather than typing the bracketed material verbatim.

Instructions for use. Material such as '[**include if applicable:**]' and '[**set out venue facts**]' provides instructions for completing the finished form and should not be typed verbatim in the document. Bracketed instructions at the beginning of almost all the forms refer the user to section 3 of this introduction for instructions about composing the caption of the form.

Subtitles. The titles of some forms are followed by a bracketed subtitle that is not to be typed as part of the form title. In the title 'Judgment [Based on Jury Verdict], for example, the bracketed words simply distinguish the form from another similarly titled form in the same chapter for ease of reference.

4. Blank lines

Signature lines appear as blank lines. Spaces for dates, times, and amounts that would be filled in *after* the document is prepared also appear as blank lines. (If an actual date, time, or amount should be inserted in the form when it is prepared, '[**date**], '[**time**], or '$[**amount**]' appears instead.)

5. Language in boxes

Language in boxes is not to be typed in the finished document but constitutes instructions, usually either telling the user whether to use the form language following the box, describing what information should be included at that point in the finished document or attached to it, or providing cautionary reminders about use of the form language.

6. Form numbers

Forms are numbered in sequence within each chapter. All forms begin with the number of the chapter, which is followed by a hyphen and the number of the form within the chapter. Some forms in chapter 9 consist only of clauses to be inserted in other forms. In these instances the clauses are numbered in sequence using the form number, followed by the number of the clause—for example, clause 14-27-1 in form 14-27. This system is used to permit future expansion of any chapter without requiring the rearrangement of the entire book.

7. Captions

An example of the caption that should precede the form title is not reprinted in the forms that require it. Typical case styles are discussed in section 3 below.

8. Digital product

The downloadable digital product version of the *Texas Collections Manual* contains the entire text of the manual as a single PDF file that is searchable and hyperlinked to allow for easy, rapid navigation to topics of interest. Also included are electronic versions of all State Bar of Texas-copyrighted forms from the manual as editable text files as well as printable or downloadable PDF files of selected forms linked from the main forms PDF file for easy retrieval.

Applicable Texas and federal case and statute citations in the practice notes and forms instructions are linked to case reports and main code sections cited via Casemaker online.

For more information about the digital product including usage notes, see the material following the 'Digital Product Documentation' tab in volume 1 of this manual.

§ 3 Captions of Forms

1. Court designations for caption of petition

Although no statute or rule prescribes the form for identifying in the caption the state court in which the petition is filed, the court and county should be named. If one of several courts may hear the case, as in counties with several district courts and county courts at law, the caption should have a blank on which the clerk can write the appropriate number when the petition is filed. The court designations set out below are recommended for captions.

District Court

IN THE DISTRICT COURT
OF _____ COUNTY TEXAS
_____ JUDICIAL DISTRICT

Constitutional County Court

IN THE COUNTY COURT
OF _____ COUNTY, TEXAS

Unnumbered County Court at Law

IN THE COUNTY COURT AT LAW
OF _____ COUNTY TEXAS

Numbered County Court at Law

IN THE COUNTY COURT AT LAW
NUMBER _____ OF
_____ COUNTY TEXAS

Justice Court

IN THE JUSTICE COURT
FOR PRECINCT NUMBER _____
OF _____ COUNTY TEXAS

2. Appearance of caption

The generally accepted appearance for captions in Texas pleadings has the cause number at the top center of the first page, the parties on the left, the court designation on the right, and a dividing line between the two, as set out below. Some counties may reverse the appearance of the court and cause number.

No. 00–12345

PAUL PAYNE	§	IN THE DISTRICT COURT
Plaintiff	§	
	§	OF TRAVIS COUNTY TEXAS
v.	§	
	§	
DON DAVIS	§	
Defendant	§	345th JUDICIAL DISTRICT

§ 4 Page Numbers

Page numbers are consecutive for both practice notes and forms within each chapter. Practice notes begin with the number of the chapter, followed by the number of the page within the chapter. Forms begin with the number of the form, followed by the number of the page within the form. This system is used to permit revisions within any chapter without renumbering the pages in the remaining chapters.

§ 5 Corrections and Updates

In drafting the manual, the members of the committee devoted a great deal of effort to making it error free, but it undoubtedly contains some errors. We would appreciate your pointing out any errors you find in the manual, as well as any revisions you believe are advisable. Please mail any corrections or suggestions to the following address:

Director, TexasBarBooks
State Bar of Texas
P.O. Box 12487
Austin, TX 78711-2487
books@texasbar.com

Periodic updating of the manual is planned to reflect changes in the law. It is also expected that, over time, additional topics will be covered and the scope of coverage of existing topics will be expanded. We welcome your suggestions about new topics that you would find helpful. Please send your suggestions to the address shown above.

Chapter 1

Debt Collection Law Practice

I. Managing the Law Office

II. Client Relations

III. Attorney's Fees and Expenses

IV. Preparation of Pleadings and Other Documents

Forms

[Reserved]

§ 1.23:2 Net Recovery Not Required

Although the claimant must prevail on the claim, a net recovery is not needed to support an attorney's fee award under chapter 38 of the Civil Practice and Remedies Code. *McKinley v. Drozd*, 685 S.W.2d 7, 11 (Tex. 1985); *Gereb v. Smith-Jaye*, 70 S.W.3d 272 (Tex. App.—San Antonio 2002, no pet.).

§ 1.23:3 Presentment of Claim

A demand for the claim must be made and go unpaid for thirty days for attorney's fees to be recovered. Tex. Civ. Prac. & Rem. Code § 38.002. The claim must be presented thirty days before trial, not thirty days before filing suit. *K.C. Roofing Co. v. Abundis*, 940 S.W.2d 375, 379 (Tex. App.—San Antonio 1997, writ denied). The purpose of the requirement for presentment is to allow the person against whom the claim is asserted an opportunity to pay within thirty days after notice without incurring an obligation for attorney's fees. *Jones v. Kelley*, 614 S.W.2d 95, 100 (Tex. 1981); *Grace v. Duke*, 54 S.W.3d 338, 344 (Tex. App.—Austin 2001, pet. denied). Presentment does not have to be made by the attorney: it can be an invoice from the creditor to the debtor before referral to the attorney. *Adams v. Petrade International, Inc.* 754 S.W.2d 696, 719 (Tex. App.—Houston [1st Dist.] 1988, writ denied); *Gensco, Inc. v. Transformaciones Metalurgicias Especiales, S.A.* 666 S.W.2d 549, 554 (Tex. App.—Houston [14th Dist.] 1984, writ dism'd).

No particular form or manner of presentment is required. *Ashford Development, Inc. v. USLife Real Estate Services Corp.* 661 S.W.2d 933, 936 (Tex. 1983); *Grace*, 54 S.W.3d at 344; *Honeycutt v. Billingsley*, 992 S.W.2d 570, 581 (Tex. App.—Houston [1st Dist.] 1999, pet. denied); *Panizo v. YMCA*, 938 S.W.2d 163, 168 (Tex. App.—Houston [1st Dist.] 1996, no writ). The claim may be made orally or in writing, but in either case it should disclose what is claimed to be owed with reasonable accuracy. *See Lewis v. Deaf Smith Electric Cooperative, Inc.*, 768 S.W.2d 511, 513 (Tex. App.—Amarillo 1989, no writ); *Seureau v. Mudd*, 515 S.W.2d 746, 749 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.); *W.G. Tufts & Son v. Herider Farms, Inc.* 485 S.W.2d 300, 303–04 (Tex. Civ. App.—Tyler 1972, writ ref'd n.r.e.). The filing of a lawsuit does not suffice as a means of presentment of the claim. *Huff v. Fidelity Union Life Insurance Co.* 312 S.W.2d 493, 500 (Tex. 1958); *Jim Howe Homes, Inc. v. Rogers*, 818 S.W.2d 901, 904 (Tex. App.—Austin 1991, no writ). A defendant's offer to settle is insufficient as a defense to a claim for attorney's fees. *Commercial Union Insurance Co. v. La Villa Independent School District*, 779 S.W.2d 102, 107 (Tex. App.—Corpus Christi 1989, no writ).

§ 1.23:4 Pleading and Proof

The plaintiff must plead and prove that presentment of a contract claim was made to the opposing party and that the party failed to tender performance. *Ellis v. Waldrop*, 656 S.W.2d 902, 905 (Tex. 1983); *see also Paramount Pipe & Supply Co. v. Muhr.* 749 S.W.2d 491, 494–95 (Tex. 1988); *Panizo v. YMCA*, 938 S.W.2d 163, 168 (Tex. App.—Houston [1st Dist.] 1996, no writ). For a discussion of sufficiency of the evidence, see *Aquila Southwest Pipeline, Inc. v. Harmony Exploration, Inc.* 48 S.W.3d 225, 240–41 (Tex. App.—San Antonio 2001, pet. denied).

§ 1.23:5 Oral and Written Contracts

Statutory attorney's fees are available for a claim on a contract, oral or written. Tex. Civ. Prac. & Rem. Code § 38.001(8). There is no need for an attorney's fee provision in the contract to recover attorney's fees under this statute. *First City Bank v. Guex*, 677 S.W.2d 25, 30 (Tex. 1984); *Dickerson v. DeBarbieris*, 964 S.W.2d 680, 688 n.11 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

A 'written contract' includes a negotiable instrument. *Community National Bank v. Channelview Bank*, 814 S.W.2d 424, 427 (Tex. App.—Houston [1st Dist.] 1991, no writ); *Barham v. Sugar Creek National Bank*, 612 S.W.2d 78, 80–81 (Tex. App.—Houston [14th Dist.] 1981, no writ).

§ 1.23:6 Rendered Services

For the purposes of chapter 38 of the Civil Practice and Remedies Code, 'rendered services' include generally any act performed for the benefit of another under some arrangement or agreement to perform the service. *Van Zandt v. Fort Worth Press*, 359 S.W.2d 893, 895 (Tex. 1962); *Mathews Construction Co. v. Jasper Housing Construction Co.* 528 S.W.2d 323, 326–27 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.). Rendered services include the following:

1. Ground preparation work performed by a dirt contractor. *Mathews Construction Co.* 528 S.W.2d at 327.
2. Utility company's furnishing electricity to owners of apartment houses. *Caston v. Texas Power & Light Co.* 501 S.W.2d 472, 473 (Tex. Civ. App.—Texarkana 1973, no writ).
3. Advertising and promotional services provided by the plaintiff, including those provided by third parties retained by the plaintiff, for the defendant's benefit. *Clark Advertising Agency v. Tice*, 490 F.2d 834, 837–38 (5th Cir. 1974).
4. Architect's services. *Allison v. Douglas*, 531 S.W.2d 445, 447–48 (Tex. Civ. App.—Waco 1975, no writ).
5. Engineer's services. *Mitchell v. M.M.M. Inc.* 261 S.W.2d 472, 475 (Tex. Civ. App.—Galveston 1953), *rev'd on other grounds*, 265 S.W.2d 584 (Tex. 1954).
6. Accountant's services. *Williams v. Milliger.* 352 S.W.2d 794, 796 (Tex. Civ. App.—Houston 1961, writ ref'd n.r.e.).
7. Attorney's services. *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482 (5th Cir. 1990); *see also Youngblood v. Wilson and Cureton*, 321 S.W.2d 887, 888 (Tex. Civ. App.—Fort Worth 1959, writ ref'd n.r.e.).

§ 1.23:7 "Labor Done"

For purposes of chapter 38 of the Civil Practices and Remedies Code, a claim for 'labor done' is a claim for a physical exertion type of personal service arising out of toil or manual labor for the direct benefit of the defendant. *Tenneco Oil Co. v. Padre Drilling Co.* 453 S.W.2d 814, 819 (Tex. 1970). The toil or manual labor may be performed by employees of a business, and the business may bring the action. *Maxwell Lumber Co. v. Merle Greer Co.* 501 S.W.2d 454, 456–57 (Tex. Civ. App.—Tyler 1973, no writ).

There must be a contractual relationship between the person performing the labor (or his employer) and the person against whom the claim is asserted. *First National Bank v. Sledge*, 653 S.W.2d 283, 288 (Tex. 1983), *superseded by statute on other grounds,* Tex. Prop. Code § 53.056(b), *as recognized in Morrell Masonry Supply, Inc. v. Lupe's Shenandoah Reserve, LLC*, No. 09–11–00284–CV, 2012 WL 952821 (Tex. App.—Beaumont 2012).

§ 1.23:8 "Material Furnished"

The 'material' referred to in Tex. Civ. Prac. & Rem. Code § 38.001 is the substance or substances or the part, goods, stock, or the like of which anything is composed or may be made.

Pacific Coast Engineering Co. v. Trinity Construction Co. 481 S.W.2d 406, 407 (Tex. 1972); *Ferrous Products Co. v. Gulf States Trading Co.* 332 S.W.2d 310, 313 (Tex. 1960). If the item furnished is the final or end product, not to be used as a component of a further or larger product, it is not 'material. *See Pacific Coast Engineering Co.* 481 S.W.2d at 407. Texas courts have held the following to be materials:

1. Water control gates furnished by a subcontractor to a general contractor to be used by the latter in a dam project. *Pacific Coast Engineering Co.* 481 S.W.2d at 407.

2. Steel beams. *Ferrous Products Co.* 332 S.W.2d at 313.

3. Ready-mixed concrete. *Page v. Superior Stone Products, Inc.* 412 S.W.2d 660, 666 (Tex. Civ. App.—Austin 1967. writ ref'd n.r.e.).

4. Fabricated plastic component parts used by the recipient in the assembly of fire extinguishers. *Ganda, Inc. v. All Plastics Molding, Inc.* 521 S.W.2d 940, 944 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.).

5. Fabricated metal housing for an electrical generator supplied to and used by a general contractor in completing its construction project. *Ambox, Inc. v. Stewart & Stevenson Services, Inc.* 518 S.W.2d 428, 432–33 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.).

There must be a contractual relationship between the person supplying the materials (or his employer) and the person against whom the claim is asserted. *First National Bank v. Sledge*, 653 S.W.2d 283, 288 (Tex. 1983).

§ 1.23:9 Sworn Account

See section 14.1 in this manual regarding sworn accounts generally. Only one transaction is necessary to recover attorney's fees for a suit on a sworn account. *Meaders v. Biskamp*, 316 S.W.2d 75, 78 (Tex. 1958).

§ 1.24 Other Statutory Bases for Recovery of Attorney's Fees

Other potential creditor-based actions allowing for recovery of attorney's fees include—

1. a statutory mechanic's lien against a motor vehicle, motorboat, vessel, or outboard motor (Tex. Prop. Code § 70.008);

2. nonjudicial foreclosure of a security interest in personal property (Tex. Bus. & Com. Code §§ 9.607. 9.609);

3. the assumed name statutes (Tex. Bus. & Com. Code § 71.201) (only attorney's fees and other expenses associated with locating and serving a party who has not complied with assumed name statutes);

4. defending against a groundless or harassing DTPA suit (Tex. Bus. & Com. Code § 17.50(c));

5. turnover proceedings (Tex. Civ. Prac. & Rem. Code § 31.002(a));

6. declaratory judgment actions (Tex. Civ. Prac. & Rem. Code § 37.009); and

7. false certification as to the evidentiary support or validity of a motion, claim, defense, or allegation (Tex. Civ. Prac. & Rem. Code § 10.002).

§ 1.25 Guarantor's Liability for Attorney's Fees

§ 1.25:1 Liability Based on Contract

If the underlying contract provides for payment of attorney's fees by the obligor, the guarantor of the obligation is similarly liable for attorney's fees. *Barclay v. Waxahachie Bank & Trust Co.* 568 S.W.2d 721, 724–25 (Tex. Civ. App.—Waco 1978, no writ); *McGhee v. Wynnewood State Bank*, 297 S.W.2d 876, 884 (Tex. Civ. App.—Dallas 1956, writ ref'd n.r.e.). If the guaranty agreement itself provides for the guarantor's liability for payment of attorney's fees, the guarantor is liable. *See Beltran v. Groos Bank, N.A.* 755 S.W.2d 944, 950–51 (Tex. App.—San Antonio 1988, no writ).

If both the underlying agreement and the guaranty agreement provide for attorney's fee liability, but the guaranty agreement provides for a greater or lesser scope of attorney's fee liability than does the underlying agreement, the scope of liability in the guaranty agreement controls. *Simpson v. MBank Dallas, N.A.* 724 S.W.2d 102, 110 (Tex. App.—Dallas 1987, writ ref'd n.r.e.); *Houston Furniture Distributors, Inc. v. Bank of Woodlake, N.A.* 562 S.W.2d 880, 884 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ).

§ 1.25:2 Liability Based on Texas Civil Practice and Remedies Code Chapter 38

Even without an express agreement to pay attorney's fees, a guarantor is nonetheless liable under an oral or written contract, pursuant to chapter 38 of the Civil Practice and Remedies Code. *See Robinson v. Surety Insurance Co.* 688 S.W.2d 705, 711 (Tex. App.—Fort Worth 1985, no writ).

§ 1.26 Attorney's Fees for Postjudgment Collection Efforts

The availability of attorney's fees for postjudgment collection efforts depends on the type of action. See section 27.66 in this manual regarding attorney's fees awarded to the garnishee's counsel in postjudgment garnishment and section 27.93 regarding attorney's fees in turnover actions.

§ 1.27 Proof of Attorney's Fees

§ 1.27:1 Attorney's Fees Recoverable but Amount Not Specified in Contract

Attorney's fees are considered unliquidated damages (*Higgins v. Smith*, 722 S.W.2d 825, 827–28 (Tex. App.—Houston [14th Dist.] 1987, no writ)) unless specified in the contract in question; see section 1.22:1 above. *Freeman v. Leasing Associates*, 503 S.W.2d 406, 408 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.). The creditor's attorney should therefore be prepared to offer evidence regarding the type and amount of work performed, the amount charged per hour, and the reasonableness of the fees. *Goudeau v. Marquez*, 830 S.W.2d 681, 683 (Tex. App.—Houston [1st Dist.] 1992, no writ). See also section 20.25:2 in this manual.

§ 1.27:2 Texas Civil Practice and Remedies Code Chapter 38

In a case in which recovery of attorney's fees is allowed by Tex. Civ. Prac. & Rem. Code § 38.001, the court can take judicial notice of the usual and customary attorney's fees and the contents of the case file without receiving further evidence in either a proceeding before the court or a jury case in which the amount of attorney's fees is submitted to the court by agreement. Tex. Civ. Prac. & Rem. Code § 38.004.

A 'proceeding before the court' apparently does not include a summary judgment motion or hearing. *See Coward v. Gateway National Bank*, 525 S.W.2d 857, 859 (Tex. 1975); *contra Long Trusts v. Atlantic Richfield Co.*, 893 S.W.2d 686, 688 (Tex. App.—Texarkana 1995, no writ); *Superior Ironworks, Inc. v. Roll Form Products, Inc.* 789 S.W.2d 430, 431 (Tex. App.—Houston [1st Dist.] 1990, no writ).

§ 1.27:3 Default Judgment

If attorney's fees are sought other than under chapter 38 of the Civil Practice and Remedies Code, some proof of attorney's fees, either by affidavit or by live testimony, will be needed to sustain an award of attorney's fees for a default judgment. *Nettles v. Del Lingco of Houston*, 638 S.W.2d 633, 635–36 (Tex. App.—El Paso 1982, no writ). If judgment is sought under Tex. Civ. Prac. & Rem. Code § 38.001, the court can take judicial notice of the usual and customary attorney's fees and the contents of the case file without receiving further evidence. Tex. Civ. Prac. & Rem. Code § 38.004.

§ 1.27:4 Summary Judgment

If the claim for attorney's fees is not governed by chapter 38 of the Civil Practice and Remedies Code, unless the attorney's fees can be characterized as liquidated damages, the creditor's attorney should prepare an affidavit setting out the factors listed in Tex. Disciplinary R. Prof'l Conduct 1.04(b). The attorney can execute the affidavit; the attorney's opinion that the fee is reasonable is sufficient, if uncontroverted by an opposing affidavit. *Sunbelt Construction Corp. v. S&D Mechanical Contractors, Inc.* 668 S.W.2d 415, 418 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.). See section 1.27:2 above regarding summary judgment motions in cases governed by chapter 38 of the Civil Practice and Remedies Code.

§ 1.28 Discovery Sanctions

Awards of attorney's fees for discovery abuse are discussed at sections 18.73 and 18.74 in this manual.

§ 1.29 Appellate Proceedings

§ 1.29:1 Appellate Attorney's Fees Generally

The trial court's award of attorney's fees may include appellate attorney's fees if there is evidence of the reasonableness of fees for appellate work. The reasonableness of attorney's fees is a fact issue that must be passed on by the trier of fact. The appellate court may not initiate an award for work done in the appellate process, because doing so would involve the exercise of original rather than appellate jurisdiction. *International Security Life Insurance Co. v. Spray*, 468 S.W.2d 347, 349 (Tex. 1971).

A general pleading seeking recovery of "reasonable attorney's fees' has been held to authorize the award of appellate attorney's fees. *Superior Ironworks, Inc. v. Roll Form Products, Inc.* 789 S.W.2d 430, 431 (Tex. App.—Houston [1st Dist.] 1990, no writ); *Ledisco Financial Services, Inc. v. Viracola*, 533 S.W.2d 951, 958 (Tex. Civ. App.—Texarkana 1976, no writ). However, the attorney should present evidence relating to attorney's fees not only for trial work but also for appellate work. If the case goes to trial, an issue should be requested inquiring as to reasonable attorney's fees for services performed in handling the various stages of an appeal. *See Central Adjustment Bureau, Inc. v. Gonzales*, 528 S.W.2d 314, 316–17 (Tex. Civ. App.—San Antonio 1975, no writ).

§ 1.29:2 Wording of Judgment

An award of appellate attorney's fees should be couched in remittitur language, to avoid objections of lack of finality, lack of definiteness, and

the existence of a conditional judgment. *Failing v. Equity Management Corp.* 674 S.W.2d 906, 909 (Tex. App.—Houston [1st Dist.] 1984, no writ); *see also Goebel v. Brandley*, 76 S.W.3d 652, 658–59 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (remittitur language permissible). Alternatively, the judgment may recite specific amounts to be awarded in the event of an unsuccessful appeal to the court of appeals and the supreme court. *See Vaughn v. DAP Financial Services, Inc.*, 982 S.W.2d 1, 9 (Tex. App.—Houston [1st Dist.] 1997. no pet.); *Pao v. Brays Village East Homeowners Ass'n*, 905 S.W.2d 35, 38–39 (Tex. App.—Houston [1st Dist.] 1995, no writ).

[Section 1.30 is reserved for expansion.]

IV. Preparation of Pleadings and Other Documents

This part of this chapter is concerned with pleading and motion form and content only as they apply particularly to collections litigation. A comprehensive discussion of pleading form is beyond the scope of this manual.

§ 1.31 Signature on Pleading or Motion

All pleadings must be signed by the party or the party's attorney. Tex. R. Civ. P. 45(d). The signing of a pleading or motion constitutes a certificate that, to the signatory's best knowledge, information, and belief, formed after reasonable inquiry—

1. the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation;
2. each claim, defense, or other legal contention contained in it is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law:
3. each allegation or other factual contention has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery: and
4. each denial of a factual contention is warranted on the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief.

Tex. Civ. Prac. & Rem. Code § 10.001.

The opposing party may file a motion for sanctions if it believes that one of these certifications is false. Tex. Civ. Prac. & Rem. Code § 10.002(a). The court may also find, sua sponte, that a certification is false. On such a finding, the court may award expenses and attorney's fees incurred as a result and, if no due diligence is shown, may also award costs for inconvenience, harassment, and out-of-pocket expenses incurred or caused. Tex. Civ. Prac. & Rem. Code § 10.002(c). This award may not be given without notice and hearing. Tex. Civ. Prac. & Rem. Code § 10.003.

§ 1.32 Affidavits

§ 1.32:1 Definition

The Texas Government Code defines an 'affidavit' as a statement in writing of a fact or facts signed by the party making it, sworn to before an officer authorized to administer oaths, and officially certified by the officer under his seal of office. Tex. Gov't Code § 312.011.

An affidavit must have a notary's jurat, not the notary's acknowledgment. *Perkins v. Crittenden*, 462 S.W.2d 565, 568 (Tex. 1970); *see also Natural Gas Clearinghouse v. Midgard Energy Co.* 23 S.W.3d 372, 378–79 (Tex. App.—Amarillo 1999, pet. denied); *Sullivan v. Bickel & Brewer.* 943 S.W.2d 477. 486 (Tex. App.—Dallas 1995, writ denied).

§ 1.32:2 Contents of Affidavit

An affidavit must be made on personal knowledge, must affirmatively show the competence of the affiant to testify to the matters stated, must state facts that would be admissible in evidence, and must have attached to it or served with it sworn or certified copies of all papers or parts referred to in the affidavit. Tex. R. Civ. P. 166a(f).

An affidavit must disclose the basis of the personal knowledge. *Radio Station KSCS v. Jennings*, 750 S.W.2d 760, 761–62 (Tex. 1988); *M.G.M. Grand Hotel, Inc. v. Castro*, 8 S.W.3d 403, 406–07 (Tex. App.—Corpus Christi 1999, no pet.). It need not expressly state that its contents are true or that the affiant is competent to testify about the contents if competence is established by the facts in the affidavit. *Cook v. Frazier.* 765 S.W.2d 546, 551–52 (Tex. App.—Fort Worth 1989, no writ).

Unless otherwise authorized by statute, an affidavit is insufficient unless the allegations contained in it are direct and unequivocal, and perjury can be assigned to them if they prove to be incorrect. It must contain facts, not mere conclusions. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984); *Welch v. Doss Aviation, Inc.* 978 S.W.2d 215, 222 (Tex. App.—Amarillo 1998, no pet.); *Requipco, Inc. v. Am-Tex Tank & Equipment, Inc.* 738 S.W.2d 299, 302 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.). It should positively and unqualifiedly represent the facts it discloses to be true and within the declarant's personal knowledge. *Brownlee*, 665 S.W.2d at 112. It should not merely recite that the affiant has personal knowledge of the facts testified to in the affidavit; it should show how the affiant has personal knowledge of these facts. *See Youngstown Sheet & Tube Co. v. Penn*, 363 S.W.2d 230, 233 (Tex. 1962); *Murfee v. Oquin*, 423 S.W.2d 172, 173–74 (Tex. Civ. App.—Amarillo 1967. writ ref'd n.r.e.).

§ 1.32:3 *Caveat:* "Knowledge and Belief"

Affidavits using phrases such as 'based upon my best recollection and belief,' 'to the best of my knowledge and belief,' and 'to the best of knowledge and belief" do not positively and unqualifiedly represent the facts to be true and within the personal knowledge of the affiant. *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996); *Lee v. Lee*, 43 S.W.3d 636, 641 (Tex. App.—Fort Worth 2001, no pet.); *Lightfoot v. Weissgarber.* 763 S.W.2d 624, 628 (Tex. App.—San Antonio 1989, writ denied).

§ 1.32:4 Affidavits and Business Records

An affidavit made under Tex. R. Civ. P. 185 and Tex. R. Evid. 902(10) may be used to authenticate and identify business records, and such an affidavit will support a summary judgment based on the pleadings. *Special Marine Products, Inc. v. Weeks Welding & Construction, Inc.* 625 S.W.2d 822, 826–27 (Tex. App.—Houston

[14th Dist.] 1981, no writ); *see also Hudspeth v. Investor Collection Services Ltd. Partnership*, 985 S.W.2d 477 (Tex. App.—San Antonio 1998, no pet.) (lender need not file detailed proof reflecting calculations of balance due on note; affidavit of bank employee setting forth total balance due is sufficient). It will not, however, satisfy the requirement of Tex. R. Civ. P. 166a(f) that the affidavit be made on personal knowledge of the affiant, and it will not permit the affiant to testify as to the contents of the business records unless personal knowledge of the contents is affirmatively shown. *Horn v. First Bank of Houston*, 530 S.W.2d 864, 865–66 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

§ 1.32:5 Attorneys Executing Affidavits

Some affidavits, such as those supporting a sworn account petition, may be executed by the party, his agent, or his attorney. Tex. R. Civ. P. 185. The attorney should never execute any such affidavit unless the attorney has personal knowledge of the facts contained in it. *See* Tex. Disciplinary R. Prof'l Conduct 3.03. *See also* Tex. Comm. on Prof'l Ethics, Op. 405 (1983) (to knowingly verify false pleading may subject attorney to discipline and constitutes perjury).

§ 1.32:6 Affidavits in Sworn Account Cases

See section 14.1:4 in this manual regarding the contents of an affidavit in a sworn account case.

§ 1.32:7 Verified Pleadings

A verified pleading is one that includes an affidavit, attached to the pleading, verifying that the contents of the pleading are true. The list of items alleged in a pleading that must be verified is found at Tex. R. Civ. P. 93. Typical defensive matters raised by verified pleadings in collections cases include—

1. denial of the execution of a written instrument (Tex. R. Civ. P. 93(7));
2. allegation that a written instrument on which a pleading is founded is without consideration or that the consideration has failed in whole or in part (Tex. R. Civ. P. 93(9));
3. denial of a sworn account (Tex. R. Civ. P. 93(10)); and
4. that a contract is usurious (Tex. R. Civ. P. 93(11)).

§ 1.32:8 Affidavit Evidencing Lien on Real Property

If a promissory note that was made by a third party, payable to the debtor and secured by a lien on real property, has been taken as collateral by a secured party, there is normally nothing in the real property records giving notice of the potential claim of the secured party if an attempt is made by the secured party to collect the third party's promissory note accompanied by foreclosure of the real property lien. Tex. Bus. & Com. Code § 9.607(a)(3) provides that after default a secured party may enforce the obligations of a person obligated on collateral. The secured party may exercise the rights the debtor has to enforce the obligations of the person obligated on the collateral to make payment or otherwise render performance to the debtor, including the debtor's rights with respect to any property that secures the obligations. To facilitate enforcement if the collateral involves a lien on real property, the secured party may record in the office in which a record of the mortgage is recorded—

1. a copy of the security agreement that creates or provides for a security interest in the obligation secured by the mortgage; and
2. the secured party's sworn affidavit in recordable form stating that—

a. a default has occurred *with respect to the obligations secured by the mortgage*; and

b. the secured party is entitled to enforce the mortgage nonjudicially.

Tex. Bus. & Com. Code § 9.607(b) (emphasis added to denote language added to the statute effective July 1, 2013).

§ 1.33 Exhibits

Documentary exhibits may be attached to pleadings. Tex. R. Civ. P. 59. Original documents should not be attached as exhibits to pleadings unless the court so requires; the originals may be mislaid. A verified copy of the document may be attached to the pleading if necessary.

A document is not put into evidence merely by attaching it to a pleading. If an exhibit is a necessary element of proof, it must be separately introduced into evidence. The pleading itself, with documents attached, may be introduced. This is a useful default judgment procedure. If the allegations in the petition conflict with the written documentary evidence, the evidence, not the pleadings, will prevail. *Cecil v. Hydorn*, 725 S.W.2d 781, 782 (Tex. App.—San Antonio 1987, no writ).

§ 1.34 Adoption by Reference

Statements in a pleading may be adopted by reference to a statement in another pleading or motion or elsewhere in the same pleading, as long as the pleading containing the statements has not been superseded by amendment. Tex. R. Civ. P. 58.

§ 1.35 Amended and Supplemental Pleadings

The distinction between amended and supplemental pleadings is clearly stated in Tex. R. Civ. P. 62–70, but the difference frequently becomes blurred in actual practice. *See Hawkins v. Anderson*, 672 S.W.2d 293 (Tex. App.—Dallas 1984, no writ). An amended pleading adds to or takes from a previously filed pleading, whereas a supplemental pleading is addressed to a pleading of another party and is designed to answer allegations. Tex. R. Civ. P. 62, 69. For example, if the plaintiff must allege that the defendant waived the statute of limitations because the defendant raised the defense in his answer, he would do so in a supplemental petition. An amended pleading must identify the instrument being amended; it must be titled, for example, 'Plaintiff's First Amended Petition' and is a complete substitute for the earlier pleading. Tex. R. Civ. P. 64.

§ 1.36 Misnamed Pleadings

If a party has mistakenly designated any pleading, the court must treat the pleading as if it had been properly designated, if justice so requires. Tex. R. Civ. P. 71. The legal effect of a pleading is not determined by its style, but by its allegations and evident purpose. *Hawkins v. Anderson*, 672 S.W.2d 293, 295 (Tex. App.—Dallas 1984, no writ). Pleadings must be docketed as originally designated and will remain identified as designated, unless the court orders redesignation. On court order, the clerk must modify the docket and all other clerk records to reflect redesignation. Tex. R. Civ. P. 71.

§ 1.37 Filing and Service of Papers in Suit

§ 1.37:1 Filing and Service Generally

An attorney must file every pleading, plea, motion, and application to the court for an order, unless the document is presented during a hearing or trial. A copy of the document filed must be served on all opposing parties or their attorneys. Tex. R. Civ. P. 21. Service may be made in person, by courier receipted delivery, by regis-

tered or certified mail, by facsimile, or by any other manner that the court may direct. If sent by mail, the document must be sent to the recipient's last known address. Service by mail is considered complete when the document is deposited, with proper postage, with the United States Postal Service. Service by facsimile after 5:00 P.M. is considered to have been served the following day. Tex. R. Civ. P. 21a.

§ 1.37:2 Certificate of Service

The attorney must attach a certificate of service to the document that was served. This certificate should state the manner of service, who was served, and when service was made. Tex. R. Civ. P. 21, 21a. A certificate of service is at form 1-6 in this chapter.

The attorney should keep a record of the method of delivery. For service by certified mail, the receipt number should be noted, and when the green card comes back, it should be stapled to the file copy. For fax transmissions, a copy of whatever record the fax machine generates should be attached to the file copy. For courier receipted delivery, a copy of the receipt should be attached.

§ 1.37:3 Electronic Filing of Court Documents

Many Texas counties have adopted local rules concerning the electronic filing of court documents. Practitioners are advised to check the local rules of the appropriate county for e-filing requirements and procedures. More information about electronic filing in Texas can be found on the Texas Courts Online Web site at **www.courts.state.tx.us/jcit/Efiling/EfilingHome.asp**. A list of the approved local rules pertaining to electronic filing may be accessed directly at **www.courts.state.tx.us/jcit/Efiling/EFilingRules.asp**.

§ 1.38 Notice of Hearing

When a motion is to be presented to the court for hearing, it is good practice to include a notice of hearing. The notice should be included at the end of the motion, before the certificate of service, or, depending on local practice, it may be filed as a separate document. A notice of hearing is at form 1-7 in this chapter.

§ 1.39 Transmittal Letters

It is a good idea to include a dated transmittal letter when sending a document to the client, the debtor, or opposing counsel. Even if the document is self-explanatory, a copy of the letter in the case file provides evidence that the document was indeed sent.

Chapter 2

Laws Affecting Debt Collection

I. Overview of Debtor-Creditor Statutes

II. Federal Fair Debt Collection Practices Act

III. Texas Debt Collection Practices Act

IV. Interest and Time-Price Differential

V. Usury

VI. Federal Statutory Requirements

VII. Texas Consumer Credit Laws

VIII. Other Texas Statutes Affecting Debtor-Creditor Relations

IX. Acceleration; Holder in Due Course

X. Revised Chapter 9 of Texas Business and Commerce Code: Secured Transactions

§ 2.41:2 Use, Forbearance, or Detention of Money

The "use" of money is that which is contracted for when a loan is made. Forbearance occurs if there is a debt due or to become due and parties agree to extend the time of its payment. Detention of money arises within the meaning of the usury statute if a debt has become due and the debtor has withheld payment without a new contract giving him the right to do so. *Parks v. Lubbock*, 51 S.W. 322, 323 (Tex. 1899); *Tygrett v. University Gardens Homeowners' Ass'n*, 687 S.W.2d 481, 483 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

§ 2.42 Charges Other Than Contractual Interest

§ 2.42:1 Other Charges Generally

It is often essential in potential usury cases to determine whether a particular charge constitutes "interest." Successful usury claims or defenses have often been made on the basis of categorizing a charge as interest even though the interest rate of the loan itself was nonusurious. In general, whether a charge is construed as interest depends on the substance of the transaction, not what the charge is called. *First USA Management, Inc. v. Esmond*, 960 S.W.2d 625, 627 (Tex. 1997); *Gonzales County Savings & Loan Ass'n v. Freeman*, 534 S.W.2d 903, 906 (Tex. 1976). An amount charged or collected in connection with a loan but not for the use, forbearance, or detention of money is not interest. *First Bank v. Tony's Tortilla Factory, Inc.*, 877 S.W.2d 285, 288 (Tex. 1994) (bank's insufficient funds charges); *Texas Commerce Bank-Arlington v. Goldring*, 665 S.W.2d 103, 104 (Tex. 1984) (lender's attorney's fees).

§ 2.42:2 "Front-End" Charges

If the lender charges or deducts prepaid interest, fees, commissions, or other "front-end" charges, and these charges do not purchase additional consideration, they are considered interest. To determine whether the additional interest charge constitutes usury, the amount of the stated principal is reduced by the charges to calculate the interest rate. *Nevels v. Harris*, 102 S.W.2d 1046, 1049 (Tex. 1937); *Gibson v. Drew Mortgage Co.*, 696 S.W.2d 211, 212–13 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.); *see also Riverdrive Mall, Inc. v. Larwin Mortgage Investors*, 515 S.W.2d 5, 8–9 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

§ 2.42:3 Commitment Fees

If the consideration given by the lender is the lender's commitment to make a loan in the future, the charge for that commitment is not interest. *Gonzales County Savings & Loan Ass'n v. Freeman*, 534 S.W.2d 903, 906 (Tex. 1976).

§ 2.42:4 Late Charges

If a borrower is charged for failing to make a required loan payment on time, the charge has been held to be a "charge for the detention of money" and therefore interest. *Butler v. Holt Machinery Co.*, 741 S.W.2d 169, 173–74 (Tex. App.—San Antonio 1987, writ denied). If the transaction is not a credit or lending transaction, however, a late charge is not interest. *See, e.g., Bexar County Ice Cream Co. v. Swensen's Ice Cream Co.*, 859 S.W.2d 402, 406 (Tex. App.—San Antonio 1993, writ denied) (franchise agreement), *overruled on other grounds by Barraza v. Koliba*, 933 S.W.2d 164, 167–68 (Tex. App.—San Antonio, 1996, writ denied); *Potomac Leasing Co. v. Housing Authority of City of El Paso*, 743 S.W.2d 712, 713 (Tex. App.—El Paso 1987, writ denied) (lease).

If the debtor alleges usury because of late charges, the presence of a usury savings clause in the contract may negate the usury claim. *See Parhms v. B&B Ventures, Inc.*, 938 S.W.2d 199, 203–04 (Tex. App.—Houston [14th Dist.] 1997,

writ denied). See section 2.59 below regarding usury savings clauses.

Many types of loans set out in the Finance Code have specific provisions governing late charges. For example, see Tex. Fin. Code § 348.107 regarding motor vehicle installment loans.

§ 2.42:5 Prepayment Penalties or Charges

For a loan subject to chapter 306 of the Finance Code, a prepayment premium, make-whole premium, or similar fee or charge is not interest. Tex. Fin. Code § 306.005 (commercial transactions); *Boyd v. Life Insurance Co. of the Southwest*, 546 S.W.2d 132, 133 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.). Prepaid interest or other charges, however, must be refunded in several types of loan transactions—for example, installment loans, retail installment transactions, motor vehicle installment transactions, and small cash advance loans. See sections 2.84:5, 2.84:6, 2.86:3, and 2.88:3 below.

§ 2.42:6 Assumption of Third Party's Debt

If as a condition of making a loan to a borrower a lender requires that the borrower assume a third party's debt to that lender, the amount of the assumed debt is interest on the new loan. *Alamo Lumber Co. v. Gold*, 661 S.W.2d 926, 928 (Tex. 1983). But if the lender requires that the borrower assume a debt owed to another creditor, that debt is not interest. *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 935–36 (Tex. 1991).

§ 2.42:7 Pleadings

A pleading asserting a claim for prejudgment interest for a period during which no interest was due does not constitute a "charge" of interest and therefore is not subject to a usury claim. *George A. Fuller Co. of Texas v. Carpet Services, Inc.*, 823 S.W.2d 603 (Tex. 1992). Pleadings are directed to the court and not the debtor and therefore are not a charging.

§ 2.43 Methods of Computing Interest

§ 2.43:1 United States Rule

Under the United States Rule, interest is computed on the principal for only that time during which the principal is unpaid. If a payment is insufficient to pay accumulated interest, the unpaid interest continues to accumulate and is paid from proceeds of subsequent payments without being added to the unpaid balance; that is, interest does not accrue on a deficiency in payment of interest. This method is sanctioned by Regulation Z, 12 C.F.R. § 226.22, *reprinted in* 15 U.S.C.A. following § 1700 (West 2009 & Supp. 2012), as one way of computing the annual percentage rate for closed-end credit transactions.

§ 2.43:2 Actuarial Method

Under the actuarial method, at the end of each unit-period or fraction of a unit-period, the unpaid balance of the amount financed is increased by the finance charge earned during that period and is decreased by the total payment, if any, made at the end of that period. This method is generally considered the true rate of return on a creditor's investment and is one way of computing the annual percentage rate for closed-end transactions under Regulation Z. *See* 12 C.F.R. § 226.22, *reprinted in* 15 U.S.C.A. following § 1700 (West 2009 & Supp. 2012). Each payment is allocated between interest and principal so that it is applied first to accumulated interest with the remainder subtracted from (or any deficiency added to) the unpaid balance.

Kinerd v. Colonial Leasing Co., 800 S.W.2d 187, 190 (Tex. 1990).

§ 2.61:4 De Minimis Violation

A minor usury violation may be excused under the doctrine of de minimis non curat lex. *Thornhill v. Sharpstown Dodge Sales, Inc.*, 546 S.W.2d 151, 153 (Tex. Civ. App.—Beaumont 1976, no writ).

§ 2.61:5 Limitation of Liability (Texas Finance Code)

See section 2.90 below regarding limiting liability for excessive charge violations of the Finance Code.

§ 2.62 Statute of Limitation

A usury action brought under the Texas Credit Title must be brought within four years from the date when the usurious interest was contracted for, charged, or received. Tex. Fin. Code § 305.006(a).

An action for excessive charges brought under chapter 349 of the Texas Finance Code must be brought before the later of either the fourth anniversary of the date of the applicable loan or retail installment transaction or the second anniversary of the date of the violation. Tex. Fin. Code § 349.402(a). An action with respect to an open-end credit transaction, however, must be brought before the second anniversary of the date of the violation. Tex. Fin. Code § 349.402(b).

§ 2.63 Common-Law Usury

Texas courts have recognized a common-law usury claim deriving from Tex. Const. art. XVI, § 11. The elements are the same as for statutory usury; see section 2.51 above. This cause of action is not a suit for penalties, but one to declare the usurious transaction void. This means that no interest is collectible and the debtor is entitled to recover all interest paid. *See Allee v. Benser*, 779 S.W.2d 61, 65 (Tex. 1988); *Danziger v. San Jacinto Savings Ass'n*, 732 S.W.2d 300, 304 (Tex. 1987).

Tex. Fin. Code § 305.007 abolishes common-law remedies for violations of the former Texas Credit Title (now repealed).

[Sections 2.64 through 2.70 are reserved for expansion.]

VI. Federal Statutory Requirements

§ 2.71 Truth in Lending Act and Regulation Z

From a collections law perspective, the federal Truth in Lending Act and its accompanying Regulation Z affect two primary areas: disclosures and billing disputes.

§ 2.71:1 Covered and Exempt Transactions—Truth in Lending Act

The Truth in Lending Act, 15 U.S.C. §§ 1601–1667f, covers traditional credit transactions between consumer and creditor. *See, e.g., Pollock v. Birmingham Trust National Bank*, 650 F.2d 807 (5th Cir. 1981).

Transactions exempt from truth-in-lending coverage include business, commercial, and agricultural transactions, and credit transactions other than those in which a security interest is acquired in property to be used as the consumer's principal dwelling in which the total amount financed exceeds $50,000. 15 U.S.C. § 1603.

§ 2.71:2 Covered Transactions—Regulation Z

The Truth in Lending Act is implemented by Regulation Z of the Federal Reserve Board, 12 C.F.R. §§ 226.1–.33, *reprinted in* 15 U.S.C.A. following § 1700 (West 2009 & Supp. 2012).

In general, Regulation Z applies to individuals or businesses who offer or extend credit if—

1. the credit is extended or offered to consumers;
2. the offering or extension of credit is done regularly;
3. the credit is subject to a finance charge or is payable by a written agreement in more than four installments; and
4. the credit is primarily for personal, family, or household purposes.

If a credit card is involved, certain provisions of Regulation Z apply even if the credit is not subject to a finance charge or is not payable by a written agreement in more than four installments. 12 C.F.R. § 226.1(c).

§ 2.71:3 Required Disclosures—Open-End Transactions

12 C.F.R. § 226.5 details the disclosures required for open-end credit transactions. Generally, they fall into three categories:

1. Initial disclosure statements that must be furnished to the consumer before the first transaction is made. 12 C.F.R. § 226.5(b)(1) (with particular requirements set out at 12 C.F.R. § 226.6).
2. Periodic statements. 12 C.F.R. § 226.5(b)(2) (with particular requirements set out at 12 C.F.R. § 226.7).
3. Subsequent disclosures required if prior disclosures have become inaccurate. 12 C.F.R. § 226.5(e) (with particular requirements set out at 12 C.F.R. § 226.9).

A written disclosure statement must be provided to a potential cosigner on an open-end account, in substantially the wording set out in the regulation. 12 C.F.R. § 227.14(b).

§ 2.71:4 Required Disclosures—Credit Card Transactions

Required disclosures in credit card transactions are governed by 15 U.S.C. § 1637(c) and 12 C.F.R. § 226.5a. Most disclosure issues fall into three categories:

1. Annual percentage rates and fees. 15 U.S.C. § 1637(c)(1)(A)(i), (ii); 12 C.F.R. § 226.5a(b)(1).
2. Grace periods for avoiding finance charge, if such periods exist. 15 U.S.C. § 1637(c)(1)(A)(iii); 12 C.F.R. § 226.5a(b)(5).
3. How the balance is calculated. 15 U.S.C. § 1637(c)(1)(A)(iv); 12 C.F.R. § 226.5a(b)(6).

§ 2.71:5 Required Disclosures—Closed-End Transactions

The disclosure requirements for closed-end transactions are found at 12 C.F.R. §§ 226.17–.18.

§ 2.71:6 Commonly Encountered Violations

Some of the more common disclosure violations are listed below.

1. Disclosures required by 12 C.F.R. § 226.18 are not grouped together, they are not segregated from everything else, or they contain information not directly related to the disclosures required under that section. 12 C.F.R. § 226.17(a).
2. There is no disclosure of the "amount financed," using that term, together with a brief description such as "the amount of credit provided to you or on your behalf." 12 C.F.R. § 226.18(b).
3. The itemization of the amount financed required by 12 C.F.R. § 226.18(c)(1) is not separate from the other required disclosures. 12 C.F.R. § 226.17(a)(1).
4. There is no disclosure of the "finance charge," using that term, together with a brief description such as "the dollar amount the credit will cost you." 12 C.F.R. § 226.18(d).
5. There is no disclosure of the "annual percentage rate," using that term, together with a brief description such as "the cost of your credit as a yearly rate." 12 C.F.R. § 226.18(e).
6. There is no disclosure of the payment schedule indicating the number, amounts, and timing of payments scheduled to repay the obligation. 12 C.F.R. § 226.18(g).
7. There is no disclosure of the "total of payments," using that term, together with a descriptive explanation such as "the amount you will have paid when you have made all scheduled payments." 12 C.F.R. § 226.18(h).

§ 2.72 Defenses to Liability

§ 2.72:1 Bona Fide Error

The creditor can avoid liability by showing that its violation both was not intentional and resulted from a bona fide error, despite the maintenance of procedures reasonably adapted to avoid such an error. Clerical errors, computer malfunctions, and printing errors are bona fide errors, while errors of legal judgment are not. 15 U.S.C. § 1640(c).

§ 2.72:2 Good-Faith Compliance

A creditor is exempt from liability if it acted in good faith and in conformity with any official rule, regulation, or interpretation of the Truth in Lending Act by the Federal Reserve Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve Board System authorized by the Board to issue interpretations or approvals. 15 U.S.C. § 1640(f).

§ 2.72:3 Correction of Error

A creditor can avoid liability if it cures an error within sixty days of discovering the error, it notifies the consumer of the cure, and the correction and notification are made before the creditor receives notice of the error from a consumer or the consumer brings an action against the creditor. 15 U.S.C. § 1640(b).

§ 2.72:4 Use of Model Forms

A creditor is deemed to be in compliance with disclosure requirements with respect to nonnumerical disclosures if it either uses the model form or clause or uses the model but deletes information that is not required or rearranges the format, as long as the alterations do not affect the substance, clarity, or meaningful sequence of disclosure. 15 U.S.C. § 1604(b). Model forms

are found at the appendixes to Regulation Z. 12 C.F.R. pt. 226 apps. G, H.

§ 2.73 Interaction of State and Federal Disclosure Laws

§ 2.73:1 Generally

The Truth in Lending Act does not exempt any creditor from complying with state credit disclosure laws and does not affect state law except to the extent that the state law is inconsistent with the federal law or regulation. If the Federal Reserve Board determines that an inconsistency between federal and state disclosure laws exists, creditors in the state may not use the inconsistent state term or form and will incur no liability under state law for failure to do so. 15 U.S.C. § 1610(a)(1).

§ 2.73:2 Retail Installment Sales

For retail installment sales as described in Texas Finance Code chapter 345, if there is an inconsistency between federal and state disclosure requirements, the federal law controls, and inconsistent state requirements need not be followed. Tex. Fin. Code § 345.009.

§ 2.73:3 Retail Charge Agreements

For periodic statements under retail charge agreements, compliance with the federal disclosure laws is deemed to be compliance with state law requirements. Tex. Fin. Code § 345.113.

§ 2.73:4 Credit Card Transactions

The tabular format required for certain disclosures by 15 U.S.C. § 1632(c) and the disclosure requirements required by 15 U.S.C. § 1637(c)–(f) expressly supersede state law. 15 U.S.C. § 1610(e).

§ 2.73:5 Availability of State and Federal Remedies

A judgment under the federal Consumer Credit Protection Act bars subsequent actions under Tex. Fin. Code §§ 349.001–.003 by the same obligor with respect to the same violation. Tex. Fin. Code § 349.404(a). Also, a consumer who recovers under the Truth in Lending Act has made an election of remedies, intentional or not.

§ 2.74 Resolution of Billing Errors (Fair Credit Billing Act)

If a consumer gives proper written notice to the creditor of an alleged billing error, 15 U.S.C. § 1666 and 12 C.F.R. § 226.13 impose procedures the creditor must follow regarding resolution of the error and limitations on the creditor's actions. In general, the consumer may withhold payment of the disputed amount until the billing error procedure has been completed, and the creditor is prohibited from making or threatening to make adverse credit reports because of the consumer's refusal to pay. 15 U.S.C. § 1666(c); 12 C.F.R. § 226.13(d)(1), (2). See 12 C.F.R. § 226.13(b) regarding what constitutes proper written notice from the consumer.

A creditor who fails to comply with the requirements of the Fair Credit Billing Act as to any amount properly disputed by the debtor forfeits his right to collect the disputed amount and any accrued finance charges, except that the forfeiture cannot exceed $50. 15 U.S.C. § 1666(e). An attorney who subsequently attempts to collect such forfeited charges violates 15 U.S.C. §§ 1692e(2)(A), 1692f(1).

§ 2.75 No Holder-in-Due-Course Rule for Credit Card Purchases

§ 2.75:1 Generally

A credit card issuer under an open-end consumer credit plan is subject to all claims (other than tort claims) and defenses arising out of any transaction in which the credit card is used as a method of payment or extension of credit if—

1. the obligor has made a good-faith effort to obtain satisfactory resolution of the problem with the person honoring the card;
2. the amount of the initial transaction exceeds $50; and
3. the initial transaction occurred either within the same state as the cardholder's previously provided mailing address or within one hundred miles of that address.

Requirements 2. and 3. do not apply if the merchant is the card issuer, is controlled by the card issuer, is under direct or indirect common control with the card issuer, is a franchised dealer in the card issuer's products or services, or has obtained the order through a mail solicitation made by or participated in by the card issuer in which the cardholder is solicited to enter into the transaction by using the issuer's credit card. 15 U.S.C. § 1666i(a).

§ 2.75:2 Limitation on Amount of Claim or Defense

The amount of claims or defenses asserted by the cardholder may not exceed the amount of credit outstanding with respect to the transaction at the time the cardholder first notified the card issuer or the seller of the claim or defense. 15 U.S.C. § 1666i(b).

§ 2.76 FTC Holder-in-Due-Course Rule

See section 2.112:5 below regarding the FTC holder-in-due-course rule.

§ 2.77 Consumer Lease Disclosures

Consumer leases are regulated by 15 U.S.C. §§ 1667–1667f, implemented by Regulation M of the Federal Reserve Board, 12 C.F.R. §§ 213.1–.9.

§ 2.77:1 Definition

For purposes of this disclosure statute, a consumer lease is—

1. a contractual lease or bailment;
2. made by a natural person;
3. for the use of personal property;
4. for longer than four months;
5. for a total not exceeding $50,000;
6. primarily for personal, family, or household purposes;
7. regardless of whether the lessee has "the option to purchase or otherwise become the owner of the property at the expiration of the lease."

15 U.S.C. § 1667(1).

Consumer leases do not include—

1. leases for agricultural purposes;
2. leases for business or commercial purposes;
3. leases to governmental agencies or instrumentalities;
4. leases to organizations; or
5. sales for which the seller extends or arranges for credit, which includes any contract in the form of a bailment or

lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.

15 U.S.C. § 1667(1). *See also* 15 U.S.C. § 1602(h).

§ 2.77:2 Required Disclosures

Before consummation of a consumer lease, the lessor must provide the lessee with a written and dated statement that accurately, clearly, and conspicuously discloses, with respect to the lease—

1. the identities of the lessor and lessee;
2. a brief description of the leased property;
3. the amount of any payment required at the inception of the lease;
4. the amounts for official fees, registration, certificate of title, or license fees or taxes;
5. the amounts of other charges not included in the periodic payments and a description of those charges;
6. if agreed, that the lessee will be liable for any difference between the property's anticipated fair market value and its appraised actual value at the end of the lease;
7. a statement of the amount or method of determining the amount of any liability imposed on the lessee at the end of the lease;
8. whether the lessee has the option to purchase the property and, if so, at what price and time;
9. a statement of all express warranties or guarantees for the property whether made by the lessor or by the manufacturer;
10. a description of the required maintenance of the leased property and an identification of the party charged with maintaining or servicing it;
11. a brief description of any insurance provided or paid for by the lessor or required of the lessee, including the types and amounts of the coverages and costs;
12. a description of any security interest held by the lessor and a clear identification of the subject collateral;
13. the number, amounts, and due dates of periodic payments;
14. the total amount of the periodic payments;
15. if the lease imposes liability on the lessee for the anticipated fair market value of the property at the end of the lease, a statement of the fair market value of the property at the lease's inception, the aggregate cost of the lease at its expiration, and the difference between the two figures;
16. a statement of the conditions under which either party can terminate the lease before the end of the term; and
17. the amount, or the method for determining the amount, of any penalty or other charge for delinquent payments, default, or early termination.

15 U.S.C. § 1667a. The action on a lease is discussed at section 14.6 in this manual.

§ 2.78 Servicemembers Civil Relief Act

Note: In this section, all persons covered as members of the armed forces on active duty are referred to as "servicemembers," and persons who were on active duty but have left active military service are referred to as "veterans." The terms are used for convenience only. The Servicemembers Civil Relief Act, 50 U.S.C. app. §§ 501–597b, is referred to as the "SCRA."

Enforcement of certain civil liabilities and prosecution of certain legal proceedings against persons in military service is suspended to enable those persons to devote their entire energies to the defense needs of the nation. 50 U.S.C. app. § 502.

§ 2.78:1 Persons Entitled to Claim Protection

Servicemember: The SCRA primarily protects persons in the military service. Military service means active duty with any military branch set out below, as well as training or education under the supervision of the United States before induction into military service. A person in the military service is a member of the Army of the United States, the United States Navy, the Marine Corps, the Air Force, or the Coast Guard on active duty. Members of the National Guard are included while under a call to active service for a period of more than thirty consecutive days. Any officer of the Public Health Service or the National Oceanic and Atmospheric Association on active service is also included. Although military service ends with the servicemember's termination of active service or death, many provisions of the SCRA allow for relief by a veteran after he leaves active service. Military service includes any period during which the servicemember is absent from duty due to sickness, wounds, leave, or other lawful cause. *See* 50 U.S.C. app. § 511(1)–(3). The SCRA also covers U.S. citizens serving in the forces of a nation allied with the United States in a war or military action if that service is similar to military service. 50 U.S.C. app. § 514.

Call-Up Period: A person who has been ordered for induction into the armed forces or a person in the armed forces reserve who has been called to active service is entitled to the protection of the SCRA from the date he receives the order until he reports for induction or service. 50 U.S.C. app. § 516.

Protection of Parties Secondarily Liable: If a right against a servicemember or veteran is stayed, postponed, or suspended, the court taking that action may, in its discretion, also grant the same relief to sureties, guarantors, endorsers, accommodation makers, and others, whether primarily or secondarily liable. The same right accrues when a court vacates or sets aside a judgment or decree. 50 U.S.C. app. § 513(a), (b). See section 2.78:14 below regarding the ability of a secondarily liable party to waive the protection of the SCRA.

§ 2.78:2 Installment Contract for Purchase of Property

If a person enters into a contract to buy or lease property, pays a deposit or installment toward the purchase or lease, and then enters military service, the creditor or lessor may not exercise a right or option to terminate the contract or repossess the property for nonpayment of the contract or any other breach of its terms, except through court action. In a court action, the court may order the repayment of prior installments or deposits or any part of them as a condition of terminating the contract and resuming possession of the property, may order a stay of proceedings, or may make other disposition of the case as may be equitable to preserve the interests of all parties (as set out in sections 2.78:5 through 2.78:8 below). 50 U.S.C. app. § 532. The servicemember's dependents may claim the protection of this provision unless in the court's

opinion their ability to comply with the contract is not materially impaired by the servicemember's military service. 50 U.S.C. app. § 538.

§ 2.78:3 Maximum Interest Rate for Preservice Obligation

If the servicemember incurred an obligation requiring him to pay interest greater than 6 percent per year before entering military service, his obligation is reduced to 6 percent annual interest during his period of military service and one year thereafter, in case of an obligation or liability consisting of a mortgage, trust deed, or other security in the nature of a mortgage or during his period of military service, in the case of any other obligation or liability. "Interest" includes service charges, renewal charges, fees, or any other charges except bona fide insurance in respect of the obligation. The creditor may apply to a court for an order authorizing payment of a greater interest rate on a showing that the ability of the servicemember to pay more than 6 percent annual interest is not materially affected by his military service. 50 U.S.C. app. § 527(a), (c), (d).

§ 2.78:4 Judicial Foreclosure of Security Interest

If a servicemember is obligated under a security agreement and still owns the collateral when he enters military service, any action to enforce the security interest arising from the servicemember's alleged breach of the security agreement committed before or during his military service may be stayed as provided in sections 2.78:5 through 2.78:8 below, or the court may make another disposition of the case as may be equitable to preserve the interests of all parties. 50 U.S.C. app. § 533(b). The servicemember's dependents may claim the protection of this provision unless in the court's opinion their ability to comply with the security agreement is not materially impaired by the servicemember's military service. 50 U.S.C. app. § 538.

§ 2.78:5 Stay of Enforcement of Obligation

A servicemember may, at any time of his military service or within 180 days thereafter, apply for a stay of enforcement of any of his obligations incurred before his military service. The court may grant a stay of enforcement of the obligation during his service and after his service for a period of time equal to the period of his military service. The postservice stay is subject to the servicemember's paying the balance of principal and accumulated interest owed at the time of his separation from military service in equal periodic installments during the extended period, at the rate of interest prescribed for the obligation if paid when due and with other terms as may be just. The court may also find that the ability of the applicant to meet his obligation has not been materially affected by his military service and refuse to grant the stay. 50 U.S.C. app. § 591(a), (b). If the court grants such a stay, no fine or penalty may accrue during the postservice payment term because of the failure of the veteran to meet his original contractual obligation. 50 U.S.C. app. § 591(c).

§ 2.78:6 Stay of Fines and Penalties on Contracts

If an action for compliance with any term of a contract is stayed by other provisions of the SCRA, the servicemember will not be liable for any fine or penalty otherwise owed because of the servicemember's nonperformance of the obligation. Also, if a servicemember fails to perform any obligation and a fine or penalty is incurred as a result, a court may reduce or waive the fine or penalty if it appears that the servicemember was in military service when the fine or penalty was imposed and, because of his service, his ability to pay or perform was materially impaired. 50 U.S.C. app. § 523.

§ 2.78:7 Stay of Nonjudicial Repossession of Security Interest

If a servicemember is obligated under a security agreement when he enters military service and still owns the collateral when he enters, the secured creditor may not seize, sell, or foreclose on the collateral during the period of his military service or for nine months thereafter, except under an agreement between the servicemember and the creditor as described in section 2.78:14 below or on order previously granted by a court with a return of it made and approved by the court. 50 U.S.C. app. § 533(c). The servicemember's dependents may claim the protection of this provision unless in the court's opinion their ability to comply with the security agreement is not materially impaired by the servicemember's military service. 50 U.S.C. app. § 538.

§ 2.78:8 Stay of Judicial Proceedings

If a person is a plaintiff or defendant in a civil action or proceeding that he has received notice of and either is in military service or has separated from military service within ninety days, the court may, on its own motion, or shall, on the application of the servicemember, stay the proceeding for a period of at least ninety days. 50 U.S.C. app. § 522(a), (b)(1). The application must contain—

1. a letter stating how the servicemember's military duty materially affects his ability to appear and stating a date when he would be available to appear; and
2. a letter from the servicemember's commanding officer stating that the servicemember's military duty prevents appearance and that military leave for the servicemember has not been authorized.

50 U.S.C. app. § 522(b)(2).

The application does not constitute an appearance for jurisdictional purposes or a waiver of any substantive or procedural defense. 50 U.S.C. app. § 522(c). The servicemember may apply for an additional stay based on the continuing effect of military duty on his ability to appear. If the court refuses to grant an additional stay, the court must appoint counsel to represent the servicemember in the proceeding. 50 U.S.C. app. § 522(d).

§ 2.78:9 Default Judgments

In all default judgments, if the defendant has not made an appearance, the prevailing plaintiff must file an affidavit setting forth facts showing that the defendant is not in military service. If the plaintiff is unable to make such a showing, he must file an alternative affidavit, stating either that the defendant is in military service or the defendant's military service status cannot be determined. 50 U.S.C. app. § 521(b)(1). A person who knowingly uses a false affidavit may be fined or imprisoned or both. 50 U.S.C. app. § 521(c). See form 20-3 in this manual for a nonmilitary affidavit. If the defendant is in military service, the court may not enter a judgment until it has appointed an attorney to represent the defendant. If appointed counsel cannot locate the servicemember, the attorney's actions in the case do not waive any of the servicemember's defenses or otherwise bind him. 50 U.S.C. app. § 521(a), (b)(2). On counsel's application or on the court's own motion, the court shall also grant a stay of proceedings for at least ninety days if the court determines that there may be a defense to the action and it cannot be presented without the defendant's presence, or, after due diligence, counsel has not been able to determine if a meritorious defense exists. 50 U.S.C. app. § 521(d).

If the court is unable to determine whether the defendant is in military service, the court may require the plaintiff to file a bond to indemnify the defendant against loss or damage suffered by reason of the judgment, should the judgment

later be set aside. 50 U.S.C. app. § 521(b)(3). If a default judgment is taken against a person in military service during the term of that person's service or within sixty days thereafter, the defendant may apply to the court rendering judgment to reopen the judgment for the purpose of allowing the servicemember to defend the action. The application must be made within ninety days of the defendant's release from military service, and the defendant will have to show a meritorious or legal defense against the plaintiff's claim and that the servicemember's ability to defend the action was materially affected by military service. 50 U.S.C. app. § 521(g).

If the court vacates, sets aside, or reverses a default judgment under the SCRA, that action does not impair the title acquired by a bona fide purchaser for value under the judgment. 50 U.S.C. app. § 521(h).

§ 2.78:10 Stay or Vacation of Judgment, Attachment, or Garnishment

In an action or proceeding commenced in any court against a servicemember during the period of his service or within ninety days thereafter, the court may, on its own motion, or shall, on the application of the servicemember, stay the execution of a judgment, order, attachment, or garnishment issued against the servicemember, if in the opinion of the court the ability of the servicemember to comply is materially affected by his military service. 50 U.S.C. app. § 524.

This stay may last for the length of the servicemember's military service and for ninety days thereafter. The stay may be subject to such terms as may be just, such as ordering payment of a debt in installments. If the servicemember is a codefendant with others, the plaintiff may proceed against the other defendants after obtaining leave of court. 50 U.S.C. app. § 525.

§ 2.78:11 Settlement of Cases Involving Property

In an action to foreclose on or repossess property, the court may appoint three disinterested persons to appraise the collateral and use their appraisal to set an amount to be paid to the servicemember (or his dependent as appropriate) as a condition of foreclosure or repossession. If the court finds that this appraisal process would cause undue hardship to the dependents of the servicemember, it will not order the appraisal. 50 U.S.C. app. § 534.

§ 2.78:12 Statutes of Limitation Affected by Military Service

Regardless of whether the plaintiff's cause of action accrued before or during the defendant's period of military service, the servicemember's period of military service is not included in computing any limitations period or period for the redemption of real property, except limitations periods under the internal revenue laws. 50 U.S.C. app. § 526.

§ 2.78:13 Exercise of SCRA Rights and Future Financial Transactions

If a servicemember applies for or receives any of the protections of the SCRA, that fact alone does not allow a lender or creditor to determine that the servicemember is unable to pay the obligation or liability, deny credit to the servicemember, change the terms of an existing credit agreement with the servicemember, refuse to grant credit to the servicemember in substantially the amount or on substantially the terms requested, or make an adverse report on the servicemember's creditworthiness, refuse to insure the servicemember, make an annotation in the servicemember's credit record to the effect that he is a member of the National Guard or reserves, or change the terms offered for insurance. 50 U.S.C. app. § 518.

§ 2.78:14 Waiver

The protections of the SCRA can be waived by written agreement of the parties executed during or after the period of military service. 50 U.S.C. app. § 517. Specific requirements apply to waivers for certain purposes.

A secondarily liable party may waive the protections set out above by written waiver executed as an instrument separate from the contract or instrument setting out the obligation or liability. No such waiver is valid if it is executed by an individual who later joins the military or if it is executed by a dependent of that individual, unless executed by the individual during the call-up period set out in section 2.78:1 above. 50 U.S.C. app. § 513(d)(2).

§ 2.78:15 Real Estate–Related Provisions

The SCRA contains numerous provisions affecting mortgages or other liens or claims against servicemembers' real property. Those provisions often differ from those set out here and are beyond the scope of this manual. *See generally* State Bar of Tex., *Texas Real Estate Forms Manual* chs. 2, 25, 28, 71 (2d ed. 2011).

§ 2.79 Other Credit Statutes

Although creditors or other creditor-side entities themselves may face litigation under the following statutes on a regular basis, the statutes are not likely to give rise to a counterclaim to a collections suit.

§ 2.79:1 Equal Credit Opportunity Act

The Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f, prohibits discrimination in any aspect of a credit transaction on the basis of the applicant's gender, marital status, race, color, religion, national origin, or age. The creditor also may not discriminate because the applicant's income comes from public assistance or because the applicant, in good faith, exercised rights under the Consumer Credit Protection Act or other similar state laws. The Act also prescribes procedures to be followed in the event of a denial of credit.

§ 2.79:2 Fair Credit Reporting Act

The Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681x, requires consumer reporting agencies to adopt reasonable procedures to meet the needs of commerce for consumer credit, insurance, and other information in a manner that is fair and equitable to the consumer with regard to the confidentiality, adversity, relevance, and proper use of that information. The Act applies not only to reporting agencies but also to providers of credit information.

[Section 2.80 is reserved for expansion.]

VII. Texas Consumer Credit Laws

§ 2.81 Consumer Credit Laws Generally

The Texas Consumer Credit Code was formerly found at Texas Revised Civil Statutes articles 5069–2.01 through –8.06. In 1997, the legislature moved those provisions to subtitle B of title 4 of the Texas Finance Code, and the former statutes were repealed. See section 2.3 above

regarding pre- and post-1997 Texas credit statutes.

Remedies for violations of subtitle B are found in Tex. Fin. Code ch. 349. See part V. in this chapter regarding usury generally and section 2.89 below regarding other statutory violations.

§ 2.82 Commonly Encountered Violations

Some of the more common nonusury violations of subtitle B include—

1. failing to give disclosures in ten-point type (*see, e.g.*, Tex. Fin. Code § 345.052(d));
2. failing to provide documents in at least eight-point type (*see, e.g.*, Tex. Fin. Code § 345.051(c); *O.R. Mitchell Motors, Inc. v. Bell*, 528 S.W.2d 856, 860 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.));
3. requiring the consumer to buy collateral protection or credit insurance through the lender (*see, e.g.*, Tex. Fin. Code § 345.205);
4. selling collateral protection or credit insurance at higher-than-lawful rates (*see, e.g.*, Tex. Fin. Code § 345.208; *see also Southwestern Investment Co. v. Mannix*, 557 S.W.2d 755 (Tex. 1977));
5. contracting for rights to trespass or breach the peace in connection with repossession or enforcement of a security interest (*see, e.g.*, Tex. Fin. Code § 348.411);
6. contracting for a confession of judgment or assignment of wages, or providing for waivers of claims against creditors (*see, e.g.*, Tex. Fin. Code § 348.410);
7. taking a prohibited lien against real estate (*see, e.g.*, Tex. Fin. Code § 342.503(b)); and
8. imposing a surcharge for buying with a credit card, instead of cash, check, or other means of payment (Tex. Fin. Code § 339.001(a)).

Other commonly encountered violations specific to a particular class of transaction are indicated in the following sections by the notation "commonly encountered violation."

§ 2.83 Open-End Accounts

§ 2.83:1 Definition

An open-end account is one in which—

1. an account under a written contract exists between creditor and obligor;
2. the creditor reasonably contemplates repeated transactions, and the obligor is authorized to make purchases or borrow money;
3. interest or time-price differential may be charged from time to time on an outstanding balance; and
4. the amount of credit that may be extended during the term of the account is generally made available to the extent that any outstanding balance is repaid.

Open-end accounts include agreements for more than one loan or cash advance, retail installment sales, and revolving credit accounts. Tex. Fin. Code § 301.002(a)(14); *see also* 15 U.S.C. § 1602(i).

§ 2.83:2 Rules Governing Interest

1. Ceilings generally. Tex. Fin. Code §§ 303.001–.017, 303.101.

2. Ceilings, variable rate account. Tex. Fin. Code §§ 303.015, 303.402.

3. Billing cycle interest limitation on open-end credit card account without merchant discount. Tex. Fin. Code § 339.002.

4. Ceiling on open-end account involving credit card transaction or merchant discount. Tex. Fin. Code § 303.006(c).

5. Ceiling on open-end account providing for credit card transaction in which merchant discount is not imposed or received (21 percent). Tex. Fin. Code § 303.009(d).

6. If creditor implements quarterly or annualized ceiling for majority of Texas obligors under a particular plan or arrangement, that ceiling is also the ceiling for all open-end accounts during period of plan or arrangement. Tex. Fin. Code § 303.106.

§ 2.83:3 Other Rules

1. Disclosures for variable rate accounts. Tex. Fin. Code § 303.105(b).

2. Disclosures for rate variations. Tex. Fin. Code § 303.105.

3. Notice of change of any agreement term. Tex. Fin. Code § 303.103(a)–(c).

4. Right of obligor to terminate open-end account on change in agreement term. Tex. Fin. Code § 303.103(d), (e).

Also, note the disclosure requirements for open-end transactions in the Truth in Lending Act and Regulation Z. 15 U.S.C. § 1637; 12 C.F.R. §§ 226.5–.16. See section 2.71:3 above.

§ 2.84 Consumer Loans (Texas Finance Code Chapter 342)

§ 2.84:1 Definitions

A regular transaction is a loan payable in installments that are consecutive, monthly, and substantially equal in amount, with the first scheduled installment due within one month and fifteen days after the date of the loan. Tex. Fin. Code § 342.001(2).

An irregular transaction is a loan payable in installments that are *not* consecutive, monthly, and substantially equal in amount, with the first scheduled installment due within one month and fifteen days after the date of the loan. Tex. Fin. Code § 342.001(1).

§ 2.84:2 Constitutional Interest, Exemption for Loan with Interest Rate of 10 Percent or Less

Unless otherwise fixed by law, the maximum interest rate is 10 percent per year. A loan with an interest rate that is 10 percent per year or less is not subject to chapter 342 of the Finance Code. Tex. Fin. Code § 342.004.

§ 2.84:3 Applicability of Chapter 342

A loan is governed by chapter 342 of the Finance Code if it (1) provides for interest in excess of 10 percent per year; (2) is extended primarily for personal, family, or household use; (3) is made by a lender engaged in the business of making, arranging, or negotiating those types of loans; and (4) either is not secured by a lien on real property or is a secondary mortgage loan as described by Tex. Fin. Code §§ 342.001(4), 342.301, or 342.456 and is predominantly payable in monthly installments. Tex. Fin. Code § 342.005.

§ 2.84:4 Rules Governing Interest Charges on Non–Real Property Loans

1. Maximum interest charge. Tex. Fin. Code § 342.201.
2. Maximum charge for loan with single repayment. Tex. Fin. Code § 342.202.
3. Additional interest for default, regular transaction. Tex. Fin. Code §§ 342.203, 342.205.
4. Additional interest for installment deferment, regular transaction. Tex. Fin. Code §§ 342.204, 342.205.
5. Additional interest for default, irregular transaction. Tex. Fin. Code § 342.206.
6. Revision of ceiling or bracket. Tex. Fin. Code §§ 341.202–.204.

§ 2.84:5 Rules Governing Alternate Charges for Certain Loans (Cash Advances)

1. Maximum cash advance as computed yearly by the consumer credit commissioner, indexing the amount to the percentage growth of the Consumer Price Index from December 1967 to the present year, using a base of $100 (or $200 for loans subject to Finance Code section 342.259). Tex. Fin. Code § 342.251.
2. Alternate interest charge instead of the charges allowed by Tex. Fin. Code § 342.201, including acquisition and investment account handling charges. Tex. Fin. Code § 342.252.
3. Maximum interest charge for loan with single repayment. Tex. Fin. Code § 342.253.
4. No other charges allowed, including insurance charges. Tex. Fin. Code § 342.254.
5. Maximum loan term. Tex. Fin. Code § 342.255.
6. Charges subject to refund. Tex. Fin. Code § 342.256.
7. Default charge, deferment of payment. Tex. Fin. Code § 342.257.
8. Schedules for weekly, biweekly, or semimonthly installments. Tex. Fin. Code § 342.258.

§ 2.84:6 Other Charges or Credits

1. Limits on charges and types of charges generally. Tex. Fin. Code § 342.502.
2. Collateral protection insurance paid by debtor. Tex. Fin. Code §§ 307.051–.058.
3. Refund of precomputed interest, regular transaction. Tex. Fin. Code §§ 342.351, 342.353.
4. Refund of precomputed interest on contract, irregular transaction or term of more than sixty months. Tex. Fin. Code §§ 342.352, 342.353.

§ 2.84:7 Form and Content of Loan Instruments

The lender must deliver a copy of each document signed by the borrower and, if it is not already contained in the note or loan contract, a written statement in English that states the names and addresses of the borrower and the lender, any type of insurance for which a charge is included, and the amount of the charge. Tex. Fin. Code § 342.451.

A lender may not take an instrument with blanks to be filled in after the loan is made. Tex. Fin. Code § 342.506. A lender may not take an

instrument in which a borrower waives any right accruing under Code chapter 342. Tex. Fin. Code § 342.507.

§ 2.84:8 Other Requirements

1. Generally, only licensed lenders can make consumer loans. Tex. Fin. Code § 342.051(a) (see Tex. Fin. Code § 342.051(c)–(e) for exceptions to the licensure requirement).
2. Must give receipt to borrower for cash payment. Tex. Fin. Code § 342.452.
3. Must accept full or partial prepayments. Tex. Fin. Code § 342.453.
4. Must return loan instruments to borrower on repayment. Tex. Fin. Code § 342.454.
5. May not take assignment of wages or lien against real property other than lien created by abstract of judgment. Tex. Fin. Code § 342.503 (commonly encountered violation).
6. May not take confession of judgment or power of attorney authorizing lender to enter confession of judgment. Tex. Fin. Code § 342.504.
7. May not take promise to pay or loan obligation that does not disclose amount financed and schedule of payments. Tex. Fin. Code § 342.505.
8. May not induce or permit person to be obligated for more than one loan if purpose is to obtain more than lawful interest. Tex. Fin. Code § 342.501.
9. Disclosures in advertising. Tex. Fin. Code § 341.301.
10. Discrimination on various grounds prohibited, Tex. Fin. Code § 341.401; penalties, Tex. Fin. Code § 341.402.
11. False, misleading, or deceptive advertising prohibited. Tex. Fin. Code § 341.403.
12. Rules regarding agreement for more than one loan or cash advance. Tex. Fin. Code § 342.455.
13. Maximum loan terms. Thirty-seven calendar months for cash advance of $1,500 or less; forty-nine calendar months for advance of between $1,500 and $3,000; sixty calendar months for loans of more than $3,000. Tex. Fin. Code § 342.508.
14. Rules regarding insurance. Tex. Fin. Code §§ 342.401–.416. See section 2.84:9 below.

§ 2.84:9 Commonly Encountered Violations Regarding Insurance

1. Requiring credit life or credit health and accident insurance. If the loan is for $100 or more, the lender may request that the buyer provide the insurance. Tex. Fin. Code § 342.402.
2. Requiring insurance to be purchased from a particular agent or broker. Tex. Fin. Code § 342.405.

§ 2.85 Revolving Credit Accounts

§ 2.85:1 Definition

A revolving credit account is an account—

1. established by a creditor for a customer under a written agreement between the creditor and the customer;
2. accepted by the customer by using the account;

3. in which the unpaid balance of and interest on the extensions of credit are debited to the account;

4. in which interest is not precomputed but may be computed on the balances of the account outstanding from time to time;

5. in which the customer may defer payment of any part of the balance of the account; and

6. in which the customer may obtain from the creditor one or more extensions of credit.

Tex. Fin. Code § 346.003. Revolving credit accounts include both direct loan accounts (the seller or lessor is the creditor) and revolving tri-party accounts. Tex. Fin. Code § 346.003(b), (c).

§ 2.85:2 Rules Governing Interest

1. Average daily balance defined. Tex. Fin. Code § 346.002.

2. Maximum interest rate. Tex. Fin. Code § 346.101.

3. Permissible interest rate for billing cycle. Tex. Fin. Code § 346.102.

4. Optional ceiling rate as set out in Tex. Fin. Code § 303.001.

§ 2.85:3 Other Charges

1. No fees except those authorized by statute. Tex. Fin. Code § 346.103.

2. Charges recoverable by creditor. Tex. Fin. Code § 346.202.

§ 2.85:4 Other Rules

1. Revolving credit accounts are subject to Tex. Fin. Code chs. 303 and 349 but are not subject to other chapters of title 4 unless specifically provided for in chapter 346. Tex. Fin. Code § 346.005(a).

2. A creditor offering a revolving credit account for personal, family, or household use must hold a license under chapter 342 unless he is not required to hold a license under Tex. Fin. Code § 342.051. Tex. Fin. Code § 346.005(b).

3. May enter into more than one revolving credit account at customer's request. Tex. Fin. Code § 346.203(a).

4. May not require customer to enter into more than one revolving credit account to collect higher-than-legal interest rates. Tex. Fin. Code § 346.203(b).

5. May unilaterally amend revolving credit account. Tex. Fin. Code § 346.204(a). See Tex. Fin. Code § 346.204(b) regarding when amended terms take effect.

6. Rules governing insurance. Tex. Fin. Code § 346.201.

§ 2.86 Retail Installment Sales

§ 2.86:1 Definitions and General Rules

1. *Retail installment contract.* One or more instruments entered into in Texas evidencing a secured or unsecured retail installment transaction. Tex. Fin. Code § 345.001(6).

2. *Retail installment transaction.* One in which retail buyer purchases goods or services from retail seller under retail installment contract or retail charge agreement that provides for time-price differential and in which buyer agrees to pay unpaid balance and time-price

differential in one or more installments. Tex. Fin. Code § 345.001(7).

3. *Retail seller.* Person who regularly and substantially engages in business of selling goods or services to retail buyers, other than services of a member of a learned profession not specifically included under Tex. Fin. Code § 345.003(b). Tex. Fin. Code § 345.001(8).

4. *Goods.* Tex. Fin. Code § 345.002.

5. *Services.* Tex. Fin. Code § 345.003.

6. *Cash price.* Tex. Fin. Code § 345.004.

7. *Itemized charge.* Tex. Fin. Code § 345.005.

8. *Bailment or lease.* A bailment or lease will be considered a retail installment transaction if the bailee-lessee contracts to pay as compensation an amount substantially equal to or greater than value of goods and, on full compliance with the bailment or lease, the bailee-lessee will become owner or has option to become owner of goods for no or nominal consideration. Tex. Fin. Code § 345.068.

§ 2.86:2 Rules Governing Time-Price Differential

1. How principal balance is computed. Tex. Fin. Code § 345.059.

2. Maximum time-price differential, contract payable in equal monthly installments. Tex. Fin. Code § 345.055.

3. Maximum time-price differential, other contracts. Tex. Fin. Code § 345.057.

4. Time-price differential computation and amount. Tex. Fin. Code § 345.155.

5. When charging of time-price differential under market competitive rate ceiling prohibited. Tex. Fin. Code § 345.156.

6. Use of optional ceilings. Tex. Fin. Code § 345.056.

7. Minimum time-price differential. Tex. Fin. Code § 345.058.

8. Medical and dental services may be financed only at rates authorized by Tex. Fin. Code ch. 303. Tex. Fin. Code § 345.253.

9. Rules governing acceleration. Tex. Fin. Code § 345.062.

§ 2.86:3 Other Charges or Credits

1. Charges for default of payment of installment. Tex. Fin. Code § 345.060 (commonly encountered violation).

2. Debt collection charges. Tex. Fin. Code § 345.061.

3. Charges for deferment of installment. Tex. Fin. Code § 345.069(b), (c).

4. Allocation of payments on consolidation of contracts. Tex. Fin. Code § 345.079.

5. Delinquency charge for retail charge agreements governed by market competitive rate ceiling. Tex. Fin. Code § 345.157.

6. Documentary fees for certain vehicles (for example, motorcycles, boats, boat trailers). Tex. Fin. Code § 345.251.

7. Refund credit on prepayment of monthly installment contract. Tex. Fin. Code § 345.075.

8. Refund credit on prepayment of other contracts. Tex. Fin. Code § 345.076.

§ 2.86:4 Form and Content of Contract

1. Must be in writing. Tex. Fin. Code § 345.051(a)(1).

2. Must be dated. Tex. Fin. Code § 345.051(a)(2).

3. Must be signed by retail buyer. Tex. Fin. Code § 345.051(a)(3).

4. Must be completed as to all essential provisions, except as provided by Tex. Fin. Code § 345.064. Tex. Fin. Code § 345.051(a)(4).

5. Must be designated "retail installment contract." Tex. Fin. Code § 345.051(b). Not required if sale is negotiated or entered into by mail or telephone and contract is based on printed solicitation clearly setting forth cash price of sales. Tex. Fin. Code § 345.353.

6. Must contain names of retail seller and retail buyer. Tex. Fin. Code § 345.052(a)(1).

7. Must contain address of retail seller's place of business. Tex. Fin. Code § 345.052(a)(2).

8. Must contain retail buyer's residence address, unless buyer specifies another address. Tex. Fin. Code § 345.052(a)(3).

9. Must contain cash price. Tex. Fin. Code § 345.052(a)(4).

10. Must specify down payment, including amount paid in money and amount allowed for trade-in goods. Tex. Fin. Code § 345.052(a)(5).

11. Must specify each itemized charge. Tex. Fin. Code § 345.052(a)(6).

12. Must reasonably identify goods sold or services furnished under contract. Tex. Fin. Code § 345.052(c).

13. Must contain notice as set out in Tex. Fin. Code § 345.052(d). Not required for contract negotiated and entered into by mail or phone, where seller has provided printed solicitation clearly setting forth cash price. Tex. Fin. Code § 345.353.

14. May not contain power of attorney to confess judgment or assignment of wages. Tex. Fin. Code § 345.354 (commonly encountered violation).

15. May not authorize holder to enter buyer's premises unlawfully or breach the peace, or provide for power of attorney by buyer appointing holder or holder's agent as buyer's agent in repossession. Tex. Fin. Code § 345.355.

16. May not contain waiver of buyer's rights of action against holder or person acting on holder's behalf for illegal acts committed in collection or repossession. Tex. Fin. Code § 345.356(a).

17. May not contain covenant that buyer will not assert claims or defenses arising out of sale. Tex. Fin. Code § 345.356(a)(2).

18. May not allow holder to accelerate unless either buyer is in default or holder in good faith believes that prospect of payment or performance is impaired. Tex. Fin. Code § 345.062.

19. May not provide for first lien on real estate to secure contract obligation except under abstracted judgment or for construction of improvements. Tex. Fin. Code § 345.357 (commonly encountered violation).

20. Promise of retail seller to compensate retail buyer for referring customers or prospective customers must be disclosed in retail installment contract if promise is part of the contract, made to induce buyer into entering contract, or made incidental to negotiations for contract. Tex. Fin. Code § 345.053.

21. Requirements for retail installment contract that is more than one document. Tex. Fin. Code § 345.063.

22. Blanks in contract generally prohibited. Tex. Fin. Code § 345.064.

23. Buyer's acknowledgment of receipt of copy of contract. Tex. Fin. Code § 345.067.

24. Disclosure regarding documentary fees for certain vehicles (for example, motorcycles, boats, boat trailers). Tex. Fin. Code § 345.251(c), (d).

25. Must contain Federal Trade Commission holder-in-due-course disclaimer rule, providing that holder is subject to all claims and defenses that could be asserted against original seller. 16 C.F.R. pt. 433 (commonly encountered violation).

§ 2.86:5 Other Rules

1. Must deliver copy of contract to buyer. Tex. Fin. Code § 345.065.

2. If copy of contract is not delivered to buyer and buyer has not received goods or services contracted for, buyer may rescind contract and receive all money paid to seller, as well as any goods traded in. Tex. Fin. Code § 345.066.

3. Rules regarding amendment of retail installment contract. Tex. Fin. Code §§ 345.070–.072.

4. Buyer may prepay unpaid time balance at any time. Tex. Fin. Code § 345.073.

5. Rules governing consolidation of contracts. Tex. Fin. Code §§ 345.078, 345.079.

6. May not induce buyer or buyer's spouse to become indebted at substantially same time under more than one retail installment contract with same seller for deliberate purpose of obtaining greater time-price differential than is permitted for one contract. Contract made more than thirty days after original contract is presumed not to be violative. Tex. Fin. Code § 345.080.

7. Must provide buyer with written statement of dates and amounts of installment payments and total amount unpaid. Buyer entitled to one free statement every six months. Tex. Fin. Code § 345.082.

8. Must give buyer written receipt for each cash payment. Tex. Fin. Code § 345.083.

9. When contract is sold, buyer may make payments to prior known creditor until he has notice of assignment or negotiation. Tex. Fin. Code § 345.303.

10. When subsequent purchaser of contract can take contract free of claims or defenses of buyer against original creditor (includes notice requirement). Tex. Fin. Code § 345.304.

11. Holders who are not authorized lenders must register with Office of Consumer Credit Commissioner. Tex. Fin. Code § 345.351 (see Tex. Fin. Code § 345.001(2) for definition of "holder").

12. May not promise to pay, pay, or otherwise tender cash to buyer as part of a

retail installment transaction. Tex. Fin. Code § 345.352.

13. Before sale, buyer may not waive rights accruing under chapter 345. Tex. Fin. Code § 345.356(b).

14. Rules governing insurance. Tex. Fin. Code §§ 345.201–.215.

§ 2.87 Retail Charge Agreements

Note: Retail charge agreements are by definition retail installment transactions. The rules set out in section 2.86 above apply unless contradicted by a particular statutory provision as set out below.

§ 2.87:1 Definition

A retail charge agreement consists of one or more instruments prescribing the terms of retail installment transactions that may be made under agreement from time to time and in which time-price differential is computed on the unpaid balance from time to time. The term includes an instrument that prescribes terms of a retail credit card arrangement. Tex. Fin. Code § 345.001(4).

§ 2.87:2 Rules Governing Time-Price Differential

1. Maximum time-price differential. Tex. Fin. Code § 345.103.

2. Optional ceiling. Tex. Fin. Code § 345.104.

§ 2.87:3 Other Charges

1. Reasonable attorney's fees and court costs allowed. Tex. Fin. Code § 345.105.

2. Reasonable processing fee of no more than $15 may be added for returned check; fee may be added to unpaid balance. Tex. Fin. Code § 345.106.

3. Cannot charge annual, membership, or participation fees. Tex. Fin. Code § 345.107.

§ 2.87:4 Other Rules

1. Agreement must be in writing and signed by buyer. Tex. Fin. Code § 345.102(a).

2. Agreement must have statutorily prescribed notice. Tex. Fin. Code § 345.102(b).

3. Buyer cannot sign agreement with blank spaces. Tex. Fin. Code § 345.108.

4. Must deliver copy of agreement to buyer. Tex. Fin. Code § 345.109.

5. If acknowledgment of delivery of copy of contract is in body of contract, it must be set out as required in statute. Tex. Fin. Code § 345.110.

6. Cash price must be furnished to buyer in sales slip or other memorandum furnished by seller. Tex. Fin. Code § 345.111.

7. Seller must provide statement of unpaid balance to buyer at end of each statement period in which unpaid balance remains. Compliance with applicable disclosure requirements of Consumer Credit Protection Act is compliance with these disclosure requirements. Tex. Fin. Code §§ 345.112, 345.113.

§ 2.88 Motor Vehicle Installment Sales

§ 2.88:1 Criteria and Relevant Definitions

1. Motor vehicle. Tex. Fin. Code § 348.001(4).

2. Retail installment transaction. Retail buyer buys motor vehicle from retail seller other than principally for purpose of resale and agrees with seller to pay part or all of cash price in one or more deferred installments. Tex. Fin. Code § 348.001(7).

3. Holder. Tex. Fin. Code § 348.001(3).

4. A bailment or lease is a retail installment transaction if the bailee or lessee contracts to pay as compensation for use of the vehicle an amount substantially equal to or exceeding the value of the vehicle and, on full compliance with bailment or lease, will become the owner or, for no or nominal consideration, has the option to become the owner. Tex. Fin. Code § 348.002.

5. A transaction is still a retail installment transaction even if—

   a. the retail seller arranges to transfer retail buyer's obligation;

   b. amounts of charges are determined by reference to a chart or other reference furnished by financing institution;

   c. a form for all or part of the retail installment contract is furnished by a financing institution; or

   d. credit standing of a retail buyer is determined by a financing institution.

   Tex. Fin. Code § 348.003.

6. See Tex. Fin. Code §§ 348.007–.009 regarding applicable law, conflicts among other sections of Finance Code, and federal Truth in Lending Act.

§ 2.88:2 Rules Governing Time-Price Differential

1. Cash price defined. Tex. Fin. Code § 348.004.

2. How principal balance computed. Tex. Fin. Code § 348.006(a), (b).

3. Maximum time-price differential, contract with equal monthly installments. Tex. Fin. Code § 348.104.

4. Time-price differential for other contracts. Tex. Fin. Code § 348.106.

5. Optional ceiling. Tex. Fin. Code § 348.105.

6. Rules governing acceleration. Tex. Fin. Code § 348.109.

§ 2.88:3 Other Charges or Credits

1. Itemized charge defined. Tex. Fin. Code § 348.005.

2. Documentary fee. Tex. Fin. Code § 348.006(c) (commonly encountered violation).

3. Cannot impose late charge until payment is at least fifteen days overdue, late charge cannot exceed 5 percent of amount of installment, and only one late charge per installment may be imposed. Tex. Fin. Code § 348.107 (commonly encountered violations).

4. Debt collection charges—reasonable attorney's fees, court costs, reasonable out-of-pocket expenses. Tex. Fin. Code § 348.108.

5. Charges involved when contract is amended. Tex. Fin. Code §§ 348.114–.115.

6. Buyer's refund credit on prepayment, monthly installment contract. Tex. Fin. Code § 348.120.

7. Buyer's refund credit on prepayment, other contracts. Tex. Fin. Code § 348.121.

§ 2.88:4 Form and Content of Contract

1. Must be a retail installment contract for each transaction. Tex. Fin. Code § 348.101(a).
2. Must be in writing. Tex. Fin. Code § 348.101(b)(1).
3. Must be dated. Tex. Fin. Code § 348.101(b)(2).
4. Must be signed by buyer and seller. Tex. Fin. Code § 348.101(b)(3).
5. Generally must be completed as to all essential provisions before signed by buyer. Tex. Fin. Code § 348.101(b)(4).
6. Printed part of contract must be in at least eight-point type unless a different size dictated by law. Tex. Fin. Code § 348.101(c).
7. Must contain names of buyer and seller. Tex. Fin. Code § 348.102(a)(1).
8. Must contain place of business or address of seller. Tex. Fin. Code § 348.102(a)(2).
9. Must contain residence or other address of buyer as specified by buyer. Tex. Fin. Code § 348.102(a)(3).
10. Must contain description of vehicle being sold. Tex. Fin. Code § 348.102(a)(4).
11. Must contain cash price of transaction. Tex. Fin. Code § 348.102(a)(5) (commonly encountered violation).
12. Must contain amount of down payment, specifying amount of money and valuation of trade-in. Tex. Fin. Code § 348.102(a)(6) (commonly encountered violation).
13. Must specify each itemized charge. Tex. Fin. Code § 348.102(a)(7) (commonly encountered violation).
14. Contract calling for variable contract rate must set out method of computation. Tex. Fin. Code § 348.102(c).
15. Must contain notice as specified in Tex. Fin. Code § 348.102(d) (commonly encountered violation).
16. May not contain confession of judgment. Tex. Fin. Code § 348.410(1) (commonly encountered violation).
17. May not contain assignment of wages. Tex. Fin. Code § 348.410(2) (commonly encountered violation).
18. May not authorize holder to enter buyer's premises in violation of chapter 9 of the Business and Commerce Code or breach the peace. Tex. Fin. Code § 348.411(1) (commonly encountered violation).
19. May not provide for power of attorney by buyer appointing holder or holder's agent as buyer's agent in repossession. Tex. Fin. Code § 348.411(2).
20. May not provide waiver of buyer's rights for collection or repossession disputes. Tex. Fin. Code § 348.412(a)(1) (commonly encountered violation).
21. May not provide covenant that buyer agrees not to assert claim or defense. Tex. Fin. Code § 348.412(a)(2).
22. Requirements regarding documentary fee, including that documentary fee notice must be in same language as that of oral sales presentation. Tex. Fin. Code § 348.006(c)–(i) (commonly encountered violation).

23. Requirements, content and type size, buyer's acknowledgment of delivery of contract copy. Tex. Fin. Code § 348.112.

24. Amendment to contract must be confirmed in writing signed by buyer and delivered or mailed to buyer. Tex. Fin. Code § 348.116.

25. May not be conditioned on the subsequent assignment of the contract to a holder. Tex. Fin. Code § 348.1015.

§ 2.88:5 Other Rules

1. Must deliver copy of contract to buyer. If seller fails to deliver, buyer who has not received delivery of vehicle may rescind contract and recover all payments made and goods traded in. Tex. Fin. Code §§ 348.110–.111.

2. Rules regarding amendment of contract. Tex. Fin. Code § 348.113.

3. Rules regarding refinancing of large installments. Tex. Fin. Code § 348.123.

4. Rules when contract is sold to third-party creditor. Tex. Fin. Code §§ 348.301–.303.

5. Rules regarding seller's paying or promising to pay money back to buyer. Tex. Fin. Code §§ 348.403, 348.404.

6. Rules regarding buyer's request for account information. Tex. Fin. Code §§ 348.405, 348.408–.409.

7. Holder must give buyer written receipt for cash payment. Tex. Fin. Code § 348.406.

8. Buyer may transfer equity in vehicle with written consent of holder. Tex. Fin. Code § 348.413.

9. Rules regarding insurance. Tex. Fin. Code §§ 348.201–.215.

§ 2.89 Liability for Violation of Subtitle B (Former Consumer Credit Code)

§ 2.89:1 Liability Generally

A person who violates one of the provisions of Texas Finance Code chapters 342 through 348 is liable to the debtor for—

1. three times the amount of actual economic loss resulting from the violation; or

2. if the violation was material and induced the obligor to enter into a transaction that would not have been entered into but for the violation, twice the interest or time-price differential contracted for, charged, or received, not to exceed $2,000 in a transaction in which the amount financed does not exceed $5,000, or not to exceed $4,000 for any other transaction. The court determines whether the violation was "material."

The lender is also liable for the debtor's reasonable attorney's fees. Tex. Fin. Code § 349.003.

§ 2.89:2 No License

If the lender makes either a consumer loan governed by Texas Finance Code chapter 342 or a revolving credit account loan governed by chapter 346 and does not possess the required license, the lender not only commits a criminal offense but is also liable for an amount equal to all principal and charges contracted for or collected, as well as reasonable attorney's fees. Tex. Fin. Code §§ 349.004, 349.502. See Tex. Fin. Code §§ 349.301–.305 regarding late payment of registration and filing fees as a means of curing the creditor's failure to obtain the license.

§ 2.90 Defenses to and Limitations of Liability for Violation of Subtitle B (Former Consumer Credit Code)

§ 2.90:1 Bona Fide Error

No liability accrues from a violation that was unintentional and resulted from bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid such a violation. Tex. Fin. Code § 349.101(a).

§ 2.90:2 Safe Harbors (Conformity with Other Laws)

A creditor is exempt from liability if it acted in good faith in conformity with either—

1. a rule adopted under or an interpretation of title 4 (Tex. Fin. Code chs. 301–351) by a state agency, board, or commission;
2. the federal Consumer Credit Protection Act, 15 U.S.C. §§ 1601–1693r; or
3. a rule or regulation adopted under or an interpretation of the Consumer Credit Protection Act by a federal agency, board, or commission.

This exemption exists even if the rule, regulation, or interpretation is later amended, rescinded, or determined to be invalid. Tex. Fin. Code § 349.101(a)(2), (b).

§ 2.90:3 Correcting Violation within Sixty Days

The creditor will not be liable for a subtitle B violation if, within sixty days of actually discovering the violation, the creditor cures the violation by either performing the required act or refunding the excessive payment and gives written notice to the debtor of the violation before the debtor gives notice of the violation or files an action alleging the violation. Tex. Fin. Code § 349.201(a). "Actually discovered" means just that—it does not mean when an ordinarily prudent person in the creditor's position would have discovered it. Tex. Fin. Code § 349.201(b).

If more than one person may be liable for a particular violation, a correction by any one such person entitles all of them to protection from liability. Tex. Fin. Code § 349.205.

§ 2.90:4 Correcting Violation after Sixty-Day Period

If the creditor fails to take advantage of the sixty-day cure period set out in section 2.90:3 above, it can still limit its liability by performing the required act or refunding the illegal payment before the debtor gives written notice of the violation or files an action alleging it. Such a cure limits liability to either actual economic loss suffered by the debtor or the interest or time-price differential contracted for, charged, or received, not to exceed $2,000.

The debtor can also recover reasonable attorney's fees set by the court. Forfeiture of interest or time-price differential is available only if the violation was material and induced the debtor into a transaction into which the debtor would not have entered had the violation not occurred. Tex. Fin. Code §§ 349.202–.203.

If more than one person may be liable for a particular violation, a correction by any such person entitles all of them to a limitation of liability. Tex. Fin. Code § 349.205.

§ 2.90:5 Only One Recovery

If the creditor has both charged excessive interest or fees and violated one or more other provisions of subtitle B, it will be liable only for the usury or for the excessive charge penalties. Tex. Fin. Code § 349.102(a). If the creditor violates multiple provisions of subtitle B, it can be held

liable for only one such violation. Tex. Fin. Code § 349.102(b).

§ 2.90:6 Statute of Limitation

An action for excessive charges brought under chapter 349 of the Finance Code must be brought before the later of either the fourth anniversary of the date of the applicable loan or retail installment transaction or the second anniversary of the date of the violation. Tex. Fin. Code § 349.402(a). An action with respect to an open-end credit transaction, however, must be brought before the second anniversary of the date of the violation. Tex. Fin. Code § 349.402(b).

§ 2.90:7 Judgment under Federal Consumer Credit Protection Act

A judgment under the Consumer Credit Protection Act (15 U.S.C. §§ 1601–1693r) bars a subsequent subtitle B action by the same obligor with respect to the same violation. Tex. Fin. Code § 349.404(a). If the debtor obtains a judgment under subtitle B and then seeks recovery for the same violation against the same creditor under the Consumer Credit Protection Act, that creditor can recover the amount of the subtitle B judgment and reasonable attorney's fees. Tex. Fin. Code § 349.404(b).

[Sections 2.91 through 2.100 are reserved for expansion.]

VIII. Other Texas Statutes Affecting Debtor-Creditor Relations

§ 2.101 Variable Rate Transactions

§ 2.101:1 Definition

A variable rate transaction is a contract, including a contract for an open-end account, that provides for an index, formula, or provision of law by which the interest rate or amount of time-price differential is determined. Tex. Fin. Code § 303.015(a).

§ 2.101:2 Rules Governing Interest

1. Parties may agree to any index, formula, or provision of law to determine interest rate that does not exceed applicable rate ceiling. Tex. Fin. Code § 303.015(a).
2. Variable contract rate may not be used in contract in which interest or time-price differential is precomputed and added into amount of contract when contract is made. Tex. Fin. Code § 303.015(b).
3. Ceiling for variable rate account. Tex. Fin. Code § 303.001.
4. Ceiling for open-end variable rate account. Tex. Fin. Code § 303.102.

§ 2.101:3 Other Rules

A variable rate agreement for credit extended for personal, family, or household use must include the disclosures either as required by the Truth in Lending Act or as provided in the Finance Code. Tex. Fin. Code § 303.015(c).

§ 2.102 Credit Card Transactions

§ 2.102:1 Definition

See Tex. Fin. Code § 301.002(a)(9) for a definition of a "lender credit card agreement," but note that this section refers to statutes applicable

to all credit card transactions, not just the transactions described in that statute.

§ 2.102:2 Rules Governing Interest

1. Maximum rate for lender credit card agreement with merchant discount. Tex. Fin. Code § 303.014.
2. Billing cycle interest limitation on open-end credit card account without merchant discount. Tex. Fin. Code § 339.002.
3. Ceiling on open-end account involving credit card transaction or merchant discount. Tex. Fin. Code § 303.006(c).
4. Ceiling on open-end account providing for credit card transaction where merchant discount is not imposed or received 21 percent. Tex. Fin. Code § 303.009(d).

§ 2.102:3 Other Charges

1. For lender credit card agreement in which merchant discount is imposed or received by creditor, no fee or charge not allowed by Finance Code chapter 346 may be charged. Tex. Fin. Code § 303.014(2)(A).
2. Seller may not impose surcharge for payment by credit card. Tex. Fin. Code § 339.001(a).

§ 2.102:4 Other Rules

1. Required disclosures. 15 U.S.C. § 1637; 12 C.F.R. §§ 226.5a, 226.12.
2. Credit card issuer generally subject to all claims or defenses of cardholder. 15 U.S.C. § 1666i; 12 C.F.R. § 226.12(c).
3. See 12 C.F.R. § 226.12 for additional rules affecting credit cards.

§ 2.103 Loans for Business, Commercial, or Investment Purposes

For extensions of credit for a business, commercial, investment, or similar purpose, the maximum interest rate is 28 percent. Tex. Fin. Code § 303.009(c).

§ 2.104 Loans to Corporation—Rules Governing Interest

Tex. Rev. Civ. Stat. arts. 1302–2.09 and 1302–2.09A, setting the maximum interest rates for loans to a corporation, were repealed by the legislature in 2003. *See* Acts 2003, 78th Leg., R.S., ch. 238, § 44(10)–(12) (H.B. 1165), eff. Sept. 1, 2003.

§ 2.105 Commercial Loans

§ 2.105:1 Definition

A commercial loan is one made primarily for business, commercial, investment, agricultural, or similar purposes. It does not include a loan made primarily for personal, family, or household use. Tex. Fin. Code § 306.001(5).

§ 2.105:2 Rules Governing Interest

1. Maximum interest rate. Tex. Fin. Code § 306.002.
2. Computation of term. Tex. Fin. Code § 306.003.
3. Determining interest rates by spreading. Tex. Fin. Code § 306.004.
4. Maximum interest rate under ceilings for loan for business, commercial, or investment purposes. Tex. Fin. Code § 303.009(c).

§ 2.105:3 Other Charges

1. Prepayment charge allowed. Tex. Fin. Code § 306.005.
2. Late charge allowed. Tex. Fin. Code § 306.006(1).
3. Bad check charge allowed. Tex. Fin. Code § 306.006(2).

§ 2.106 "Qualified" Commercial Loans ($3 Million or More)

§ 2.106:1 Definition

A "qualified commercial loan" is either—

1. a commercial loan with an aggregate value of—
   a. $3 million or more if secured by real property; or
   b. $250,000 or more if not secured by real property, and, if the aggregate value of the loan is less than $500,000, the loan documents contain a written certification from the borrower that the borrower was advised by the lender to seek the advice of an attorney or accountant and the borrower had the opportunity to do so; or
2. a renewal or extension of a commercial loan as described above, regardless of the principal amount of the loan at the time of renewal or extension.

Tex. Fin. Code § 306.001(9)(A). A commercial loan made for financing a business licensed by the Motor Vehicle Board of the Texas Department of Motor Vehicles is not a qualified commercial loan. Tex. Fin. Code § 306.001(9)(B).

§ 2.106:2 Rules Governing Interest

The interest rate on a qualified commercial loan may not exceed the applicable rate ceiling. Tex. Fin. Code § 306.101(a).

§ 2.106:3 Other Charges

A variety of other charges are listed in Tex. Fin. Code § 306.101(b).

§ 2.107 Interest on Negotiable Instruments Provided for, but Rate Not Ascertainable

If a negotiable instrument provides for interest, but the amount of interest is not ascertainable from the instrument, interest is payable at the judgment rate in effect at the place of payment of the instrument and at the time interest first accrues. Tex. Bus. & Com. Code § 3.112(b).

§ 2.108 Home Solicitation Transactions

§ 2.108:1 Definition

Chapter 601 of the Texas Business and Commerce Code (the former Home Solicitation Transactions Act) applies to a consumer transaction in which a merchant or agent personally solicits a sale to a consumer at a place other than the merchant's place of business, the consumer agrees to purchase at a place other than the merchant's place of business, and the goods or services are sold for a consideration of $25 or more. Tex. Bus. & Com. Code § 601.002(a)(3)(A). It does not apply to a sale of goods made under a preexisting revolving charge account or retail charge agreement or after negotiations between parties at a business establishment at a fixed location at which goods or services are offered for sale. Tex. Bus. & Com. Code § 601.002(b)(3).

§ 2.108:2 Rules Governing Interest

The ceilings set out in Texas Finance Code chapter 303 do not apply to home solicitation transactions. Tex. Fin. Code § 303.301(1). The attorney should refer to the laws governing the type of transaction in question, for example, Tex. Fin. Code § 345.055 (retail installment contract).

§ 2.108:3 Contents of Contract or Documentation

1. Notice form requirements. Tex. Bus. & Com. Code §§ 601.052–.055, 601.154; see section 2.108:5 below regarding particular violations commonly committed.
2. Contract or receipt cannot contain waiver of rights or confession of judgment. Tex. Bus. & Com. Code § 601.151.

§ 2.108:4 Rights Involving Cancellation

1. Qualifying transaction may be canceled by consumer not later than midnight of third business day after consumer signs agreement or offer to purchase. Tex. Bus. & Com. Code § 601.051. Merchant not entitled to compensation if consumer properly cancels. Tex. Bus. & Com. Code § 601.101.
2. May not transfer, negotiate, sell, or assign debt before midnight of fifth business day after contract signed or goods or services purchased. Tex. Bus. & Com. Code § 601.153 (commonly encountered violation).
3. May not fail to notify consumer before end of tenth business day after receiving notice of cancellation of merchant's intent to repossess or abandon shipped or delivered goods. Tex. Bus. & Com. Code § 601.154(1).
4. Rights and duties regarding goods possessed by consumer. Tex. Bus. & Com. Code §§ 601.102–.103.
5. May not refuse valid cancellation. Tex. Bus. & Com. Code § 601.154(2), (3) (commonly encountered violation).
6. Generally, must undo transaction. Tex. Bus. & Com. Code § 601.154(2), (3).

§ 2.108:5 Other Rules

All these rules are commonly violated.

1. Must inform consumer orally of right to cancel transaction. Tex. Bus. & Com. Code § 601.152(1).
2. May not misrepresent consumer's right to cancel. Tex. Bus. & Com. Code § 601.152(2).
3. Must provide consumer with the "notice of cancellation" set out in Tex. Bus. & Com. Code § 601.053(3), set in ten-point, bold-faced type, in the same language as that of the oral sales presentation.
4. Must provide consumer with a fully completed receipt or copy of the contract in the same language as that principally used in the oral sales presentation. Tex. Bus. & Com. Code § 601.052.
5. Must furnish notice of right to cancel in immediate proximity to the signature space on the contract in ten-point, bold-faced type. Tex. Bus. & Com. Code § 601.052(b)(4).
6. Must furnish consumer, at the time consumer signs contract or otherwise agrees to the purchase, with a completed notice of cancellation, in dupli-

cate, attached to the contract or receipt and easily detachable. Tex. Bus. & Com. Code § 601.053.

7. Must complete both copies of the notice of cancellation by entering the merchant's name and address, the date of transaction, and the date by which consumer must give notice of cancellation. Tex. Bus. & Com. Code § 601.052(b).

8. Must furnish notice of cancellation in same language used in the contract. Tex. Bus. & Com. Code § 601.053(2).

§ 2.109 Business Opportunity Act

§ 2.109:1 Definition

A "business opportunity" is defined as a sale or lease for an initial consideration of $500 or more of products, equipment, supplies, or services to be used by the buyer to begin a business in which the seller represents that—

1. the buyer will or is likely to earn profit in excess of initial consideration; and

2. the seller will either (a) provide or help the buyer find locations; (b) provide a sales, production, or marketing program; or (c) buy back any of what is bought or produced by the purchaser.

Tex. Bus. & Com. Code § 51.003(a). For exceptions, see Tex. Bus. & Com. Code § 51.003(b).

§ 2.109:2 Requirements for Disclosure Form and Contract

1. Sellers must register and file a disclosure statement with the secretary of state. Tex. Bus. & Com. Code §§ 51.051–.054, 51.164 (commonly encountered violation).

2. Rules regarding disclosures to the buyer. Tex. Bus. & Com. Code §§ 51.151–.163.

3. Rules regarding the form and content of the contract. Tex. Bus. & Com. Code § 51.201 (commonly encountered violation: failure to put contract in writing).

4. Seller may not ask the buyer to waive provisions of this statute. Tex. Bus. & Com. Code § 51.006 (commonly encountered violation).

§ 2.109:3 Other Rules

1. May not employ representation, device, scheme, or artifice to deceive buyer. Tex. Bus. & Com. Code § 51.301(1).

2. May not make untrue statement or omission of material fact. Tex. Bus. & Com. Code § 51.301(2).

3. May not represent that business opportunity provides or will provide income or earning potential unless seller has documented data substantiating claim and discloses data to buyer when representation made. Tex. Bus. & Com. Code § 51.301(3).

4. May not make claim in promotional or advertising material or in oral sales presentation, solicitation, or discussion inconsistent with information required to be disclosed by Texas Business and Commerce Code chapter 51. Tex. Bus. & Com. Code § 51.301(4).

5. Copies of completed contract and any other documents seller requires buyer to sign must be given to buyer at time buyer signs contract. Tex. Bus. & Com. Code § 51.202 (commonly encountered violation).

6. Seller must keep complete set of books, records, and accounts of business opportunity sales for at least four years from date of contract. Tex. Bus. & Com. Code § 51.008 (commonly encountered violation).

[Section 2.110 is reserved for expansion.]

IX. Acceleration; Holder in Due Course

§ 2.111 Acceleration

§ 2.111:1 Acceleration Generally

Acceleration is defined as a change in the date of the maturity of an obligation from a future date to the present. *General Motors Acceptance Corp. v. Uresti*, 553 S.W.2d 660, 663 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.). Acceleration is the only practical solution to the problem of how to enforce a defaulted installment debt. Acceleration is particularly important if enforcing a security interest in personal property, because the foreclosure sale of the collateral discharges the security interest under which it is made. Tex. Bus. & Com. Code § 9.504(d).

§ 2.111:2 Acceleration Clauses

To accelerate, there must be a clear, unequivocal contractual provision permitting it. If the meaning of a term in an acceleration clause is open to reasonable doubt, it should be construed to avoid acceleration. *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 893 (Tex. 1991); *Ramo, Inc. v. English*, 500 S.W.2d 461, 466 (Tex. 1973). A waiver of notice of intent to accelerate is not sufficient to waive notice of acceleration. *Shumway*, 801 S.W.2d at 893–94.

§ 2.111:3 "Acceleration of Note" vs. "Acceleration of Debt"

An important distinction has been made between "acceleration of the note" and "acceleration of the debt." "Acceleration of the note" has been interpreted as authorizing the entire face amount of the note, including unearned interest, to be collected on acceleration; "acceleration of the debt" does not call for the collection of unearned interest, because interest does not become part of the "debt" until it is earned. *Jim Walter Homes, Inc. v. Schuenemann*, 668 S.W.2d 324, 328 (Tex. 1984). The phrases *all amounts due or to become due hereunder, all sums herein agreed to be paid*, and *the entire unpaid balance* have all been found not to call for the acceleration of unearned interest or time-price differential. *Schuenemann*, 668 S.W.2d at 329 (and cases cited therein). The attorney should keep these distinctions in mind, not only when drafting contracts and security agreements, but also when making any type of communication to the debtor or the debtor's attorney and when drafting pleadings and motions.

§ 2.111:4 Acceleration for Insecurity

Section 1.208 of the Texas Business and Commerce Code, providing that the creditor "may accelerate payment or performance at will" or "when he deems himself insecure" if he in good faith believes that the prospect of payment or performance is impaired, was repealed by the 2003 legislature. See Acts 2003, 78th Leg., R.S., ch. 542, § 1 (H.B. 1394), eff. Sept. 1, 2003.

§ 2.111:5 Retail and Motor Vehicle Installment Sales

A retail installment sale for goods, services, or motor vehicles or a retail charge agreement may

not authorize the holder of the debt to accelerate all or part of the debt unless either the retail buyer is in default of his obligations or the holder believes in good faith that the prospect of the buyer's payment or performance is impaired. Tex. Fin. Code §§ 345.062, 348.109.

§ 2.111:6 Notice of Intent to Accelerate and Notice of Acceleration

Without a waiver, the holder of a note providing for acceleration of maturity at the option of the holder must demand payment of the delinquent installments before exercising the option to accelerate, and failure to give proper notice of intent to accelerate makes any attempted acceleration ineffective. *Williamson v. Dunlap*, 693 S.W.2d 373, 374 (Tex. 1985); *Ogden v. Gibraltar Savings Ass'n*, 640 S.W.2d 232, 233–34 (Tex. 1982); *Allen Sales & Servicenter v. Ryan*, 525 S.W.2d 863, 866 (Tex. 1975). See section 2.111:7 below regarding waivers. After notice of intent to accelerate has been given, an additional notice that the debt has been accelerated is also required. Notice of intent to accelerate is necessary to provide the debtor an opportunity to cure his default, and notice that the debt has been accelerated cuts off the debtor's right to cure the default and gives notice that the entire debt is due and payable. A notice that the debt has been accelerated is ineffective unless proper notice of intent to accelerate has been given. A letter to the debtor stating that failure to cure the default on or before a specified date "may" result in acceleration is not sufficient notice of intent to accelerate. *Ogden*, 640 S.W.2d at 234.

If the creditor makes demand for payment at the same time that he gives the debtor notice of acceleration and then sues to collect on the note, the creditor will be entitled to a judgment for past-due installments plus accumulated interest as provided in the note, not the accelerated amount of the entire indebtedness and not a take-nothing judgment. *Williamson*, 693 S.W.2d at 374.

See form 5-3 in this manual for a letter giving notice of default and intent to accelerate and form 5-4 for a letter giving notice of acceleration.

§ 2.111:7 Waiver of Notice

Waiver of presentment, notice of intent to accelerate, and notice of acceleration is effective only if it is clear and unequivocal. *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 893 (Tex. 1991).

§ 2.112 Holder in Due Course

§ 2.112:1 Effect of Holder-in-Due-Course Status

A holder in due course takes a negotiable instrument free of most contractual defenses a debtor can raise against enforcement of the instrument. Tex. Bus. & Com. Code § 3.305(b). The exceptions, sometimes called "real defenses," are discussed at section 2.112:4 below. Also, a number of state and federal statutes further limit the applicability of the holder-in-due-course doctrine, particularly in consumer transactions. See sections 2.112:5 and 2.112:6 below.

§ 2.112:2 Elements of Holder-in-Due-Course Status

1. The instrument must be negotiable. Tex. Bus. & Com. Code § 3.104(b); see Tex. Bus. & Com. Code § 3.104 for the definition of "negotiable instrument."

2. The person claiming holder-in-due-course status must be a holder of the instrument. Tex. Bus. & Com. Code § 3.302(a); see Tex. Bus. & Com. Code § 1.201(b)(21) for the definition of "holder."

3. When issued or negotiated to the holder, the instrument must not bear such apparent evidence of forgery or alteration or be otherwise so irregular or incomplete as to call its authenticity into question. Tex. Bus. & Com. Code § 3.302(a)(1).

4. The holder must take for value. Tex. Bus. & Com. Code § 3.302(a)(2)(A).

5. The holder must take in good faith. Tex. Bus. & Com. Code § 3.302(a)(2)(B).

6. The holder must take without notice that—

   a. the instrument is overdue;

   b. the instrument has been dishonored; or

   c. there is an uncured default with respect to payment of another instrument issued as part of the same series. Tex. Bus. & Com. Code § 3.302(a)(2)(C).

7. The holder must take without notice that the instrument contains an unauthorized signature or has been altered. Tex. Bus. & Com. Code § 3.302(a)(2)(D).

8. The holder must take without notice of any claim of a property or possessory right in the instrument or its proceeds, including a claim to rescind a negotiation and to recover the instrument or its proceeds. Tex. Bus. & Com. Code §§ 3.302(a)(2)(E), 3.306.

9. The holder must take without notice that a party has a defense or claim in recoupment described in section 3.305(a) of the Texas Business and Commerce Code. Tex. Bus. & Com. Code § 3.302(a)(2)(F). See section 2.112:4 below regarding these "real" defenses. A "claim in recoupment" is a claim raised by the obligor against the original payee arising out of the original transaction. *See FDIC v. Lattimore Land Corp.*, 656 F.2d 139, 143 (5th Cir. 1981).

§ 2.112:3 Burden of Proof

If a defense or claim in recoupment is proved by the debtor, the holder has the burden to prove holder-in-due-course status. Tex. Bus. & Com. Code § 3.308(b).

§ 2.112:4 "Real" Defenses Not Defeated by Holder-in-Due-Course Status

Holder-in-due-course status does not defeat an obligor's claims of—

1. infancy, to the extent it is a defense to a simple contract (see section 17.7:2 in this manual);

2. duress, lack of legal capacity, or illegality of the transaction that, under other law, nullifies the obligor's obligation (see sections 17.15, 17.7, and 17.20);

3. fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or essential terms (see section 17.23); or

4. discharge in insolvency proceedings.

Tex. Bus. & Com. Code § 3.305(a)(1).

§ 2.112:5 Federal Holder-in-Due-Course Rule

One who sells or leases goods or provides services to consumers cannot take or receive a consumer credit contract that does not have the following provision in at least ten-point, boldfaced type:

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

16 C.F.R. § 433.2.

The intent of this rule is to make it impossible for a holder of a consumer credit contract to be a holder in due course. Tex. Bus. & Com. Code § 3.106 cmt. 3. The rule goes further, however, in that a subsequent holder is not only subject to all defenses available against the seller but also all claims that could be asserted against the seller, with affirmative recovery limited only by the amounts paid under the contract.

§ 2.112:6 Retail Installment Sales (Limit of Holder-in-Due-Course Doctrine)

A right of action or defense of a retail buyer arising out of a retail installment transaction cannot be affected by the transfer of the contract to a third party unless—

1. the third party acquires the contract in good faith;
2. the buyer is notified of the transfer; and
3. the third party does not receive written notice from the buyer of the buyer's claim or defense before the thirty-first day after notice is mailed.

Tex. Fin. Code § 345.304(a). See Tex. Fin. Code § 345.304(b) for the specific requirements for the notice.

§ 2.112:7 General Prohibition against Waiver of Rights

Several provisions of the Texas Finance Code prohibit lenders from taking instruments if borrowers have waived certain rights, including rights of holders in due course. They include—

1. Tex. Fin. Code § 342.507 (consumer loans; see section 2.84 above);
2. Tex. Fin. Code § 345.356 (retail installment sales; see section 2.86);
3. Tex. Fin. Code § 347.053 (manufactured-home credit transactions); and
4. Tex. Fin. Code § 348.412 (motor vehicle installment sales; see section 2.88).

[Sections 2.113 through 2.120 are reserved for expansion.]

X. Revised Chapter 9 of Texas Business and Commerce Code: Secured Transactions

§ 2.121 Chapter 9 Generally

Article 9 of the Uniform Commercial Code (Secured Transactions) was substantially rewritten in all fifty states effective July 1, 2001, except in Connecticut (effective October 1, 2001) and Alabama, Florida, and Mississippi (effective January 1, 2002). In Texas, this law is referred to as chapter 9 of the Texas Business and Commerce Code. The revisions to chapter 9

contain the first major changes to the law of secured transactions since 1972. There are significant changes in scope, substantive rules, and procedures intended to bring greater certainty to secured financing transactions by bringing more types of property and types of financing transactions within chapter 9 and by enforcement of security interests. However, many of the familiar procedures and principles of chapter 9 remain:

1. The filing of a financing statement (now called a UCC1) is still the primary method for perfecting a security interest.
2. "Floating" or "blanket" lien on after-acquired property remains a privileged arrangement.
3. The "first to file" rule remains the primary (although not the sole) priority principle.
4. Purchase-money security interests remain the primary exception to the "first to file" rule, although they have been changed slightly to make them easier to maintain.
5. The lender has a lien on the proceeds of the collateral if he has a perfected lien on the collateral, although the definition of proceeds has been significantly enlarged and the lien on proceeds is now "automatic."
6. Attachment and perfection of security interest are retained concepts and still central issues for lenders.
7. A first security interest perfected under chapter 9 still takes priority over a lien creditor or trustee in bankruptcy whose lien arises later.

A complete review of the 2001 revisions to chapter 9 is beyond the scope of this manual, but a good summary for the interested reader appears in the statute at UCC comment 4, "Summary of Revisions," to Code section 9.101.

§ 2.121:1 Multistate Secured Lending Transactions

Many states did not enact in full the official version of revised UCC article 9 recommended by the American Law Institute and the National Conference of Commissioners on Uniform Laws. For example, although one of the heralded changes in the revision was the abolition of local filing (for example, in Texas, filings with county clerks), Georgia and Louisiana did not abolish local filing, although both states maintain a central index to facilitate lien searches. As another example, although the debtor does not have to sign or authenticate a UCC1 financing statement under the official version, in Alabama the debtor's signature *is* required unless the transaction fits within certain very carefully defined exceptions. The practitioner should investigate the specific UCC provisions involved in each transaction or collection effort in the jurisdiction whose law is applicable. The practitioner should also become familiar with the place-of-filing and choice-of-law rules contained in the 2001 revisions to chapter 9.

§ 2.121:2 Consumer-Goods Transactions

The 2001 revisions to chapter 9, including the accompanying conforming revisions to other chapters in the Texas Business and Commerce Code, include special rules for "consumer goods," "consumer-goods transactions," and "consumer transactions"; for example:

1. Tex. Bus. & Com. Code §§ 2.502 and 2.716 provide a buyer of consumer goods with enhanced rights to possession of the goods, thereby accelerating the opportunity to achieve "buyer in ordinary course of business" status under section 1.201.

2. Tex. Bus. & Com. Code § 9.103(e) (allocation of payments for determining extent of purchase-money status), § 9.103(f) (purchase-money status not affected by cross-collateralization, refinancing, restructuring, or the like), and § 9.103(g) (secured party has burden of establishing extent of purchase-money status) do not apply to consumer-goods transactions. The limitation of those provisions to non-consumer transactions leaves to the courts the fashioning of proper rules for consumer-goods transactions.

3. Tex. Bus. & Com. Code § 9.108 provides that in a consumer transaction, a description of consumer goods, a security entitlement, a securities account, or a commodity account "only by [UCC-defined] type of collateral" is not a sufficient collateral description in a security agreement.

4. When applicable, Tex. Bus. & Com. Code §§ 9.403 and 9.404 make effective the Federal Trade Commission's anti-holder-in-due-course rules—16 C.F.R. § 433—even in the absence of the required legend.

Chapter 9 includes the following definitions relevant to consumer-goods transactions:

1. "Consumer debtor" means a debtor in a consumer transaction (Tex. Bus. & Com. Code § 9.102(a)(22)).

2. "Consumer goods" means goods that are used or bought for use primarily for personal, family, or household purposes (Tex. Bus. & Com. Code § 9.102(a)(23)).

3. "Consumer-goods transaction" means a consumer transaction in which (a) an individual incurs an obligation primarily for personal, family, or household purposes; and (b) a security interest in consumer goods secures the obligation (Tex. Bus. & Com. Code § 9.102(a)(24)).

4. "Consumer obligor" means an obligor who is an individual and who incurred the obligation as part of a transaction entered into primarily for personal, family, or household purposes (Tex. Bus. & Com. Code § 9.102(a)(25)).

5. "Consumer transaction" means a transaction in which (a) an individual incurs an obligation primarily for personal, family, or household purposes; (b) a security interest secures the obligation; and (c) the collateral is held or acquired primarily for personal, family, or household purposes. The term includes consumer-goods transactions (Tex. Bus. & Com. Code § 9.102(a)(26)).

See Tex. Bus. & Com. Code § 9.102 UCC cmt. 7 for an explanation of the impact of the July 1, 2001, revisions to chapter 9 on the definitions relating to consumer-goods transactions.

Certain provisions of chapter 9 do not apply to consumer transactions:

1. The ten-day safe harbor for advance notification of disposition provided by Tex. Bus. & Com. Code § 9.612 does not apply in a consumer transaction.

2. Tex. Bus. & Com. Code § 9.613 (specifying the contents and form of notice of disposition) does not apply to a consumer-goods transaction.

3. Tex. Bus. & Com. Code § 9.620 prohibits partial strict foreclosure with respect to consumer-goods collateral and, unless the debtor agrees to waive the requirement in an authenticated record after default, in certain cases requires the secured party to dispose

of consumer goods collateral that has been repossessed.

4. The "rebuttable presumption" rule does not apply to a consumer transaction. Tex. Bus. & Com. Code § 9.626. (See section 2.122:7 below for a discussion of the "rebuttable presumption rule.") Section 9.626 also provides that its limitation to transactions other than consumer transactions leaves to the courts the proper rules for consumer transactions and prohibits the courts from drawing inferences from that limitation. Tex. Bus. & Com. Code § 9.626(b).

A secured party in a consumer-goods transaction must provide a debtor with a notification explaining how the secured party calculated a deficiency at the time he first undertakes to collect the deficiency. Tex. Bus. & Com. Code § 9.616.

§ 2.121:3 Information-Gathering Procedures under Chapter 9

Tex. Bus. & Com. Code § 9.210 allows a debtor to obtain information from a secured party about the secured obligation and the collateral in which the secured party may claim a security interest, both before and after default. Only the debtor has the right to request information. *See* Tex. Bus. & Com. Code § 9.210(a)(2)–(4). The debtor may request information from the secured party by—

1. requesting that the secured party prepare and send an accounting (defined in Tex. Bus. & Com. Code § 9.102(a)(4));
2. submitting to the secured party a list of collateral for approval or correction; or
3. submitting to the secured party a statement of the aggregate amount of unpaid secured obligations for approval or correction.

Tex. Bus. & Com. Code § 9.210(a)(2)–(4).

The secured party must respond within fourteen days of the receipt of a request, either by providing an accounting, approving or correcting a list of collateral or the aggregate amount of unpaid secured obligations, or, if the secured party no longer claims an interest in the collateral or secured obligation, providing a statement saying so and the name and mailing address of any known assignee or successor. Tex. Bus. & Com. Code § 9.210(c)–(e).

The debtor's rights under this section may not be waived or varied. Tex. Bus. & Com. Code § 9.602(2). Noncompliance by the secured party may subject the secured party to injunctive relief, actual damages, and statutory damages under Tex. Bus. & Com. Code § 9.625.

§ 2.122 Subchapter F "Default"

Subchapter F of chapter 9 (referred to as part 6 in the official comments to article 9) extensively revises former subchapter E (referred to as part 5 of article 9 in most other jurisdictions). Provisions relating to enforcement of consumer-goods transactions and consumer transactions are discussed below.

Subchapter F treats the postdefault period and covers the rules and restrictions applicable to collection, enforcement, disposition, and acceptance (that is, in satisfaction of the secured obligation). It is intended to address—

1. the required notices;
2. the persons to whom notices must be sent;
3. required deadlines for notices;
4. the standard of conduct to which a secured party will be held;

5. how any proceeds of a disposition will be applied; and

6. the consequences for failure to observe the requirements of subchapter F.

Although every aspect of a secured party's disposition of collateral is subject to the requirement that it must be "commercially reasonable" (*see* Tex. Bus. & Com. Code § 9.610(b)), chapter 9 does not define "commercially reasonable." It does, however, provide some examples and some safe harbors in Tex. Bus. & Com. Code § 9.627.

§ 2.122:1 Debtor, Secondary Obligor, Waiver

Section 9.602 of the Texas Business and Commerce Code requires that certain rights of debtors and obligors and duties owed them by the secured party cannot be waived or varied. Tex. Bus. & Com. Code § 9.602. Section 9.102(a)(28) defines "debtor" as—

1. a person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor;

2. a seller of accounts, chattel paper, payment intangibles, or promissory notes; or

3. a consignee.

Tex. Bus. & Com. Code § 9.102(a)(28).

An "obligor" is a person who—

> with respect to an obligation secured by a security interest in or an agricultural lien on the collateral, (i) owes payment or other performance of the obligation, (ii) has provided property other than the collateral to secure payment or other performance of the obligation, or (iii) is otherwise accountable in whole or in part for payment or other performance of the obligation.

Tex. Bus. & Com. Code § 9.102(a)(60). Issuers or nominated persons under a letter of credit are not obligors. A "secondary obligor" is an obligor to the extent that the obligor's obligation is secondary or the obligor has a right of recourse with respect to an obligation secured by collateral against the debtor, another obligor, or property of either. Tex. Bus. & Com. Code § 9.102(a)(72). However, with one exception (section 9.616, as it relates to a consumer obligor), the rights and duties addressed in section 9.602 affect nondebtor obligors only if they are secondary obligors.

The secured party is relieved from any duty or liability to any person unless the secured party knows the person is a debtor or obligor. Tex. Bus. & Com. Code § 9.628. Generally, a secondary obligor's rights and a secured party's duties under subchapter F may not be waived. Tex. Bus. & Com. Code § 9.602. However, a debtor or secondary obligor may waive the right to notification of disposition of collateral and, in a nonconsumer transaction, waive the right to redeem collateral *if* the secondary obligor or debtor agrees to do so *after default*. Tex. Bus. & Com. Code § 9.624.

§ 2.122:2 Rights of Collection and Enforcement of Collateral

Tex. Bus. & Com. Code § 9.607 explains in greater detail than former section 9.502 the rights of a secured party who seeks to collect or enforce nonpossessory collateral, such as accounts, chattel paper, and payment intangibles. It also sets forth the enforcement rights of a depositary bank holding a security interest in a deposit account maintained with the depositary bank. *See* Tex. Bus. & Com. Code § 9.607(a)(4), (5). However, section 9.607 addresses only the rights of the secured party with respect to the debtor and not the rights or duties of third par-

ties, such as account debtors on collateral, which are addressed elsewhere (*see, e.g.*, Tex. Bus. & Com. Code § 9.406). See Tex. Bus. & Com. Code § 9.608 concerning the manner in which proceeds of collection or enforcement are to be applied.

§ 2.122:3 Disposition of Collateral

Warranties of Title: The warranties of title, possession, and quiet enjoyment that are made applicable by other law to commercial sales generally also apply to a secured party who disposes of collateral. Tex. Bus. & Com. Code § 9.610(d). Section 9.610(e)–(f) provides rules for the exclusion, modification, or limitation of those warranties.

Notification, Application of Proceeds, Surplus and Deficiency, Other Effects: A secured party is required to give notification of a disposition of collateral to other secured parties and lienholders who have filed financing statements against the debtor covering the collateral. Tex. Bus. & Com. Code § 9.611. However, the secured party is relieved of that duty when a timely search of the filing records is undertaken and the results are not received by the time of notification. Tex. Bus. & Com. Code § 9.611(e). Section 9.613, which applies only to nonconsumer transactions, sets out the contents of a sufficient notice of disposition and provides that a notification sent ten days or more before the earliest time for disposition is deemed sent within a reasonable time. Tex. Bus. & Com. Code § 9.613. Section 9.615 addresses the application of proceeds of disposition, the entitlement of a debtor to any surplus, and the liability of an obligor for any deficiency. Tex. Bus. & Com. Code § 9.615. Section 9.619 clarifies the effect of a disposition by a secured party, including rights of transferees of the collateral. Tex. Bus. & Com. Code § 9.619.

§ 2.122:4 Rights and Duties of Secondary Obligor

A secondary obligor obtains the rights and assumes the duties of a secured party if the secondary obligor receives an assignment of a secured obligation, agrees to assume the secured party's rights and duties on a transfer to it of collateral, or becomes subrogated to the rights of the secured party with respect to the collateral. Tex. Bus. & Com. Code § 9.618. The assumption, transfer, or subrogation is not a disposition of collateral under section 9.610, but it does relieve the former secured party of further duties, clarifying a disputed point under chapter 9 before the July 1, 2001, revisions.

§ 2.122:5 Transfer of Record or Legal Title

Texas Business and Commerce Code section 9.619 contains a new provision that provides for a transfer of record or legal title in collateral to a secured party. Such a transfer is not of itself a disposition under subchapter F and does not of itself relieve the secured party of its duties under subchapter F. This rule applies regardless of the circumstances under which the transfer of title occurs. Tex. Bus. & Com. Code § 9.619.

§ 2.122:6 Strict Foreclosure

Texas Business and Commerce Code section 9.620, unlike former section 9.505, permits a secured party to accept collateral in partial satisfaction, as well as full satisfaction, of the obligations secured. Tex. Bus. & Com. Code § 9.620. The right of strict foreclosure extends to intangible as well as tangible property. Section 9.622 clarifies the effects of an acceptance of collateral on the rights of junior claimants. Tex. Bus. & Com. Code § 9.622. Unreasonable delay is relevant when determining whether a disposition under section 9.610 is commercially reasonable. *See* Tex. Bus. & Com. Code § 9.610 UCC cmt. 3.

§ 2.122:7 Effect of Noncompliance: "Rebuttable Presumption" Test

The "rebuttable presumption" test applies to a determination of whether the secured party complied with certain provisions of subchapter F (the test does not necessarily apply in consumer transactions—see discussion at section 2.121:2 above). Tex. Bus. & Com. Code § 9.626. The deficiency claim of a noncomplying secured party is calculated by crediting the obligor with the greater of the actual net proceeds of a disposition or the amount of net proceeds that would have been realized if the disposition had been conducted in accordance with subchapter F (that is, in a commercially reasonable manner). Tex. Bus. & Com. Code § 9.626(a)(3). For nonconsumer transactions, this section rejects the "absolute bar" test that some courts have imposed, barring a noncomplying secured party from recovering any deficiency, regardless of the loss (if any) the debtor suffered as a consequence of the noncompliance. *See* Tex. Bus. & Com. Code § 9.626 State Bar Comm. cmt.

§ 2.122:8 "Low-Price" Disposition: Calculation of Deficiency and Surplus

Tex. Bus. & Com. Code § 9.615(f) addresses the problem of procedurally regular postdefault dispositions of collateral that nonetheless fetch a low price. It provides a special method of calculation of a deficiency if the proceeds of a disposition of collateral to a secured party, a person related to the secured party, or a secondary obligor are "significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought." Tex. Bus. & Com. Code § 9.615(f). (See Tex. Bus. & Com. Code § 9.102(a)(64) for a definition of "person related to.") In these situations, because of the possibility that there were not adequate incentives to obtain a better price, the calculation of a deficiency or surplus is based *not* on the actual net proceeds but on the proceeds that *would have been* received in a disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor.

[Reserved]

Chapter 3

Finding Debtor and Debtor's Assets

I. Finding Debtor

II. Finding Debtor's Assets

III. Ascertaining Form of Debtor's Business

Forms

tory Report (PWD 763)" form can be downloaded from the Department's Web site at **tpwd.state.tx.us/publications/fishboat/forms/**.

§ 3.9:3 Aircraft

The Federal Aviation Administration (FAA) maintains records on individual aircraft. Aircraft registration records include applications for aircraft registration, evidence of ownership, security agreements, mechanic's liens, lien releases, leases, lease terminations, and N-Number changes.

Records of all aircraft registered in the United States are sold through a subscription service by **PublicData.com**. The records are searchable by name of owner, make and model, or serial number.

The FAA's Aircraft Registration Branch will provide limited information at no charge over the telephone at 866-762-9434. For example, by direct telephone call to the FAA, an attorney may discover whether a given person has an aircraft registered in his name. Information on specific aircraft may be available by providing the FAA with the aircraft's serial number and N-Number. The same information is available online at **http://www.faa.gov/licenses_certificates/aircraft_certification/aircraft_registry**. Copies of the complete records on an aircraft can be requested through the FAA's Web site. The records are available either on paper or, for more recent records, on a CD-ROM. Certified copies of the records are also available. A schedule of charges can be found on the FAA's Web site.

§ 3.10 Public Records

Although the county clerk's and tax assessor's records are more often searched to find the debtor's assets, they may contain address information as well. See sections 3.21:1 and 3.21:2 below regarding searching these records. When searching for an address in the county clerk's records, the attorney should examine all documents indexed in the debtor's name. All conveyances executed after December 31, 1981, must have the grantee's address. Tex. Prop. Code § 11.003(a)(1). Also, county clerks typically require a document presented for recording to have a "return to" address at the end of the document. Finally, many document forms, such as the State Bar of Texas's conveyancing forms found in the *Texas Real Estate Forms Manual*, require the addresses of the parties to the transaction. The tax assessor's records will contain an address for the person paying taxes on particular property.

§ 3.11 Title Company

Title companies are also discussed at section 3.21:3 below, but are worth mentioning here because they not only index property by legal description but also keep records of judgments, tax liens, divorces, and probate proceedings, indexed by individual or business name. The attorney should ask for a "name" search. Most of the documents the title company discovers will contain some sort of address and perhaps other information as well, so the company should be asked to provide copies of documents that turn up in its search. Some title companies now provide modem access to their databases for a fixed fee.

§ 3.12 Professional or Occupational Licenses

If the debtor has a professional or occupational license, such as real estate broker-salesperson, insurance agent, auctioneer, physician, chiropractor, dentist, surveyor, nurse, accountant, or attorney, the relevant licensing authority should provide the debtor's address according to its records. If the debt or judgment pertains to the debtor's professional activity, there may be a recovery fund to pay unpaid judgments. *See, e.g.*, Tex. Occ. Code §§ 1101.601–.615 (Real

Estate Recovery Fund to pay eligible judgments against licensees).

[Sections 3.13 through 3.20 are reserved for expansion.]

II. Finding Debtor's Assets

§ 3.21 Real Property Searches

§ 3.21:1 County Clerk

Every county clerk in the state must keep an index of grantors and grantees of documents recorded in the clerk's county. County clerks do not keep any true ownership records; there is no such thing in Texas. The attorney should not expect the county clerk's staff to research its records but should be prepared to conduct the research. If the county is a distant one, a local title company may be of assistance; see section 3.21:3 below. Both the grantor and grantee indexes for tax liens and abstracts of judgment as well as conveyances should be searched in the county records.

§ 3.21:2 Tax Assessor-Collector

The county tax assessor keeps a tax roll for all real and tangible personal property located within the county. Most such rolls can be searched by name, providing a way to determine whether an individual may own property in that county. The assessor's or taxing authority's records may not indicate whether an individual or entity actually owns property, but at a minimum they will indicate the person or entity who receives the tax bill for that property. The assessor's records may be used as a starting point for tracing ownership of real property. If the county tax assessor does not maintain a name index, other taxing authorities in the county, such as school or water districts, may maintain such an index. Many counties now provide Internet access to their tax rolls.

§ 3.21:3 Title Company

A title company can provide a chain of title to a particular piece of property. A complete abstract of title can be prohibitively expensive and of little use to the debt collector, but the title company can usually provide a last deed in the chain to any piece of property, as well as liens recorded against that property.

Larger title companies will have a customer service department. In smaller counties, the attorney should ask for the abstract plant.

§ 3.22 UCC Searches

Caveat: In 1999, the legislature made sweeping changes to chapter 9 of the Texas Business and Commerce Code, which took effect July 1, 2001. If collection efforts as to a particular obligation began before July 1, 2001, however, *they are still governed by the prior law*. Because of the significant changes made to the Code, it is of paramount importance to know whether the prior law or the current law governs the collection efforts and, in consulting any statutory materials, to be sure which law, the prior or the current, the attorney is looking at.

Because Uniform Commercial Code financing statements must describe the collateral securing a secured debt, a review of these documents will give the attorney such information as the kind of equipment the debtor may have and the identity of any party claiming a security interest in it. Tex. Bus. & Com. Code § 9.502.

Any UCC search before July 1, 2006, must be conducted under both the former law and the current law. Under the former law, depending on the type of property involved, the financing statement would have been filed in the county clerk's office, either in the county of the debtor's residence, in the county in which the goods were kept, or in the county in which the real property that the collateral was affixed to or was to be affixed to is located, or in the secretary of state's office for collateral located or deemed located in Texas. *See* prior Texas Business and Commerce Code section 9.401. Under the new law, the financing statement will normally be filed in the central filing office of the state of the debtor's *location*, which in the case of debtors located in Texas will be the secretary of state's office. Tex. Bus. & Com. Code §§ 9.301, 9.501(a).

The new rules for determining a debtor's location can be complex, but the most commonly applicable ones can be summarized as follows:

1. *Registered organizations.* A registered organization is an organization organized solely under the law of the United States or a single state and as to which the state or United States must maintain a public record showing the organization has been organized. Tex. Bus. & Com. Code § 9.102(a)(71). Note that effective July 1, 2013, "registered organization" means an organization formed or organized solely under the law of a single state or the United States by the filing of a public organic record with, the issuance of a public organic record by, or the enactment of legislation by the state or the United States. Tex. Bus. & Com. Code § 9.102(a)(71). See also Tex. Bus. & Com. Code §§ 1.201(b)(25) and 9.102(a)(68–a) for definitions of "organization" and "public organic record," respectively. Effective July 1, 2013, the term *registered organization* includes a business trust that is formed or organized under the law of a single state if a statute of the state governing business trusts requires that the business trust's organic record be filed with the state. Tex. Bus. & Com. Code § 9.102(a)(71). A registered organization is located in its jurisdiction of organization. Tex. Bus. & Com. Code § 9.307(e). Thus if the debtor is a corporation, limited liability company, or limited partnership organized under the laws of a particular state, the debtor is located in that state. However, there are special rules for registered organizations formed under federal law. *See* Tex. Bus. & Com. Code § 9.307(f).

2. *Other debtors.* If the debtor is an individual, the debtor is located at his principal residence. Tex. Bus. & Com. Code § 9.307(b)(1). If the debtor is an organization but is not a registered organization (for example, a general partnership), the debtor is located at the debtor's place of business if the debtor has only one place of business or at the debtor's chief executive office if the debtor has more than one place of business. Tex. Bus. & Com. Code § 9.307(b)(2), (3). Special rules apply to banks, foreign air carriers, and the United States of America. *See* Tex. Bus. & Com. Code § 9.307(h)–(j).

3. *Foreign debtors.* If the debtor is located in a jurisdiction outside the United States and that jurisdiction does not provide for a public filing system for nonpossessory security interests for a secured party to prevail over a subsequent lien creditor, the debtor is deemed to be located in the

District of Columbia. *See* Tex. Bus. & Com. Code § 9.307(c).

Generally, when searching for information concerning a debtor whose obligation was documented or redocumented after July 1, 2001, it makes no difference where the collateral is located; the central filing office of the jurisdiction of the debtor's location should be searched. However, if the collateral consists of as-extracted collateral, timber to be cut, or fixtures (including goods that are to become fixtures), search the local filing office (that is, the real estate recording office that would be used for recording a mortgage on the related real property). Tex. Bus. & Com. Code § 9.501(a)(1).

To determine whether a financing statement has been filed the attorney can—

1. examine the client's financing statement to see whether the upper right-hand corner has been stamped by the secretary of state or county clerk's office;

2. call the secretary of state's office (512-475-2703), give the name of the debtor, and request the search; or

3. submit a form UCC11 to the appropriate office. See form 3-2 in this chapter.

On receipt of a form UCC11, the filing officer must issue his certificate showing whether there is on file, on the date and hour stated therein, any presently effective financing statement naming a particular debtor and any statement of assignment and, if there is, giving the date and hour of filing of each such statement and the name and address of each secured party. On request, the filing officer must furnish a copy of any filed financing statement or statement of assignment. A financing statement for some kinds of personal property can be obtained by sending a form UCC11 to the Secretary of State, Uniform Commercial Code Section, P.O. Box 13193, Austin, TX 78711-3193. See form 3-2 in this chapter; form UCC11 is also available on the secretary of state's Web site at **sos.state.tx.us**. The form can be downloaded or filled out and then printed from the site. This information is also available through the Secretary of State Online Access system, called SOSDirect, which allows computer access to information maintained by the secretary of state. Information on subscribing to this system may be obtained by calling 512-475-2755 (corporations) or 512-475-2740 (UCC), accessing the secretary of state's Web site at **sos.state.tx.us**, or sending an e-mail to **SOSDirect@sos.state.tx.us**. See sections 5.11:4 through 5.11:6 in this manual for further discussion of financing statements.

§ 3.23 Debtor's Bank Account

The easiest way to find out where the debtor banks is to write him a check on an unfamiliar account, which when cashed will show the depository bank and offer the account number itself. If the debtor is a business, something may be bought from the business with a check.

Discovery from financial institutions is discussed at section 18.16 in this manual.

§ 3.24 Vehicles, Boats, Aircraft

The resources set out in section 3.9 above for finding the debtor's address can also be used for ascertaining whether the debtor has any of these particular types of assets.

[Sections 3.25 through 3.30 are reserved for expansion.]

III. Ascertaining Form of Debtor's Business

§ 3.31 Importance of Ascertaining Debtor's Form of Business

There are three primary reasons for ascertaining the form a business debtor takes. First, different entities are served with process in different ways. See sections 16.10 through 16.13 in this manual regarding service of process on different entities. Second, the nature of liability of the owners of the business varies with the type of entity. See sections 6.21 through 6.34 for a discussion of individual liability for debts of business entities. Third, the form of the debtor's business determines its location for UCC perfection and search purposes. See section 3.22 above.

§ 3.32 Comptroller

The Open Records Division of the Texas Comptroller of Public Accounts maintains records on corporate franchise tax and sales tax. Its search service is free; the phone number is 800-252-1386, which directs the caller to the Web site, **http://ourcpa.cpa.state.tx.us/coa/Index.html**. The information available includes the nature of the business—sole proprietorship, partnership, or corporation—as well as the names of corporate agents and officers, owners of sole proprietorships and partnerships, and corporate assumed names.

§ 3.33 Corporation Records of Secretary of State

If provided with the corporation's name or a close approximation, the secretary of state can provide such information as the corporation's registered agent and the names of its incorporators or whether the business even is a corporation chartered or authorized to do business in Texas. This information may be obtained at no charge by calling 512-463-5555 or by sending an e-mail to **corpinfo@sos.state.tx.us**. It also may be obtained by mail for a small charge per corporation name search.

§ 3.34 Assumed Name Records

Searching the assumed name records is discussed at section 3.5 above. An assumed name record search will disclose not only the name but also the form of the debtor's business.

[Reserved]

A search of the relevant records should be made and should go back at least ten years, as tax liens generally become unenforceable after ten years from the date of assessment. The taxpayer and the IRS can agree to extend the ten-year period. 26 U.S.C. § 6502(a). A variety of occurrences, including a bankruptcy stay, will suspend the running of the ten-year period. 26 U.S.C. § 6503. Note also the refiling rights of the IRS as set out in 26 U.S.C. § 6323(g).

Any notices of possible federal tax liens filed against persons with the same or similar names as the debtor should be examined carefully. The notice will have either a taxpayer identification number or a Social Security number. The possibility that the defaulting taxpayer and defaulting debtor are different people or entities may be established based on information in the client's file such as a credit application or report. However, if there is any possibility that the two are the same, the attorney should send the notice to the IRS. This action is cheap insurance against the possibility that the IRS could effectively overturn the foreclosure sale by retaining and enforcing its lien after the client's lien is extinguished by power of sale.

§ 5.36:2 Notice to Texas Comptroller

The Texas Comptroller of Public Accounts (the "comptroller") is required to file a tax lien for all taxes due the state. Tex. Tax Code § 113.002(a). The lien attaches to all of the taxpayer's property as of the first day of the period in which the lien was filed (Tex. Tax Code §§ 113.001(b), 113.105(b)), and the filing and recording of a tax lien notice is record of the notice (Tex. Tax Code § 113.006(a)). The Texas Supreme Court has stated in dicta that the practical effect of filing the tax lien is to render any property subject to it virtually unsalable. *R Communications, Inc. v. Sharp*, 875 S.W.2d 314, 317 n.6 (Tex. 1994). The lien is enforceable against any purchaser of the taxpayer's property and attaches to all after-acquired property of the delinquent taxpayer as well. Tex. Tax Code §§ 111.020, 113.105.

Every county clerk is required to keep a bound state tax lien book in which state tax liens of the comptroller are recorded. Tex. Tax Code § 113.004. A state tax lien is filed with the county clerk, presumably in the county of the taxpayer's place of business or residence for personal property, and in the county in which the real property is located. Tex. Tax Code § 113.005(a).

There is no state law provision precisely analogous to section 7425(c)(1) of the Internal Revenue Code. Accordingly, a notice to the comptroller would be required only in the case of collateral other than consumer goods and only if an authenticated notice of a claim against the collateral had been received from the comptroller by the secured party before the notification date. Tex. Bus. & Com. Code § 9.611(c)(3)(A). This is because the entry in the state tax lien book is not a "financing statement" (Tex. Bus. & Com. Code § 9.102(a)(39)), and the state's interest in the property is not required to be perfected by filing a financing statement. Accordingly, the selling secured party does not have an affirmative duty to search out the state's security interest in the collateral under Tex. Bus. & Com. Code § 9.611(c)(3)(B).

Finally, the seller is not obligated to give prior notice to the comptroller of its intent to sell the encumbered collateral under section 9.611(c)(3)(C) because tax liens filed under chapter 113 of the Tax Code do not fall within the exception to the perfection-by-filing requirement in Tex. Bus. & Com. Code § 9.311(a)(2). As a result, unless the state provides the selling secured party with an authenticated notice of its interest in the collateral, the seller has no obligation to inform the state of Texas of the sale of collateral securing payment of delinquent taxes owed. *See* Tex. Bus. & Com. Code § 9.611(c)(3)(A).

However, the practical reality, because of the transferee liability provisions described above and the ad valorem tax priority provisions such as Tex. Tax Code § 32.05, is that a search for state tax liens against the debtor's property is essential before conducting a foreclosure sale of the collateral. Even if no notice to the comptroller is required, any purchaser at the sale would not take free and clear of the state's liens, and the provisions of Tex. Bus. & Com. Code § 9.611 at best merely provide a defense to an action for wrongful foreclosure or conversion. *See Grand Prairie Independent School District v. Southern Parts Imports, Inc.*, 803 S.W.2d 762 (Tex. App.—Dallas), *rev'd on other grounds*, 813 S.W.2d 499 (Tex. 1991). In that case, the city of Grand Prairie alleged that the foreclosing secured party, Heller Financial, wrongfully foreclosed on the debtor's collateral. The debtor failed to pay personal property taxes on property it used as collateral for a loan from Heller. Heller failed to give the city notice of its intended foreclosure sale under the predecessor to section 9.611(c)(3) (prior section 9.504(c)). The city's wrongful foreclosure suit was dismissed by summary judgment because Heller was not required to provide notice to the city. *Grand Prairie Independent School District*, 803 S.W.2d at 767. Heller was not aware of the city's security interest in the property because the city did not inform Heller of the existence of that interest. Furthermore, Heller was not obligated to provide the city with notice of the intended sale because the city never filed a financing statement to perfect its tax lien. Of course, the city was not required to file a financing statement to obtain an ad valorem tax lien on the personal property that was Heller Financial's collateral. Tex. Tax Code § 32.05.

§ 5.37 Purchase of Property by Creditor

The secured party may buy the collateral at a public sale. He may buy at a private sale only if the collateral is of a type customarily sold in a recognized market or is the subject of widely distributed standard price quotations. Tex. Bus. & Com. Code § 9.610(c). The debtor is not expressly prohibited from waiving this provision by contract in the laundry list of nonwaivable provisions in section 9.602, but any purchase by the secured party, a related party, or a secondary obligor renders the calculation of a surplus or deficiency following the disposition subject to special scrutiny under Tex. Bus. & Com. Code § 9.615(f).

§ 5.38 Disposition of Collateral by Methods Other Than Sale

§ 5.38:1 What Constitutes Disposition

The secured creditor, after the debtor's default, may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing by public or private proceedings. Notice must be given of public or private sale or other intended disposition. Tex. Bus. & Com. Code § 9.610(a). Disposition is not synonymous with sale and transfer of title, and a disposition by some other method is also subject to the notice requirement.

§ 5.38:2 Destruction of Collateral

Destruction of the collateral by the creditor was held to be a disposition entitling the debtor to notice in *Tanenbaum v. Economics Laboratory, Inc.*, 628 S.W.2d 769, 772 (Tex. 1982). The creditor was said to be put to an election either to sell the repossessed collateral or to retain it in complete satisfaction of the debt. *Tanenbaum*, 628 S.W.2d at 771. However, the court also held that if the creditor destroys or scraps the collateral, the creditor, de facto, elects retention of the collateral in satisfaction of the secured obligation. *Tanenbaum* may have been superseded by revised chapter 9 on this aspect of retention in satisfaction.

finances. *See SSP Partners v. Gladstone Investment (USA) Corp.*, 275 S.W.3d 444, 456 (Tex. 2008), *abrogating Paramount Petroleum Corp. v. Taylor Rental Center*, 712 S.W.2d 534, 536 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

§ 6.24:6 Foreign Corporation

The statutory limitations on piercing the corporate veil (that is, having to prove actual fraud in contract cases and the unavailability of failure to follow corporate formalities as a ground for piercing) may or may not apply to foreign corporations. See Tex. Bus. Orgs. Code § 1.002(14), which includes a for-profit corporation, nonprofit corporation, and professional corporation in its definition of "corporation" but does not specify domestic or foreign. Also, Tex. Bus. Orgs. Code § 21.223 refers only to "corporations" and does not specify domestic or foreign. The manual committee is not aware of case law on this matter.

§ 6.25 Insolvency, Dissolution, and Forfeiture of Corporations

§ 6.25:1 "Trust Fund" Theory

Under the common law, when a corporation becomes insolvent and ceases doing business, the officers and directors hold corporate assets in trust for the benefit of creditors. *Hixson v. Pride of Texas Distributing Co.*, 683 S.W.2d 173, 176 (Tex. App.—Fort Worth 1985, no writ); *Fagan v. La Gloria Oil & Gas Co.*, 494 S.W.2d 624, 628 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ).

This common-law doctrine has been circumscribed by statute. It does not apply, for instance, to a dissolved corporation except for predissolution claims. *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 551–52 (Tex. 1981); *but see Smith v. Chapman*, 897 S.W.2d 399, 401–02 (Tex. App.—Eastland 1995, no writ) (trust fund cause of action available against directors of dissolved corporation).

§ 6.25:2 Dissolved Legal Entity

A dissolved corporation has a limited existence for three years after dissolution to prosecute or defend proceedings in its corporate name, permit the survival of a claim of or against it, hold title to corporate property for the purpose of distributing the property, and settle any other affairs not settled before dissolution. Tex. Bus. Orgs. Code § 11.356. This provision also applies to other legal entities. *See* Tex. Bus. Orgs. Code § 1.002(22). *See also* Tex. Bus. Orgs. Code § 2.109 (professional corporation).

§ 6.25:3 "Denuding" of Corporate Assets

If one or more shareholders appropriate the corporation's assets, leaving it unable to satisfy corporate claims, the corporation's creditors may trace the assets and hold the shareholders responsible for the corporation's obligations, to the extent of the corporate assets received by the shareholder. *World Broadcasting System, Inc. v. Bass*, 328 S.W.2d 863, 865–66 (Tex. 1959); *Huff v. Harrell*, 941 S.W.2d 230, 236 (Tex. App.—Corpus Christi 1996, writ denied). A "denuding" claim is typically brought with one or more causes of action, such as alter ego or fraudulent transfer. See section 6.24 above and section 14.10 in this manual regarding those causes of action.

§ 6.25:4 Forfeiture of Charter

Forfeiture of a corporation's charter results in the corporation's losing some rights, but it does not mean the corporation will automatically become dissolved. In *McCarroll v. My Sentinel*, No. 14-08-01171-CV, 2009 WL 4667403 (Tex. App.—Houston [14th Dist.] Dec. 10, 2009, no pet.), the court imposed personal liability for corporate debt incurred after charter forfeiture.

See Tex. Tax Code § 171.255 regarding liability of directors and officers.

§ 6.26 General Partnership

Texas general partnerships are governed by the Texas Business Organizations Code effective January 1, 2010. See Tex. Bus. Orgs. Code § 152.052 for the factors determining whether a partnership exists.

Generally, all partners are jointly and severally liable for all obligations unless otherwise agreed by the claimant. Tex. Bus. Orgs. Code § 152.304(a). An incoming partner has no liability for obligations arising before his entry into the partnership, relating to an action taken or omission occurring before entry, or arising under a contract or commitment entered into before entry. Tex. Bus. Orgs. Code § 152.304(b).

An action may be brought against the partnership and any individual partner. Tex. Bus. Orgs. Code § 152.305. Service on any partner will support a judgment against the partnership and the partner served. Tex. Civ. Prac. & Rem. Code § 17.022. If the suit is against several partners jointly indebted under a contract and citation is served on at least one but not all partners, judgment may be rendered only against the partnership and the partners actually served, not against the partners not served. Tex. Civ. Prac. & Rem. Code § 31.003. See section 16.10 in this manual regarding citation and service on partnerships.

A claim against a partnership may be satisfied against the assets of a partner only if a judgment is also entered against the partner based on the same claim and the judgment obtained against the partnership has not been reversed or vacated and remains unsatisfied for ninety days after entry or ninety days after the expiration date of a stay. Tex. Bus. Orgs. Code § 152.306(b). The creditor can proceed directly against an individual partner if (1) the partnership is a debtor in bankruptcy; (2) the creditor and the partnership agree that the creditor is not required to comply with section 152.306(b); (3) the court orders otherwise, finding that partnership property subject to execution is clearly inadequate to satisfy the judgment; or (4) liability is imposed by law on the partner independently of his status as a partner. Tex. Bus. Orgs. Code § 152.306(c).

§ 6.27 Limited Partnership

A limited partner is not liable for the debts of the limited partnership unless he either is also a general partner or participates in the control of the business. If the limited partner participates in control of the business, he is liable only to persons transacting business with the limited partnership who reasonably believe, based on the limited partner's conduct, that he is a general partner. Tex. Bus. Orgs. Code § 153.102.

See Tex. Bus. Orgs. Code § 153.103 for a nonexclusive list of actions a limited partner can take that are deemed not to constitute participation in control of the business.

§ 6.28 Limited Liability Partnership

A limited liability partnership is an entity distinct from its partners. Tex. Bus. Orgs. Code § 152.056. The limited liability partnership should be sued in its partnership name. Tex. Bus. Orgs. Code § 2.101(1). The limited liability partnership should be identified as a limited liability partnership in the petition. *See* Tex. Bus. Orgs. Code §§ 5.063, 152.803.

Partners are not individually liable, directly or indirectly, by contribution, indemnity, or otherwise, for any obligation of the partnership incurred while the partnership is a registered

limited liability partnership. Tex. Bus. Orgs. Code § 152.801(a).

See section 16.10 in this manual regarding citation and service on a limited liability partnership.

§ 6.29 Limited Liability Company

A limited liability company is an entity distinct from its members. *See* Tex. Bus. Orgs. Code § 101.101(a). (A limited liability company may have one or more members.) Except as otherwise provided, the limited liability company's existence begins on the filing of the certificate of formation. *See* Tex. Bus. Orgs. Code §§ 3.001, 4.051.

Except as and to the extent the regulations specifically provide otherwise, a member or manager is not liable for the debts, obligations or liabilities of a limited liability company including under a judgment, decree, or order of a court. Tex. Bus. Orgs. Code § 101.114. A member of a limited liability company is not a proper party to proceedings by or against a limited liability company, except where the object is to enforce a member's right against or liability to the limited liability company. Tex. Bus. Orgs. Code § 101.113.

Courts in other states have begun to allow piercing the limited liability company veil in many, but not all, of the circumstances in which corporate veils have been pierced in other cases. For example, in *Kaycee Land & Livestock v. Flahive*, 46 P.3d 323 (Wyo. 2002), the Wyoming Supreme Court concluded that wording similar to that of the Texas statute (construed in conjunction with the legislative history of the Wyoming statute) was not intended to limit the piercing doctrine to corporations. Some commentators have noted that, except for the failure to follow corporate formalities (one of the key purposes of organizing as a limited liability company being to escape such formalities), tests similar to those applied to corporations may be applied to limited liability companies in deciding when and whether to pierce the entity veil. *See, e.g.*, Warren H. Johnson, *Limited Liability Companies (LLC): Is the LLC Liability Shield Holding Up Under Judicial Scrutiny?*, 35 New Eng. L. Rev. 177 (2000). The court in *Pinebrook Properties, Ltd. v. Brookhaven Lake Property Owners Association*, 77 S.W.3d 487 (Tex. App.—Texarkana 2002, no pet.), reversed the holding of the trial court that a limited liability company was the alter ego of the company's president. The court analyzed the issue using the same factors that would determine whether to pierce a corporate veil: commingling of assets, failure to comply with formalities, use of entity assets for personal purposes, and fraudulent use or purpose in the creation or operation of the entity. *Pinebrook Properties*, 77 S.W.3d at 500–01. The court's disposition is generally in accord with the approach suggested by the commentators mentioned above.

§ 6.30 Professional Corporation

A professional corporation is an entity distinct from its shareholders. One or more individuals may incorporate a professional corporation by filing a certificate of formation with the secretary of state. *See* Tex. Bus. Orgs. Code §§ 3.001, 4.002. Unless otherwise provided in its governing documents, a professional corporation exists perpetually until the winding up and termination of the corporation. Tex. Bus. Orgs. Code §§ 3.003, 303.005. Shareholders of a professional corporation have no greater liability than do shareholders of a for-profit corporation. Tex. Bus. Orgs. Code § 303.002. *See* Tex. Bus. Orgs. Code §§ 2.109, 301.010, 303.001. The professional corporation should be sued in its corporate name. *See* Tex. Bus. Orgs. Code § 2.101(1).

§ 6.31 Association or Unincorporated Joint-Stock Company

Liability for a debt of a foreign or domestic association or unincorporated joint-stock company can be fixed on an individual member as well as on the company or association, provided that the individual sought to be held liable is served and judgment is obtained against him. Execution cannot issue against a stockholder's or member's individual property until execution has issued against the organization's joint property and has been returned without satisfaction. Tex. Rev. Civ. Stat. arts. 6133, 6136, 6137. The composition and liability of these entities are discussed in *Thompson v. Schmitt*, 274 S.W. 554 (Tex. 1925), and *Wells v. Mackay Telegraph-Cable Co.*, 239 S.W. 1001 (Tex. Civ. App.—Galveston 1921, no writ).

§ 6.32 Personal Liability of Individual Signing in Representative Capacity

An authorized representative signing an instrument will not be personally liable on the instrument if the party represented is identified in the instrument and the instrument shows unambiguously that the representative signed on behalf of the represented party. Tex. Bus. & Com. Code § 3.402(b)(1). The representative will be liable to a holder in due course without notice of the representative capacity if either condition is not met. The representative will be liable to a party not a holder in due course if either condition is not met, unless the representative can prove that the original parties to the instrument did not intend for the representative to be liable. Tex. Bus. & Com. Code § 3.402(b)(2). Notwithstanding the above, if the representative signs his name as drawer of a check without indication of his representative status and the check is payable from an account of the represented party who is identified on the check, the representative is not liable if his signature is an authorized signature of the represented party. Tex. Bus. & Com. Code § 3.402(c).

§ 6.33 Guarantor or Surety

See section 14.11 in this manual regarding guarantors and sureties.

§ 6.34 Agency

One who contracts in his own name as an agent for an undisclosed principal is personally liable, even if he disclosed the fact of agency. *Carter v. Walton*, 469 S.W.2d 462, 471–72 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.). An individual is personally liable on a contract he signed as a purported agent if no authority to do so existed. *Talmadge Tinsley Co. v. Kerr*, 541 S.W.2d 207, 209 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.). To avoid personal liability, an agent has the duty to disclose not only that he is acting in a representative capacity but also the identity of his principal. *Gonzales County Water Supply Corp. v. Jarzombek*, 918 S.W.2d 57, 60 (Tex. App.—Corpus Christi 1996, no writ). The fact that a person opened an account in the name of a business without use of the terms *incorporated*, *corporation*, or *company* in the business name is not enough to create a duty for a creditor to investigate to see if the business is in fact a corporation. The test of disclosure is the creditor's actual knowledge that a business is a corporation or whether the creditor had reasonable grounds to know of the corporation's existence. *Wynne v. Adcock Pipe & Supply*, 761 S.W.2d 67, 69 (Tex. App.—San Antonio 1988, writ denied).

Chapter 7

Creation and Enforcement of Liens

I. Miscellaneous Property Code Liens

II. Private Mechanic's and Materialman's Liens

III. Governmental Mechanic's Liens

Forms

Chapter 7

Creation and Enforcement of Liens

I. Miscellaneous Property Code Liens

§ 7.1 Farm, Factory, or Store Worker's Lien

§ 7.1:1 Scope of Lien

A worker has a statutory lien on property of his employer created or used by the worker or necessarily connected with the work to secure payment of the amount due for work or services performed under a contract for certain types of work. Tex. Prop. Code §§ 58.001–.003. This lien is independent of the constitutional lien, discussed at section 7.14 below.

§ 7.1:2 Who May Claim Lien

A worker claiming the lien can be a clerk, accountant, bookkeeper, waiter, waitress, cook, maid, porter, servant, employee, artisan, craftsman, factory operator, mill operator, mechanic, quarry worker, common laborer, or farmhand. Tex. Prop. Code § 58.001(2).

Courts generally deny the lien to anyone who could be classified as a manager or supervisor under the terms of employment. The lien is available only to those who labor for wages, not to their employers who contract with others to render services. *Cotton Belt State Bank v. Roy H. Hatcheries, Inc.*, 351 S.W.2d 325, 326 (Tex. Civ. App.—Waco 1961, no writ); *see also Ferrell-Michael Abstract & Title Co. v. McCormac*, 184 S.W. 1081, 1086 (Tex. Civ. App.—Fort Worth 1916), *aff'd on other grounds*, 215 S.W. 559 (Tex. Comm'n App. 1919, judgm't adopted) (distinguishing between supervisors who also do manual labor by choice, not entitled to lien, and those who perform both functions by agreement, entitled to lien).

Corporations and employers may not claim the worker's lien. *Texas International Products v. Mustex, Inc.*, 368 S.W.2d 27, 30 (Tex. Civ. App.—Fort Worth 1963, no writ). The labor or service must be accomplished in an office, store, hotel, rooming house or boardinghouse, restaurant, shop, factory, mine, quarry, mill, farm, or in certain logging or timber operations. Tex. Prop. Code § 58.002(a).

§ 7.1:3 Property Subject to Lien

Each thing of value owned by or in the possession or control of the employer or the employer's agent, receiver, or trustee is subject to the lien if it is—

1. created in whole or part by the lien claimant's work;
2. used by or useful to the lien claimant in the performance of the work; or
3. necessarily connected with the performance of the work.

Tex. Prop. Code § 58.003.

Also, the amount of the lien is limited to the amount owed the worker under the employment contract. Tex. Prop. Code § 58.002(b).

§ 7.1:4 Claim, Perfection, and Enforcement of Lien

To claim and perfect a worker's lien, the claimant must, within thirty days after the debt has accrued, serve duplicate copies of an account stating the service performed and the amount owed for the service. One copy is delivered to the employer or the employer's agent, receiver, or trustee, and the other is filed with the clerk of the county in which the service was rendered; the account must be supported by the claimant's affidavit verifying the contents of the account. Tex. Prop. Code § 58.004. For calculating the date when the debt accrues, wages are due weekly for work performed by the day or week and monthly for work performed by the month. Tex. Prop. Code § 58.009. If the worker claims a lien against a fixture, the affidavit should describe the realty to which the fixture is attached. *See Security Trust Co. v. Roberts*, 208 S.W. 892 (Tex. Comm'n App. 1919, holding approved). See form 7-1 in this chapter for an affidavit.

The claimant must file a foreclosure suit within six months after the lien is secured; otherwise, the lien expires. Tex. Prop. Code § 58.006. See form 7-2 for a foreclosure petition.

§ 7.1:5 Lien Priority

Competing worker's liens take priority in the order that the accounts are filed with the county clerk. All worker's liens are first liens, except for farmhand's liens, which are subordinate to a landlord's lien provided by law. Tex. Prop. Code § 58.005.

A person who purchases from its owner property to which the worker's lien has attached and who has no actual or constructive notice of the lien takes the property free from the lien. The claimant gives constructive notice of the lien by filing an account with the county clerk or by filing a foreclosure suit. Tex. Prop. Code § 58.007. As further protection against a bona fide purchaser the claimant should try to have the property sequestered. Sequestration is discussed at sections 8.16 through 8.24 in this manual, and sequestration forms are found at form 7-3 and forms 8-8 through 8-16.

§ 7.1:6 Attorney's Fees

Attorney's fees are not authorized by the worker's lien statutes, but Tex. Civ. Prac. & Rem. Code § 38.001 provides for reasonable attorney's fees in a suit for services rendered or labor performed or a suit on a contract. For a discussion of attorney's fees, see part III. in chapter 1 of this manual.

§ 7.2 Possessory Liens

§ 7.2:1 Scope of Worker's Possessory Lien

A worker who repairs an article may retain it until the amount specified by the repair contract is paid or, if no amount is specified by contract, until the reasonable and usual compensation is paid. Tex. Prop. Code § 70.001(a). Chapter 70 of the Property Code provides similar liens for stable keepers, garagemen, pasturers, and cotton ginners (Tex. Prop. Code § 70.003) and liens on garments (Tex. Prop. Code § 70.002).

§ 7.2:2 Availability of Worker's Possessory Lien

The lien is available to any worker in Texas "who by labor repairs an article." Tex. Prop. Code § 70.001(a). Presumably, this broad category includes corporations. *See Miller & Freeman Ford, Inc. v. Greater Houston Bank*, 544 S.W.2d 925 (Tex. 1976). The lien applies to the repaired article while it is in the worker's possession, and in limited circumstances the lien may continue if the worker has released the article in return for a check that is subsequently not

honored. Possession of the article as a condition for the lien is discussed at section 7.2:4 below.

The lien arises only if the article's owner authorizes the repairs. If property has been stolen, a person without title cannot make repairs and accessions to the property and then demand payment when the true owner recovers the property. *Drake Insurance Co. v. King*, 606 S.W.2d 812, 818 (Tex. 1980), *superseded by rule on other grounds as stated in Bay Area Healthcare Group, Ltd. v. McShane*, 239 S.W.3d 231 (Tex. 2007). Similarly, the courts scrutinize carefully any worker's claim that repairs were authorized by the owner's agent; the lien does not attach in the absence of any express, implied, or apparent agency. *See Hydra-Rig, Inc. v. ETF Corp.*, 707 S.W.2d 288, 291–92 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.).

§ 7.2:3 Distinction between Statutory Worker's Possessory Lien and Constitutional Mechanic's Lien

The possessory lien created by Tex. Prop. Code § 70.001 differs in important respects from the nonpossessory constitutional lien deriving from Tex. Const. art. XVI, § 37. The constitutional lien is discussed at section 7.14 below.

Possession of the article is an essential element of the statutory worker's lien but is irrelevant to the constitutional lien. The constitutional lien survives the worker's relinquishment of the article to the owner, but ordinarily the statutory lien does not. The constitutional lien does not authorize the worker to retain a repaired article pending payment for the repairs, but the statute creating a worker's lien for repairs provides this specific right. The right to the constitutional lien and the right to retain possession are two distinct rights. Therefore, the constitutional lien cannot serve as a defense to an action for conversion. *Garcia v. Rutledge*, 649 S.W.2d 307, 311 (Tex. App.—Amarillo 1982, no writ). The constitutional lien, however, may continue after the owner regains possession of the property. *River Oaks Chrysler-Plymouth, Inc. v. Barfield*, 482 S.W.2d 925, 928 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ dism'd).

§ 7.2:4 Requirement of Possession Generally

Generally, if the worker voluntarily returns possession of the article to the owner, he loses his statutory lien on it. *Clifton v. Jones*, 634 S.W.2d 883, 886 (Tex. App.—El Paso 1982, no writ); *Atlas Amalgamated, Inc. v. Castillo*, 601 S.W.2d 728, 730 (Tex. Civ. App.—Waco 1980, writ ref'd n.r.e.).

§ 7.2:5 Ability to Repossess If Repairs Paid for by Bad Check

If the worker relinquishes a motor vehicle, motorboat, vessel, or outboard motor in reliance on a check not honored after acceptance, the lien continues to exist, and the worker is entitled to regain possession of the item. Tex. Prop. Code § 70.001(b). A worker who wants to regain possession under these circumstances must do so in accordance with the repossession provisions of Tex. Bus. & Com. Code § 9.609. See generally part III. in chapter 5 of this manual. For the worker to have a perfected right to repossess the repaired property, the person obligated for the repairs must sign a notice stating that the article may be subject to repossession under Property Code section 70.001(b). The notice must be separate from the written contract, or, if printed on the written contract, it must be in bold-faced type, capitalized, underlined, or otherwise set off so as to be conspicuous, with a separate signature line. Tex. Prop. Code § 70.001(c).

The worker repossessing an article under the repair statute may charge for the costs of repossessing the article to the extent of the reasonable value of the services required to take possession

of the article. The reasonable value is defined as the actual cost of the repossession. Tex. Prop. Code § 70.001(d).

A repossessed motor vehicle must be promptly delivered either to the place where the repairs were made or to a vehicle storage facility licensed under the Vehicle Storage Facility Act, chapter 2303 of the Texas Occupations Code. The vehicle must remain there until lawfully returned to the owner or lienholder or disposed of by foreclosure of the lien. Tex. Prop. Code § 70.001(g).

The possessory lien under Tex. Prop. Code § 70.001 survives the death of the owner of the repaired chattel if the repairer retains possession. *See Lithgow v. Sweedberg*, 78 S.W. 246 (Tex. Civ. App. 1904, no writ).

§ 7.2:6 Priority of Worker's Possessory Lien

If an automobile is in the possession of a mechanic who has repaired it and who claims a worker's possessory lien on it, the mechanic's lien has priority over a competing lien of a secured party who previously perfected a security interest by noting it on the vehicle's certificate of title. *Gulf Coast State Bank v. Nelms*, 525 S.W.2d 866, 869–70 (Tex. 1975). *See also* Tex. Bus. & Com. Code § 9.333.

§ 7.2:7 Enforcement of Worker's Possessory Lien

Sale of property subject to a worker's possessory lien is controlled by two overlapping and confusing sections of the Texas Property Code, sections 70.005 and 70.006. The confusion is caused because Tex. Prop. Code § 70.005 excludes lienholders of vehicles subject to the Certificate of Title Act (Tex. Transp. Code §§ 501.001–.179) whereas Tex. Prop. Code § 70.006 includes not only those lienholders but also lienholders of motorboats, vessels, or outboard motors to which chapter 31 of the Texas Parks and Wildlife Code applies. Procedures for selling property are outlined clearly, but provisions specifying which types of property are subject to each of the two Property Code sections are not clear.

This discussion assumes that section 70.006 applies to motor vehicles subject to the Certificate of Title Act and to vessels and outboard motors requiring a certificate of title under Tex. Parks & Wild. Code §§ 31.045–.056. It also assumes that Property Code section 70.005 applies to all other types of property subject to a worker's possessory lien.

Under Property Code section 70.005, a lienholder possessing designated property for sixty days after the repair charges accrue must send a first notice of sale, requesting the owner to pay the unpaid charges, if the owner's Texas residence is known. See form 7-5 in this chapter. If the charges are not paid before the eleventh day after the date of the request, a second notice must be sent to the owner, stating that, after twenty days, the lienholder may sell the property at a public sale. See form 7-6. If the request for payment and notice of sale under section 70.005 is premature, however, this will not invalidate a public sale, if the public sale takes place more than twenty days after the notice. *Cranetex, Inc. v. Precision Crane & Rigging of Houston, Inc.*, 760 S.W.2d 298, 304 (Tex. App.—Texarkana 1988, writ denied). If the property owner's residence is outside Texas or is unknown, the lienholder may sell the property without notice at a public sale after the sixtieth day after the unpaid charges accrued. Proceeds of the sale are applied to the repair charges and, if the repaired property is a garment, to the reasonable costs of the sale. Excess proceeds are paid to the person entitled to them, as discussed at section 7.2:9 below.

Under Property Code section 70.006, a lienholder possessing designated property must give written notice to the owner and each holder of a

lien recorded on the certificate of title, and must file a copy of the notice and other required information with the county tax assessor-collector's office in the county in which the repairs were made, not later than the thirtieth day after the charges accrue. Tex. Prop. Code § 70.006(a). The notice must state the amount of the charges and request payment and must be sent by certified mail, return receipt requested. If the charges are not paid before the thirty-first day after the notice is mailed, the lienholder may sell the property at a public sale and apply the proceeds to the charges. *See Dob's Tire & Auto Center v. Safeway Insurance Agency*, 923 S.W.2d 715, 720 (Tex. App.—Houston [1st Dist.] 1996, writ dism'd w.o.j.). Excess proceeds are paid to the person entitled to them, as discussed at section 7.2:9 below. On the other hand, a proper tender of the amount claimed in the notice will discharge the worker's possessory lien. Refusal of the worker to surrender the vehicle after proper tender has been made constitutes conversion. *Collision Center Paint & Body, Inc. v. Campbell*, 773 S.W.2d 354, 355 (Tex. App.—Dallas 1989, no writ).

See form 7-4 for a notice of sale for a motor vehicle, motorboat, vessel, or outboard motor under a worker's possessory lien.

§ 7.2:8 Judicial Supervision of Sale

Tex. Prop. Code §§ 70.005–.006 do not require judicial supervision or public notice of the sale. If the attorney believes that a sale would create constitutional problems (see section 7.2:10 below), the lienholder should probably obtain a court judgment and then sell the chattel pursuant to a writ of execution and order of sale, rather than proceeding with a public sale as prescribed under sections 70.005 and 70.006. *See Adams v. Department of Motor Vehicles*, 520 P.2d 961, 965 (Cal. 1974); Annot., 64 A.L.R.3d 814 (1975).

§ 7.2:9 Excess after Sale

If there are excess proceeds after sale, the lienholder must pay them to "the person entitled to them." Tex. Prop. Code §§ 70.005(d), 70.006(f).

If a person entitled to excess proceeds is unknown or has moved from Texas or from the county in which the lien accrued, the excess must be paid to the treasurer of the county in which the lien accrued. Tex. Prop. Code § 70.007(a).

§ 7.2:10 Constitutionality

Because the enforcement procedures described in section 7.2:7 above do not require a hearing, they may violate constitutional due-process requirements. A similar statutory scheme in California was held unconstitutional because, unless the owner brought suit, the lienholder could sell the property without a hearing and thus deprive the owner of due process of law. *Adams v. Department of Motor Vehicles*, 520 P.2d 961 (Cal. 1974). Courts in several other states have reached the same conclusion and have declared their statutes unconstitutional. *See* Annot., 64 A.L.R.3d 814 (1975). The California court suggested that lienholders might retain the chattel, file a suit on the merits, and then proceed with a judicial sale under a writ of execution.

§ 7.3 Landlord's Liens

For a discussion of landlord's liens, see chapter 28 in this manual.

§ 7.4 Other Property Code Liens

§ 7.4:1 Types of Liens

Texas Property Code chapter 70 provides for possessory (subchapter A), stock breeder's (subchapter C), aircraft repair and maintenance (subchapter D), and agricultural (subchapter E) liens

as well as liens on certain vessels (subchapter B). The subchapter A liens include worker's liens on vehicles and boats (section 70.001), liens on garments (section 70.002), stable keeper's and pasturer's liens (section 70.003), garagemen's liens (section 70.003), plastic fabricator's liens (section 70.009), and liens for cotton ginners (section 70.003). These provisions generally provide a remedy for those who have provided repair or maintenance on personal property or who have provided storage or care for personal property such as vehicles, livestock, garments, and agricultural crops. *See* Tex. Prop. Code ch. 70.

Chapter 59 of the Property Code creates a lien over property in a self-service storage facility. Under chapter 59, the owner, lessor, sublessor, or managing agent of a self-service storage facility may foreclose a lien on all property in the facility for the payment of unpaid charges under a rental agreement. *See* Tex. Prop. Code §§ 59.001(1), 59.021, 59.042.

§ 7.4:2 Enforcement Provisions

Property subject to a lien under subchapter A of chapter 70 of the Texas Property Code may be sold at a public sale or, in the case of garments, a private sale. Tex. Prop. Code § 70.003(d)(1) (cotton under a cotton ginner's lien), § 70.005 (property other than cotton or motor vehicles), § 70.006 (motor vehicles, motorboats, vessels, and outboard motors). Notice of the charges due the lienholder and notice of the sale are generally required; however, the specific notice requirements vary between the liens. *See, e.g.*, Tex. Prop. Code § 70.003(d)(1) (sale of cotton), § 70.005(a), (b) (sale of property other than cotton or motor vehicles), § 70.006(a)–(h) (sale of motor vehicles).

The sale of property subject to a self-service storage facility lien must be sold at public sale at the facility itself or at a reasonably near public place. Tex. Prop. Code § 59.045. The lessor's notice of the sale and notice to the owner and lienholders are discussed in sections 59.044 and 59.0445 of the Texas Property Code.

[Sections 7.5 through 7.10 are reserved for expansion.]

II. Private Mechanic's and Materialman's Liens

§ 7.11 Overview

A contractor who provides material or labor for a construction project but who is not paid for that material or labor may normally bring suit for payment against the party that contracted for the material and labor. However, economic factors such as the cost of a lawsuit or the financial viability of the defendant may make a lawsuit either impractical or pointless. Both state and federal governments have attempted to address this problem by adopting statutes that give the unpaid contractor additional recourse for the recovery of at least partial payment for his material and labor.

Under chapter 53 of the Texas Property Code, the owner of real property being improved under a private construction contract is required to withhold from construction payments earned by the general contractor (called an "original contractor" by the Property Code) both a statutory retainage equal to 10 percent of the payments earned by the general contractor and funds earned by but not yet paid to the general contractor that are "trapped" in the owner's possession by the receipt from subcontractors of

claims of unpaid amounts owing on the project. The Property Code establishes a procedure whereby the unpaid claimant can assert a mechanic's lien on the property being improved to secure the owner's obligation to use the retainage and "trapped funds" to pay the claim. If the owner does not make the required payments to the lien claimant out of the retainage, the claimant can seek judicial foreclosure of the lien for the purpose of selling the property to obtain proceeds to pay the claim. The statute governing the perfection of claims on private projects is discussed at section 7.12 below.

The "prompt pay" statute sets forth a statutory time frame that governs how quickly owners, contractors, and subcontractors must assent to or make payment of undisputed claims of late or incomplete payments to a contractor on a private construction project. The "prompt payment" statute is discussed at section 7.12:24 below.

In addition to the state statutes providing for a system of mechanic's lien claims on private construction projects, the Texas Constitution grants general contractors a mechanic's lien claim that is independent of the statutory mechanic's lien system. These constitutional provisions are discussed at sections 7.13 and 7.14 below.

Mechanic's lien claims may also arise in the context of public works projects. Public works projects, however, generally involve public lands, and public lands owned by the state or federal government are not subject to foreclosure in favor of private individuals. To provide an alternative remedy to contractors on public work projects, both the state and federal governments have established systems whereby payment bonds are issued by third-party sureties, and the unpaid claimant is required by statute to pursue recovery against the bond rather than against the public lands. These public works statutes are discussed at sections 7.21 and 7.22 below.

Finally, chapter 162 of the Property Code provides a mechanism of last resort for the claimant who fails to properly perfect a mechanic's lien claim under the applicable law. The "construction trust fund" statute makes certain construction payments "trust funds" payable to the claimant as "beneficiary" of the "trust" and allows the claimant to pierce the corporate veil to pursue the individual officers and directors who received payments owing to the claimant but diverted the funds for impermissible purposes. The "construction trust fund" statute is discussed at section 7.23 below.

§ 7.12 Statutory Mechanic's Lien

§ 7.12:1 Mechanic's Liens Generally

Private construction projects are governed by chapter 53 of the Texas Property Code. (This portion of the Property Code is sometimes referred to as the "Hardeman Act" because that was the name of the predecessor statute codified by the Property Code.) An original contractor is granted mechanic's lien rights under both chapter 53 of the Property Code and article XVI, section 37, of the Texas Constitution. A subcontractor's mechanic's lien rights, however, are totally dependent on the subcontractor's compliance with chapter 53 of the Property Code. *First National Bank v. Sledge*, 653 S.W.2d 283, 285 (Tex. 1983).

Chapter 53 establishes a procedure whereby mechanic's lien claimants owed money for their labor or materials may "perfect" a claim against retainage and trapped construction payments in the owner's possession. By following the requirements of chapter 53, the claimant also obtains a lien against the owner's property, and this lien can be judicially foreclosed to generate funds to pay the claimant in the event the owner has not withheld or refuses to pay the statutorily mandated amounts. To accomplish this, the lien claimant must give notices and file a lien affidavit that meets the requirements of chapter 53

within the statutorily defined time frames. However, even if the claimant follows the procedures set forth in chapter 53, the amount the property owner is required to pay the claimant may prove to be less than the unpaid amount owing to the claimant.

§ 7.12:2 Scope and Utility of Lien

A mechanic's lien may be established by any person who (1) labors, specially fabricates material, or furnishes labor or materials for construction or repair in Texas of (a) a house, building, or improvement; (b) a levee or embankment to be erected for the reclamation of overflow land along a river or creek; or (c) a railroad; and (2) does so under or by virtue of a contract with the owner or the owner's agent, trustee, receiver, contractor, or subcontractor. Tex. Prop. Code § 53.021(a). Because the statute (Tex. Prop. Code § 53.001(3)) requires that labor be used in the "direct prosecution of the work" to qualify for the lien, it is difficult to qualify off-site labor unless the Property Code expressly provides otherwise, as with the manufacture of specially fabricated materials. Tex. Prop. Code § 53.001(12). The statute defines "materials" to include (1) material, machinery, fixtures, or tools incorporated or consumed in the work or that are ordered and delivered for incorporation or consummation; (2) reasonable rent and costs of actual running repairs for construction equipment used or reasonably required and delivered for use in the direct prosecution of the work at the site of the construction or repair; or (3) power, water, fuel, and lubricants consumed or ordered and delivered for consumption in the direct prosecution of the work. Tex. Prop. Code § 53.001(4). For material suppliers, it is sufficient to show either delivery of the materials to the construction site or that the materials were furnished to a contractor for the specific project. It is not necessary to show how the contractor ultimately used the materials. *W.L. MacAtee & Sons, Inc. v. House*, 153 S.W.2d 460 (Tex. 1941).

Architects, Engineers, and Surveyors: The Property Code grants mechanic's lien rights to architects, engineers, and surveyors who, by virtue of a written contract with the owner or the owner's agent, trustee, or receiver, prepare a plan or plat in connection with the actual or proposed design, construction, or repair of improvements on real property or the location of the boundaries of the real property. Tex. Prop. Code § 53.021(c).

Landscapers: The Property Code grants mechanic's lien rights to a person who provides labor, plant material, or other supplies for the installation of landscaping for a home, building, or improvement, including the construction of a retention pond, retaining wall, berm, irrigation system, fountain, or other similar installation under or by virtue of a written contract with the owner or the owner's agent, contractor, subcontractor, trustee, or receiver. Tex. Prop. Code § 53.021(d).

Demolition Services: Until recently, demolition services to clear improvements from real property were not within the scope of the mechanic's lien statutes. *See Big Three Welding Equipment Co. v. Crutcher, Rolfs, Cummings, Inc.*, 229 S.W.2d 600, 603 (Tex. 1950); *J&J Equipment Inc. v. Pilkinton*, 850 S.W.2d 804, 805–06 (Tex. App.—Corpus Christi 1993, no writ). However, a person may now claim a lien for labor or materials furnished for demolition of a structure on real property under or by virtue of a written contract entered into on or after September 1, 2003, with the owner or the owner's agent, trustee, receiver, contractor, or subcontractor. Tex. Prop. Code § 53.021(e); Acts 2003, 78th Leg., R.S., ch. 410, § 3 (H.B. 208), eff. Sept. 1, 2003.

Lending Services: Creditors advancing money to contractors are not entitled to a mechanic's lien, even if the funds are used to pay for labor and materials for a specific construction project. *Verschoyle v. Holifield*, 123

S.W.2d 878, 883 (Tex. 1939); *F.&C. Engineering Co. v. Moore*, 300 S.W.2d 323, 325 (Tex. Civ. App.—San Antonio 1957, writ ref'd n.r.e.).

Employment Services: Only those who labor for wages are entitled to a mechanic's lien and not the employer who contracts to furnish the employees for the labor. *Cotton Belt State Bank v. Roy H. Hatcheries, Inc.*, 351 S.W.2d 325, 326 (Tex. Civ. App.—Waco 1961, no writ). *But see Advance'd Temporaries, Inc. v. Reliance Surety Co.*, 165 S.W.3d 1 (Tex. App.—Corpus Christi 2004).

Preparatory Services: Preparatory activities conducted before the commencement of construction of improvements, such as erecting stakes and batterboards, do not qualify for liens. *Diversified Mortgage Investors v. Lloyd D. Blaylock General Contractor, Inc.*, 576 S.W.2d 794, 802 (Tex. 1978).

Cost-Plus Fees: The mechanic's lien statutes will secure the contractor's fee on a "cost-plus" contract. *Stricklin v. Southwest Reserve Life Insurance Co.*, 234 S.W.2d 439 (Tex. 1950).

Sales Tax: The mechanic's lien statutes will secure sales tax owed to a claimant. *First National Bank in Dallas v. Whirlpool Corp.*, 517 S.W.2d 262 (Tex. 1974).

Attorney's Fees: Statutory mechanic's liens do not secure attorney's fees incurred in filing the lien, although attorney's fees are recoverable in litigation to enforce and foreclose the lien. *Dossman v. National Loan Investors, L.P.*, 845 S.W.2d 384, 386–87 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

Prejudgment Interest: Statutory mechanic's liens do not secure prejudgment interest or unearned or lost profits. *Ambassador Development Corp. v. Valdez*, 791 S.W.2d 612, 622–24 (Tex. App.—Fort Worth 1990, no writ).

Lost Profits: Statutory mechanic's liens do not secure lost profits. *Nixon Construction Co. v. Downs*, 441 S.W.2d 284 (Tex. Civ. App.—Houston 1969, no writ). But see *San Antonio Credit Union v. O'Connor*, 115 S.W.3d 82 (Tex. App.—San Antonio 2003, pet. denied), in which the court granted a constitutional lien to secure a builder's damages arising from the owner's breach of contract.

§ 7.12:3 Property Subject to Lien

A valid mechanic's lien attaches to "the house, building, fixtures, or improvements, the land reclaimed from overflow, or the railroad and all of its properties, and to each lot of land necessarily connected or reclaimed." Tex. Prop. Code § 53.022(a). "The lien does not extend to abutting sidewalks, streets, and utilities that are public property." Tex. Prop. Code § 53.022(b). A single lien will not attach to two noncontiguous tracts. *Centex Materials, Inc. v. Dalton*, 574 S.W.2d 621, 623–24 (Tex. Civ. App.—Tyler 1978, no writ); *see also Houston Electrical Distributing Co. v. MBB Enterprises*, 703 S.W.2d 206, 208 (Tex. App.—Houston [14th Dist.] 1985, no writ).

Urban Tracts: "A lien against land in a city, town, or village extends to each lot on which the house, building, or improvement is situated or on which the labor was performed." Tex. Prop. Code § 53.022(c).

Rural Tracts: "A lien against land not in a city, town, or village extends to not more than 50 acres on which the house, building, or improvement is situated or on which the labor was performed." Tex. Prop. Code § 53.022(d).

Lien Attaches to Original Tract Configuration: The mechanic's lien attaches to the tract as configured at the start of construction under the original contract. The subsequent conveyance of portions of the tract, even if before the filing of the actual lien affidavit, does

not prevent the lien's attachment to the conveyed portions. *Valdez v. Diamond Shamrock*, 842 S.W.2d 273 (Tex. 1992).

Leasehold Estate: The general rule is that a mechanic's lien will attach only to the interest that the party contracting for the construction project has in the real property that is the subject of the improvements. This means that contractors working for tenants will normally be able to place a lien only on the tenant's leasehold estate. In such instances, the termination of the leasehold estate will extinguish the mechanic's lien claim against the property. *See Diversified Mortgage Investors v. Lloyd D. Blaylock General Contractor, Inc.*, 576 S.W.2d 794, 805 (Tex. 1978). The only exception to this general rule is that, if the tenant is acting as the landlord's agent for the work, the lien claim will attach to the fee title of the fee owner. *Rosen v. Peck*, 445 S.W.2d 241 (Tex. Civ. App.—Waco 1969, no writ). However, landlords rarely agree to authorize a lien for work by a tenant, and Texas courts have held that a tenant who does leasehold finish-out pursuant to the terms of a typical lease agreement is generally not the landlord's agent for purposes of authorizing a mechanic's lien against the landlord's fee interest. *See Diversified Mortgage Investors*, 576 S.W.2d at 805; *2811 Associates v. Metroplex Lighting & Electric*, 765 S.W.2d 851 (Tex. App.—Dallas 1989, writ denied). *But see Bond v. Kagan-Edelman Enterprises*, 985 S.W.2d 253 (Tex. App.—Houston [1st Dist.] 2000), *rev'd in part*, 20 S.W.3d 706 (Tex. 2000).

Practice Note: The effectiveness of enforcing a mechanic's lien claim against a leasehold estate to collect payment of the lien generally depends on the financial circumstances of the tenant. Under most modern commercial leases, it is an event of default for a tenant to allow a mechanic's lien to be filed against the leasehold property. See, for example, 3 State Bar of Tex., *Texas Real Estate Forms Manual* ch. 71, forms 71-2, 71-3, 71-6 (2d ed. 2011). Since the landlord will almost certainly terminate the lease rather than allow a stranger to the lease to take possession of the leasehold as a purchaser at a mechanic's lien foreclosure sale, the mechanic's lien claimant has little chance of realizing a significant monetary recovery through a foreclosure sale of the leasehold. Nonetheless, if the tenant's business is more or less viable, the threat of disrupting that business operation through either prompting action under the lease by the landlord or foreclosing the mechanic's lien against the leasehold estate may be effective leverage to collect payment from the tenant. However, if the tenant is insolvent or otherwise financially unstable, the threat of losing the leasehold may not be effective leverage to collect from the tenant. Thus, whenever possible, the contractor would prefer to contract directly with the owner to do "landlord's finish-out work" rather than with the tenant for "tenant's finish-out work."

§ 7.12:4 Payment Bonds

The claimant's right to seek judicial foreclosure of a statutory mechanic's lien against the real property is cut off if a payment bond or a lien release bond of proper form is filed of record, either before or after the lien claim is filed. Tex. Prop. Code §§ 53.171(c), 53.201(b).

Statutory Payment Bond: Statutory payment bonds are established by the procedures set forth at Tex. Prop. Code §§ 53.201–.211. If a statutory payment bond in the requisite form and substance is filed in the public records, the lien claimant cannot file a mechanic's lien against the owner's property or file a suit against the owner, but instead must pursue payment on the payment bond. Tex. Prop. Code § 53.201(b). The filing of the payment bond also relieves the owner of any obligation to withhold statutory retainage, observe fund trapping notices, or pay undisputed claims. *Industrial Indemnity Co. v. Zack Burkett Co.*, 677 S.W.2d 493, 495 (Tex. 1984) (construing article 5472d, section 7, of the

Texas Revised Civil Statutes, now codified in Tex. Prop. Code § 53.201). Claims against the payment bond are perfected by giving the notices required under section 53.206 within the specified time periods. Tex. Prop. Code § 53.206. If the claim remains unpaid for sixty days after the claimant perfects the claim, the claimant may bring a lawsuit against the principal and surety on the bond. Tex. Prop. Code § 53.208(a). The claimant must sue on the bond within twelve months after the claim is perfected if the bond is recorded at the time the lien is filed or within two years if the bond was not recorded at the time the lien was filed; otherwise, the claim is barred by limitations. Tex. Prop. Code § 53.208.

Lien Release Bond: A "lien release bond" is a payment bond established after the start of construction with respect to a specific mechanic's lien claim. Tex. Prop. Code § 53.171. The filing of a lien release payment bond of the proper form and amount (as established by Tex. Prop. Code § 53.172) requires that the lien claimant pursue payment against the payment bond rather than through the perfection and foreclosure of a lien claim against the owner's interest in the real property. *Sheldon Pollack Corp. v. Pioneer Concrete of Texas, Inc.*, 765 S.W.2d 843, 846 (Tex. App.—Dallas 1989, writ denied). Property Code sections 53.171 through 53.176 provide the statutory procedure for filing the lien release bond.

Practice Note: In the construction trade, it is commonly said that the lien claim is "bonded around" by the filing of a release bond.

There is one case that holds that the lien release bond does not release the owner from personal liability for failing to withhold trapped funds or statutory retainage. *See Stolz v. Honeycutt*, 42 S.W.3d 305, 312 (Tex. App.—Houston [14th Dist.] 2001, no writ) (relying, in part, on the notice language from Property Code section 53.056(d) that "if the claim remains unpaid, the owner may be personally liable").

§ 7.12:5 Waiver and Release of Lien or Payment Bond Claim

A waiver and release of a lien or payment bond claim is enforceable only if the waiver and release is executed and delivered according to chapter 53, subchapter L, of the Texas Property Code. Tex. Prop. Code § 53.281(a). The waiver and release may release the owner, owner's property, contractor, and surety on a payment bond from claims and liens only if the waiver and release substantially complies with one of the forms in Property Code section 53.284, and it is signed by the claimant or his authorized agent and notarized. Tex. Prop. Code § 53.281(b)(1), (2). In the case of a conditional release, evidence of payment to the claimant must also exist. Tex. Prop. Code § 53.281(b)(1)(3).

A statement purporting to waive, release, or otherwise adversely affect a lien or payment bond claim is enforceable and creates an estoppel or impairment of a lien or payment bond only if:

1. the statement is in writing and substantially complies with a form in Property Code section 53.284;
2. the claimant has actually received payment in good and sufficient funds in full for the lien or payment bond claim; or
3. the statement is in a written original contract or subcontract for the construction, remodel, repair, or land development related to a single-family house, townhouse, or duplex and the statement is made before labor or materials are provided under the original contract or subcontract. (Note that this subsection does not apply to a person who supplies only material and not labor. *See* Tex. Prop. Code § 53.282(c)).

Tex. Prop. Code § 53.282(a).

If an owner or original contractor sends an explanation, in writing, of the basis for nonpayment, evidence of a contractual waiver of lien rights, and a notice or request for release of the lien to the claimant at his address stated in the lien affidavit, and the claimant does not release the filed lien affidavit on or before the fourteenth day after the date the owner or original subcontractor sends such explanation, evidence, and notice, the filing of a lien rendered unenforceable by a lien waiver under Property Code section 53.282(a)(3) will violate Civil Practices and Remedies Code section 12.002. Tex. Prop. Code § 53.282(b).

A person may not require a claimant or potential claimant to execute an unconditional waiver and release for a progress payment or final payment amount unless the claimant or potential claimant received payment in that amount in good and sufficient funds. Tex. Prop. Code § 53.283. For conditional and unconditional waivers and releases on progress payment and final payment, see forms 7-24, 7-25, 7-26, and 7-27. *See also* Tex. Prop. Code § 53.284.

Subchapter L applies to contracts executed on or after January 1, 2012, and in an effort to familiarize people with this new legislation, subchapter L contains a provision that determines a waiver or release is enforceable and in compliance if it is furnished in attempted compliance and evidences by its terms intent to comply with the subchapter. Tex. Prop. Code § 53.285(a). The attempted compliance provision expires on August 31, 2012. Tex. Prop. Code § 53.285(c). Subchapter L does not apply to written agreements to subordinate, release, waive, or satisfy all or part of a lien or bond claim in (1) an accord and satisfaction of an identified dispute, (2) an agreement concerning an action pending in a court or arbitration proceeding, or (3) an agreement that is executed after an affidavit claiming the lien has been filed or the bond claim has been made. Tex. Prop. Code § 53.287.

§ 7.12:6 Perfecting Statutory Lien Generally

The process of perfecting a statutory mechanic's lien consists of giving notice of the payment claim in proper form to the proper parties within the statutory time frames and, if the claim is not paid, thereafter timely filing a lien affidavit in proper form in the official real property records of the county in which the property is located. If all the requirements are met, the claimant then gets a perfected lien against the owner's interest in the real property improved by the labor or materials to secure payment of the claim from retainage and trapped funds in the owner's possession, but only in the amount authorized under the Texas Property Code, which may ultimately prove to be less than the actual amount of the payment claim. See section 7.12:20 below. The statutory mechanic's lien can be foreclosed only by judicial foreclosure.

Practice Note: By agreement between the owner and the original contractor before the start of construction, a deed-of-trust lien may be created against the owner's property to secure payment to the original contractor of the construction contract price. This allows the original contractor to nonjudicially foreclose the deed of trust rather than proceed through the judicial foreclosure process required under the mechanic's lien statutes.

§ 7.12:7 Relationship of Claimant to Owner

The filing and notice requirements applicable to perfecting statutory mechanic's lien claims differ according to the status of the party that contracted for the labor or materials.

It is essential to determine whether the claimant contracted to provide the labor or materials to an "owner," an "original contractor," or a "subcontractor" to make an accurate determination of the proper parties and time frames for notice.

Owner: Although used repeatedly in chapter 53 of the Texas Property Code, "owner" is not expressly defined in the Code. The actual use of "owner" in the Code clearly indicates, however, that an owner is the person holding title to the real property interest that is being improved by the construction. *See, e.g.*, Tex. Prop. Code § 53.021(e). Generally, the owner is either a fee owner or a tenant holding a leasehold estate.

Original Contractor: An original contractor is a person that contracts with the owner, either directly or through an agent of the owner. Tex. Prop. Code § 53.001(7). There may be more than one original contractor on a construction project. Tex. Prop. Code § 53.002.

Practice Note: An original contractor is usually called a "general contractor" or "prime contractor" by people in the construction industry, but the Property Code uses the term *original contractor.*

Subcontractor: A subcontractor is a person who does not contract directly with the owner but instead contracts to provide labor or material to either an original contractor or another subcontractor to fulfill all or part of the work required by contract between the owner and the original contractor. Tex. Prop. Code § 51.001(13). Because subcontractors cannot claim to be third-party beneficiaries of the contract between the owner and the original contractor without specific terms to that effect in the original contract, subcontractors can claim against the owner only through the perfection of a statutory mechanic's lien. *Raymond v. Rahme*, 78 S.W.3d 552, 559–62 (Tex. App.—Austin 2002, no pet.).

Practice Note: In the construction industry, a subcontractor is often referred to as a "second-tier" contractor, "third-tier" contractor, and so forth, depending on how far down the chain of contracts the subcontractor is from the original contractor. These are not terms used by the Property Code, however, and for purposes of the mechanic's lien statutes found in the Code the only meaningful distinction is whether the subcontractor contracted with an original contractor or another subcontractor.

§ 7.12:8 Proper Parties for Statutory Lien Notices

The proper parties for notice of the payment claim are determined by whether the claimant is an original contractor or a subcontractor. *See* Tex. Prop. Code §§ 53.055–.056.

Original Contractor: An original contractor does not have to give notice of nonpayment to the owner. Tex. Prop. Code § 53.056(a). The only statutory notice requirement applicable to the original contractor is that notice of the filing of the mechanic's lien affidavit must be given to the owner at the owner's last known business or residence address by the fifth business day after the lien affidavit is filed. Tex. Prop. Code § 53.055. See form 7-7 in this chapter for a notice to owner of filing lien affidavit.

Practice Note: If time permits, the original contractor should consider giving the owner written demand for payment of the debt and notice of intent to file a mechanic's lien affidavit if the debt is not paid. The claimant's goal is to obtain payment while avoiding the generally unrecoverable expenses of preparing and filing a lien, and a demand or warning letter will often accomplish that goal. Further, giving the owner prior notice before filing the lien may help maintain the lines of communication with the owner necessary to complete the construction project. (The contractor's filing a mechanic's lien claim without prior notice is particularly objectionable to an owner who is financing the construction, as the filing of a mechanic's lien claim puts the owner in default under most standard loan agreements.)

Subcontractor: Before the subcontractor can file a mechanic's lien affidavit, the subcontrac-

tor must first give statutorily prescribed notices of the unpaid amount of the claim to (1) the original contractor and the owner of unpaid amounts owing by a subcontractor and (2) the owner of unpaid amounts owing by the original contractor. Tex. Prop. Code § 53.056. The notice of claim must state the amount of the claim. Tex. Prop. Code § 53.056(b).

"A copy of the statement or billing in the usual and customary form is sufficient as notice." Tex. Prop. Code § 53.056(f). The notice must be given by registered or certified mail to the owner or original contractor (as applicable) at the last known business address or residence. Tex. Prop. Code § 53.056(e). See form 7-8 for a notice of claim to owner and original contractor.

§ 7.12:9 Deadlines for Notices of Unpaid Contract Amounts

The statutory deadlines for giving notice of the unpaid claim are always keyed to the month in which the unpaid labor or material was provided by the claimant. However, the deadlines and forms of the notices vary according to whether the construction project involves a residential construction contract or a nonresidential construction contract.

Payment Claim on Residential Construction Contract: A "residential construction contract" is a contract between an owner and a contractor to construct or repair a new or existing residence or improvements appurtenant to the residence. Tex. Prop. Code § 53.001(9). A "residence" is—

> a single-family house, duplex, triplex, or quadruplex or a unit in a multiunit structure used for residential purposes that is:
>
> (A) owned by one or more adult persons; and
>
> (B) used or intended to be used as a dwelling by one of the owners.

Tex. Prop. Code § 53.001(8).

Thus, residential construction contracts cover both homesteads and part-time, nonhomestead residences such as vacation homes. The requirements of Property Code sections 53.251–.260 pertaining to residential construction contracts are in addition to the other requirements of chapter 53. Tex. Prop. Code § 53.251(b).

The time frames for mailing notices and filing lien affidavits under a residential construction contract are generally shorter than those for a nonresidential one. *See* Tex. Prop. Code §§ 53.052(b), 53.252. Fund-trapping notices work in the same manner for residential construction projects as for nonresidential projects. *See* Tex. Prop. Code §§ 53.056, 53.252. Notice must be sent for *each* month in which unpaid work is furnished; however, the deadline for filing lien affidavits runs from the *last* month in which work was furnished by the claimant. Tex. Prop. Code §§ 53.052–.053, 53.252.

The following chart shows the applicable time frames for giving notice of an unpaid claim on a residential construction project.

	Sold to Owner:	*Sold to Original Contractor:*		*Sold to Subcontractor:*	
Month Labor/ Material Furnished	*File Lien Affidavit*	*Notice of Claim to Owner/ Original Contractor*	*File Lien Affidavit*	*Notice of Claim to Owner/ Original Contractor*	*File Lien Affidavit*
January	April 15	March 15	April 15	March 15	April 15
February	May 15	April 15	May 15	April 15	May 15
March	June 15	May 15	June 15	May 15	June 15
April	July 15	June 15	July 15	June 15	July 15
May	August 15	July 15	August 15	July 15	August 15
June	September 15	August 15	September 15	August 15	September 15
July	October 15	September 15	October 15	September 15	October 15
August	November 15	October 15	November 15	October 15	November 15
September	December 15	November 15	December 15	November 15	December 15
October	January 15	December 15	January 15	December 15	January 15
November	February 15	January 15	February 15	January 15	February 15
December	March 15	February 15	March 15	February 15	March 15

See section 7.12:10 below concerning notice of contractual retainage claims on residential construction projects.

See forms 7-8 and 7-9 in this chapter for a notice of claim against a homestead property. See form 7-10 for a contractor's disclosure statement for residential construction.

Payment Claim on Nonresidential Construction Contract: A nonresidential construction contract is any construction contract other than a residential construction contract.

A subcontractor who contracted with the original contractor must give notice of the unpaid balance to the owner with a copy to the original contractor by the fifteenth day of the third month following each month for which the material or labor was provided. Tex. Prop. Code § 53.056(b), (c). A subcontractor who contracted with a subcontractor must give notice of the unpaid balance to (1) the original contractor by the fifteenth day of the second month following each month for which the material or labor was provided and (2) the owner and the original contractor by the fifteenth day of the third month following the month for which the material or labor was provided. Tex. Prop. Code § 53.056(b). Notices of default in payment must be sent for each month in which unpaid labor or materials were furnished. Tex. Prop. Code § 53.056(b). The deadline for filing lien affidavits runs from the *last* month in which work was furnished by the claimant. Tex. Prop. Code §§ 53.053, 53.056(b). All lien affidavits must be filed before thirty days after completion of the original contract between the owner and the original contractors. *See* Tex. Prop. Code §§ 53.084, 53.101; see also "Filing Liens and Trapping Funds at Project's End" in section 7.12:11 below.

The following chart shows the applicable time frames for giving notice of an unpaid claim on a nonresidential construction project.

	Sold to Owner:	*Sold to Original Contractor:*		*Sold to Subcontractor:*		
Month Labor/ Material Furnished	*File Lien Affidavit*	*Notice of Claim to Owner/ Original Contractor*	*File Lien Affidavit*	*Notice of Claim to Original Contractor*	*Notice of Claim to Owner/ Original Contractor*	*File Lien Affidavit*
January	May 15	April 15	May 15	March 15	April 15	May 15
February	June 15	May 15	June 15	April 15	May 15	June 15
March	July 15	June 15	July 15	May 15	June 15	July 15
April	August 15	July 15	August 15	June 15	July 15	August 15
May	September 15	August 15	September 15	July 15	August 15	September 15
June	October 15	September 15	October 15	August 15	September 15	October 15
July	November 15	October 15	November 15	September 15	October 15	November 15
August	December 15	November 15	December 15	October 15	November 15	December 15
September	January 15	December 15	January 15	November 15	December 15	January 15
October	February 15	January 15	February 15	December 15	January 15	February 15
November	March 15	February 15	March 15	January 15	February 15	March 15
December	April 15	March 15	April 15	February 15	March 15	April 15

See section 7.12:10 below for special notice requirements not included in this chart.

See form 7-12 for a notice to original contractor by second-tier claimant.

Practice Note: As a practical matter, the third-month notice is not required if the second-month notice contains the statutory language required by section 53.056 and is sent to both the original contractor and the owner on or before the fifteenth day of the second month after all or part of the claimant's labor or material was provided. See form 7-8. One consideration in favor of sending the notices sequentially rather than concurrently is to give the original contractor the opportunity to see that payment is made without putting the owner on notice of potential problems with the original contractor's subcontractors and possibly creating friction between the owner and the original contractor that will affect the subcontractor. However, the delay in presenting the claim to the owner may adversely affect the amount of funds "trapped" in the owner's hands by the notice, as discussed in section 7.12:20 below.

Specially Fabricated Materials: Sections 53.021 and 53.058 of the Property Code establish additional notice requirements for contractors who provide specially fabricated materials. In order for a claimant providing specially fabricated materials to fully protect his lien rights, the claimant must give the owner notice not later than the fifteenth day of the second month after the month in which the claimant receives and accepts the order for the specially fabricated materials. Tex. Prop. Code § 53.058(b). If the contract is with a person other than the original contractor, the claimant must also give notice within that same time to the original contractor. Tex. Prop. Code § 53.058(b). The notice must contain a statement that the order has been received and accepted and that includes the price of the order. Tex. Prop. Code § 53.058(c). This notice must be sent by registered or certi-

fied mail, return receipt requested, to the last known business address or residence address of the owner or reputed owner and the original contractor as applicable. Tex. Prop. Code § 53.058(d). It is not necessary that the specially fabricated materials actually be delivered to the construction site for the claimant to perfect the lien claim. Tex. Prop. Code § 53.021(b). If the claimant actually delivers the specially fabricated materials to the job site, the claimant must also comply with the normal notice procedures for material suppliers. Tex. Prop. Code § 53.058(e). A claimant providing specially fabricated materials who fails to give the section 53.058 notice will still have a valid claim as to delivered items if the required notices are given under section 53.056 of the Property Code. Tex. Prop. Code § 53.058(f). See form 7-13 for a notice regarding specially fabricated materials.

§ 7.12:10 Notice for Contractual Retainage Claims

Both original contracts and subcontracts may provide that a percentage of each payment earned by the contractor supplying material or labor will be held back or "retained" until final completion of work. This contractual "retainage" serves as a kind of security deposit or reserve fund that can be used to address problems with the quality of the contractor's work or defaults by the contractor in paying for labor or materials used in the contract.

If a subcontract provides for contractual retainage, the retainage could be construed as an unpaid amount owing under the contract subject to the regular notice and filing requirements of the mechanic's lien statutes, notwithstanding that the funds were withheld pursuant to an agreement and not because of a payment default. To relieve that subcontractor of the burden of giving notices for each month's contractual retainage, the Texas Property Code provides that by giving the project owner (and the original contractor, if the retainage pertains to a contract with a second-tier or lower subcontractor) early notice of the contractual retainage agreement, the subcontractor is relieved of the burden of giving the default notices otherwise required. *See* Tex. Prop. Code § 53.057.

Retainage Claims on Nonresidential Projects: A subcontractor on a nonresidential construction project may give the owner written notice of a subcontract containing a retainage agreement under section 53.057 instead of or in addition to the notice under section 53.056 (labor and materials) or section 53.252 (specially fabricated materials). Tex. Prop. Code § 53.057(a). Notice under section 53.057 must be given to the owner not later than the earlier of (1) the thirtieth day after the date the retainage agreement is completed, terminated, or abandoned; or (2) the thirtieth day after the date the original contract is terminated or abandoned. Tex. Prop. Code § 53.057(b). If the claimant's retainage agreement is with a subcontractor and not with the original contractor, the claimant must also give notice within that time frame to the original contractor. Tex. Prop. Code § 53.057(b–1). If the claimant is a subcontractor, filing a notice for contractual retainage under section 53.057 and section 53.055 will relieve the subcontractor of the obligation to send monthly fund-trapping notices for the retainage under section 53.056. *See* Tex. Prop. Code § 53.057(e); *see also* Tex. Prop. Code § 53.056(b).

Retainage Claims on Residential Projects: The claimant must give notice of the retainage agreement to the owner not later than the earlier of (1) the thirtieth day after the date the retainage agreement is completed, terminated, or abandoned; or (2) the thirtieth day after the date the original contract is terminated or abandoned. Tex. Prop. Code § 53.057(b). If the contract is a subcontract, the claimant must also give notice to the original contractor. Tex. Prop. Code § 53.057(b–1). No further notice of contractual retainage agreements is required on residential

construction projects. Tex. Prop. Code § 53.057(e).

Form of Retainage Notice: The notice must generally state the existence of a requirement for retainage and include the name and address of the claimant and the name and address of the subcontractor, if the retainage agreement is with a subcontractor. Tex. Prop. Code § 53.057(c). These notices must be sent to the last known business or residence address of the owner or reputed owner and the original contractor as applicable. Tex. Prop. Code § 53.057(d). See form 7-14 in this chapter for a notice of agreement providing for retainage.

Effect of Retainage Notice: Although section 53.057(e) provides that a claimant who gives notice under section 53.057 is not required to give any other notices for retainage, the notice does not appear to authorize the owner to withhold any additional funds as under the fund-trapping notice described in section 7.12:11 below.

A claimant has a lien on the retained funds, and the owner is personally liable to the claimant for such funds, if the claimant gives notice of the filed affidavit required by section 53.055 and gives notice in accordance with section 53.057 along with either complying with chapter 53, subchapter E, of the Texas Property Code or filing an affidavit claiming a lien. Tex. Prop. Code § 53.057(f). If the claimant files an affidavit claiming a lien, it must be filed not later than the earliest of—

1. the date required for filing an affidavit under section 53.052;
2. the fortieth day after the date stated in an affidavit of completion as the date of completion of the work under the original contract, if the owner sent the claimant notice of an affidavit of completion as required;
3. the fortieth day after the date of termination or abandonment of the original contract, if the owner sent the claimant notice of the termination or abandonment as required; or
4. the thirtieth day after the date the owner sent to the claimant a written notice of demand for the claimant to file the affidavit claiming the lien.

Tex. Prop. Code § 53.057(f)(1)(B).

An owner's written demand for the claimant to file an affidavit claiming a lien must contain the owner's name and address, a description of the real property on which the improvement is located that is legally sufficient for identification, and a statement that the claimant must file the lien affidavit not later than the thirtieth day after the date the demand is sent. Tex. Prop. Code § 53.057(g)(1)(2). The written demand is effective only for the amount of contractual retainage earned by the claimant as of the day the demand was sent. Tex. Prop. Code § 53.057(g)(3).

§ 7.12:11 Funds Subject to Lien Claims

Statutory Retainage: Section 53.101 of the Texas Property Code provides that—

> (a) During the progress of work under an original contract for which a mechanic's lien may be claimed and for 30 days after the work is completed, the owner shall retain:
>
> (1) 10 percent of the contract price of the work to the owner; or
>
> (2) 10 percent of the value of the work, measured by the proportion that the work done bears to the work to be done, using the contract

> price or, if there is no contract price, using the reasonable value of the completed work.

Tex. Prop. Code § 53.101.

For purposes of chapter 53 of the Property Code, the work is not "completed" until actual completion; substantial completion will not suffice. Tex. Prop. Code § 53.001(15). The required retainage is computed separately for each original contract and not for the project as a whole. *Page v. Structural Wood Components, Inc.*, 102 S.W.3d 720, 723–24 (Tex. 2003). If the owner fails to withhold such retainage, the owner is potentially liable to lien claimants for the payment of lien claims up to the amount of the retainage that should have been withheld. Tex. Prop. Code § 53.105(a); *Hunt County Lumber, Inc. v. Hunt-Collin Electric Co-operative, Inc.*, 749 S.W.2d 179 (Tex. App.—Dallas 1988, writ denied). Retainage secures artisans and mechanics first and then the other lien claimants in proportion to their relative claims. Tex. Prop. Code §§ 53.102, 53.104.

Trapped Construction Payments: In addition to meeting the minimum statutory retainage requirements, an owner is also required to withhold from payments earned by the original contractor an amount sufficient to pay alleged claims if the owner is given written notice to the effect that, if the claim remains unpaid, the owner may be personally liable and the owner's property subjected to a lien unless the owner withholds payments from the contractor for payment of the claim or the claim is otherwise paid or settled. Tex. Prop. Code §§ 53.056(d), 53.081, 53.082.

Practice Note: The following statement is sufficient to comply with section 53.056(d): "If the claim remains unpaid, you may be personally liable and your property may be subjected to a lien unless you withhold payments from the contractor for payment of the claim or the claim is otherwise paid or settled." *See* Tex. Prop. Code § 53.056(d). This notice is commonly referred to as a "fund trapping" notice and should be routinely included as part of the notice of unpaid claim sent to the owner and original contractor. Trapping funds is important to the claimant because the statutory 10 percent retainage may not in itself be sufficient to cover all the perfected claims under a contract.

Once the owner receives a notice of default with such a statement, the owner must withhold trapped funds from payments owing to the original contractor until the time for filing the affidavit of mechanic's lien has passed or, if a lien affidavit has been filed, until the lien claim is satisfied or released. Tex. Prop. Code § 53.082. The amount trapped is the amount the owner owes the original contractor, over and above offsets and back charges. *Lennox Industries v. Phi Kappa Sigma Educational & Building Ass'n*, 430 S.W.2d 404 (Tex. Civ. App.—Austin 1968, no writ); *accord Page*, 102 S.W.3d at 720. *But overruled in part by Hayek v. Western Steel Co.*, 478 S.W.2d 786 (Tex. 1972).

Fund Trapping for Specially Fabricated Materials: An owner may withhold funds under a fund-trapping notice given with respect to specially fabricated materials under section 53.058 if the owner has also received notice of an unpaid claim under Property Code section 53.056.

Filing Liens and Trapping Funds at Project's End: Under Property Code sections 53.084 and 53.101, the owner has to hold statutory retainage funds for only thirty days past "completion of the work," which the supreme court has interpreted to mean the completion or termination of the original contract under which a claimant is proceeding. *See* Tex. Prop. Code §§ 53.084, 53.101. *See Page v. Marton Roofing, Inc.*, 102 S.W.3d 733, 735 (Tex. 2003) (fund-trapping liens); *Page v. Structural Wood Components, Inc.*, 102 S.W.3d 720, 725 (Tex. 2003)

(statutory liens). Moreover, all lien affidavits must be filed within thirty days of completion of the original contract. Accordingly, these statutes effectively shorten the time otherwise given a claimant for giving a fund-trapping notice.

Practice Note: Contractors providing labor and materials at the end of a project (those doing interior painting and carpet installation, for example) are more likely to be affected by the shorter effective deadlines than contractors working at the start of a project (those pouring the foundation, for example). However, any contractor could be caught by shorter deadlines if the owner terminates the original contract (for the original contractor's default, for example) before the original anticipated completion date. The only certain way for a claimant to protect his lien rights is to give all required notices and file the lien affidavit within thirty days of the completion of the claimant's work or delivery of materials.

§ 7.12:12 Demands for Payment

Once a subcontractor has provided the owner with notice of a payment claim, the subcontractor may demand payment from the owner. The demand must state that all or part of the claim has accrued under Property Code section 53.053 or is past due according to the agreement between the parties. Tex. Prop. Code § 53.083(a). A copy of the demand letter must be sent to the original contractor. Once this notice is given, the original contractor must notify the owner within thirty days if it intends to dispute the claim. Tex. Prop. Code § 53.083(d). If the original contractor does not provide timely notice to the owner that it disputes the claim, the original contractor is considered to have assented to the demand, and the owner is required to pay the claim. Tex. Prop. Code § 53.083(b). The claimant may incorporate a demand for payment into the original notice of claim. Tex. Prop. Code § 53.083(c). Notice and demand alone will not preserve a lien claim. If the owner does not pay the claim, a mechanic's lien affidavit must still be filed within the time required by the statute, except as allowed by Texas Property Code section 53.057(f). Tex. Prop. Code §§ 53.052(a), 53.103.

§ 7.12:13 Mechanic's Lien Affidavit

If the claimant does not receive payment after giving notice of its claim, the next step is to file the mechanic's lien affidavit to perfect the lien claim against the owner's interest in the real property to secure payment of the claimant's interest in the statutory retainage and any trapped funds.

§ 7.12:14 Form of Statutory Lien Affidavit

General Contents: The lien affidavit must be signed by either the person claiming the lien or by an authorized representative on the claimant's behalf and must contain—

1. a sworn statement of the amount of the claim;
2. the name and last known address of the owner or reputed owner;
3. a general statement of the kind of work done and materials furnished by the claimant and, for a claimant other than an original contractor, a statement of each month in which the work was done or the materials were furnished;
4. the name and last known address of the person by whom the claimant was employed or to whom the claimant furnished the material or labor;
5. the name and last known address of the original contractor;
6. a description, legally sufficient for identification, of the property sought to be charged with a lien;

7. the claimant's name, mailing address, and physical business address; and

8. for a claimant other than an original contractor, a statement identifying the date each notice of the claim was sent to the owner and the method by which the notice was sent.

Tex. Prop. Code § 53.054.

See forms 7-15 and 7-16 in this chapter for an affidavit and cover letter.

Homestead Lien Affidavit: A lien affidavit against a homestead must contain the mandatory disclosure set out in Tex. Prop. Code § 53.254(g). It reads "Notice: This is not a lien. This is only an affidavit claiming a lien." This notice must be conspicuously printed, stamped, or typed at the top of the page in a type size equal to a least ten-point boldface or the computer equivalent. Tex. Prop. Code § 53.254(f).

Jurat Required: The notary statement on the lien affidavit must state that the affidavit was "subscribed and sworn to" and not just "acknowledged"; otherwise, the lien affidavit is legally insufficient to perfect the claim. *See Sugarland Business Center, Ltd. v. Norman*, 624 S.W.2d 639, 641 (Tex. App.—Houston [14th Dist.] 1981, no writ); *Perkins Construction Co. v. Ten-Fifteen Corp.*, 545 S.W.2d 494, 498 (Tex. Civ. App.—San Antonio 1976, no writ); *Conn, Sherrod & Co. v. Tri-Electric Supply Co.*, 535 S.W.2d 31, 34 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.); *Crockett v. Sampson*, 439 S.W.2d 355, 359 (Tex. Civ. App.—Austin 1969, no writ).

Description of Work and Materials: The affidavit must provide a meaningful description of the general type of work or material supplied, but it is not necessary to describe individual items of work done or material furnished. Tex. Prop. Code § 53.054(c). If there is a written contract for the work, it is often useful to attach a copy to the affidavit as an exhibit.

The affidavit may use abbreviations or symbols customarily used in the trade. Tex. Prop. Code § 53.054(c). But using abbreviations and symbols that are not commonly recognized in the trade may render the lien invalid. *See Haden Co. v. Mixers, Inc.*, 667 S.W.2d 316, 316 (Tex. App.—Dallas 1984, no writ) (holding that description "5—12' 2" x 14' 1" O.H.Std.M.G. $3,328.00" was "gibberish" and insufficient to perfect lien).

Multiple Contracts: The better practice is not to file one lien claim for payments owing under multiple contracts, even if the different projects are located in a single tract or development. *See H.B. Zachry Co. v. Waller Creek, Ltd. (In re Waller Creek, Ltd.)*, 867 F.2d 228 (5th Cir. 1989) (lien claim defeated on grounds that claims on two separate contracts combined into one lien affidavit).

§ 7.12:15 Requests for Information

By statute, the mechanic's lien affidavit must contain certain information that may not be known or easily learned by the claimant. *See* Tex. Prop. Code § 53.054. On written request, owners and contractors must furnish the mechanic's lien claimant with information needed to perfect the claimant's lien rights or evaluate the merits of the payment claims. Tex. Prop. Code § 53.159.

Request to Owner: On written request from any person furnishing labor or materials for a project, an owner is required to furnish within a reasonable time not exceeding ten days from receipt of the request—

1. a description of the property being improved legally sufficient to identify it;

2. a statement of whether a bond is in place on the construction project and, if a bond does exist, the name of the

bonding company and a copy of the bond;

3. a statement of whether there are any prior recorded liens or security interests against the real property and the name and address of any persons having lien or security interests; and

4. the date on which the original contract for the project was executed.

Tex. Prop. Code § 53.159(a).

Subsection 53.159(g) of the Texas Property Code provides that a subcontractor who does not receive information requested under subsection (a)(4) within the period prescribed is not required to comply with section 53.057 and may perfect a lien for retainage by filing a lien affidavit under section 53.052. Subsection (g) expires on September 1, 2013.

See form 7-17 in this chapter for a request to an owner.

Request to Original Contractor: On written request from any person furnishing labor or materials under the original contract, the original contractor is required to provide within a reasonable time not exceeding ten days from the receipt of the request—

1. the name and last known address of the person to whom the original contractor has furnished labor and materials for the project (usually the owner);

2. confirmation of whether the original contractor furnished or was furnished with a payment bond;

3. if a bond does exist, the name and address of the surety and a copy of the bond; and

4. the date on which the original contract for the project was executed.

Tex. Prop. Code § 53.159(b).

See form 7-18 for a request to an original contractor.

Request to Subcontractor: On written request from an owner, original contractor, bond surety on the original contract, or any person furnishing work under a subcontract, a subcontractor is required to provide within a reasonable time not exceeding ten days from receipt of the request—

1. the name and last known address of each person from whom the subcontractor purchased labor or materials (other than materials furnished from the subcontractor's inventory);

2. the name and last known address of each person to whom the subcontractor furnished labor or materials;

3. whether the subcontractor has furnished or been furnished a payment bond on the project; and

4. if a payment bond exists, the name and last known address of the surety and a copy of the bond.

Tex. Prop. Code § 53.159(c).

See form 7-19 for a request to a subcontractor.

Information from Claimant: An owner, contractor, or bond surety may request that a claimant for a lien or under a bond furnish a copy of any applicable written agreement, purchase order, or contract and any billing statement or payment request reflecting the amount claimed and, if further requested, the estimated amount due for each calendar month in which the claimant performed labor or furnished materials. The claimant must provide the information within thirty days of receipt of the request. Tex. Prop. Code § 53.159(d).

Payment of Costs: If the person from whom information is requested does not have a direct contractual relationship on the project with the

person requesting the information, the person requesting the information may be required to pay for the actual costs, not to exceed $25, of furnishing the information. Tex. Prop. Code § 53.159(e).

Failure to Provide Information: If a person other than a claimant requested to furnish information under Property Code section 53.159(e) fails to provide it, that person may be liable to the requesting person for the reasonable and necessary costs incurred in obtaining the requested information elsewhere. Tex. Prop. Code § 53.159(f).

No Tolling: Chapter 53 does not allow requests for information necessary to prepare a notice letter or a lien affidavit under Code section 53.159 to toll the statutory time limits for sending a notice of claim or filing a mechanic's lien affidavit. Therefore, the claimant should always allow enough time to obtain the required information elsewhere should the requested party fail to provide it in a timely manner.

§ 7.12:16 Deadlines for Filing Statutory Lien Affidavit

The lien affidavit itself must be filed by the earlier of (1) the fifteenth day of the fourth calendar month after the month in which the indebtedness accrues on a nonresidential construction contract (Tex. Prop. Code § 53.052(a)); (2) the fifteenth day of the third month after the month in which the indebtedness accrues on a residential construction project (Tex. Prop. Code § 53.052(b)); or (3) the thirtieth day after completion or termination of the original contract under which the claim arises (*Page v. Structural Wood Components, Inc.*, 102 S.W.3d 720, 723–24 (Tex. 2003)).

Original Contractor: Indebtedness to an original contractor accrues—

1. on the last day of the month in which a written declaration by the original contractor or the owner is received by the other party to the original contract stating that the original contract has been terminated; or
2. on the last day of the month in which the original contract has been completed, finally settled, or abandoned.

Tex. Prop. Code § 53.053(b).

Subcontractor: Indebtedness to a subcontractor accrues on the last day of the last month in which the labor was performed or the material furnished. Tex. Prop. Code § 53.053(c).

Specially Fabricated Materials: Indebtedness for specially fabricated materials accrues on the last day of—

1. the last month in which materials were delivered;
2. the last month in which delivery of the last of the material would normally have been required at the job site; or
3. the month of any material breach or termination of the original contract by the owner or contractor or of the subcontract under which the specially fabricated material was furnished.

Tex. Prop. Code § 53.053(d).

Retainage: "A claim for retainage accrues on the last day of the month in which all work called for by the contract between the owner and the original contractor has been completed, finally settled, or abandoned." Tex. Prop. Code § 53.053(e).

Architects, Engineers, and Surveyors: Since an architect, engineer, or surveyor is usually an original contractor, the "accrual of indebtedness" for determining the lien filing deadline will run from the completion of his services. *See* Tex. Prop. Code § 53.053(b). The

indebtedness may accrue before the actual start of construction, if all the contract work is preparatory in nature. This means that the architect, engineer, or surveyor may have to file a lien before the start of construction.

§ 7.12:17 Special Homestead Requirements

If labor or materials are provided for work on a homestead property, no mechanic's lien can be created against the property unless the original contractor meets very specific statutory requirements before the start of construction on the project. If the original contractor does not meet these requirements, no subcontractor providing labor or materials for the project will be able to meet the statutory requirements to perfect a mechanic's lien on the homestead property. Tex. Const. art. XVI, § 50; Tex. Prop. Code § 53.254.

Basic Requirements: If a homestead is involved, to create a valid mechanic's lien against the property—

1. the original contractor and the owner must execute a written agreement setting out the terms of the contract before work commences;
2. if the owner of the homestead is married, both spouses must sign the contract; and
3. the contract must be filed with the clerk of the county in which the homestead is located.

Tex. Prop. Code § 53.254.

The contract inures to the benefit of all persons who labor or furnish material for the original contractor. Tex. Prop. Code § 53.254(d).

Practice Note: While Code section 53.254 provides that the contract must be signed before construction starts, no particular time for the filing of the contract is specified. However, filing the contract before the start of construction will evidence that the contract was timely executed.

Extensions of Credit: Any homestead construction project involving a loan has additional statutory requirements that must be met in connection with closing the construction contract with the owner. A contract for the improvement (as opposed to new construction) of homestead property cannot be signed before the fifth day after the owner has made written application for the extension of credit unless the owner must make immediate repairs to conditions that materially affect the health or safety of the people residing in the homestead. Tex. Const. art. XVI, § 50(a)(5)(B). Because the validity of the lien is in issue, lenders are highly reluctant to waive the five-day period. The construction contract cannot be executed except in the office of the lender, an attorney, or a title company. Tex. Const. art. XVI, § 50(a)(5)(D). (That is, there are no more "kitchen table closings" by home improvement salesmen that create liens on the property.) The owner can rescind a construction contract within three days after execution. Tex. Const. art. XVI, § 50(a)(5)(C).

Additional Notices: Certain additional notices are required with respect to homestead construction projects.

Disclosure Statement. The Property Code provides that a mandatory disclosure statement must be provided to the owner—

1. by a third-party lender, before closing of the loan (Tex. Prop. Code § 53.257);
2. by the original contractor, before the residential construction contract is executed (Tex. Prop. Code § 53.255(a)); and
3. by any lien claimant, with the second-month notice letter to the owner (Tex. Prop. Code § 53.252(a), (b)).

See form 7-10 in this chapter for a disclosure statement.

Practice Note: There are no statutory penalties for failing to give the notice, and the statute expressly provides that the failure of an original contractor or a lender to provide the statement will not invalidate a lien. Tex. Prop. Code §§ 53.255(c), 53.257(c). However, some attorneys argue that the statute creates a new civil cause of action in favor of residential owners.

Notice of Proposed Subcontractors. Before beginning construction, the original contractor must provide the owner with a list of the proposed subcontractors and suppliers for the project. Tex. Prop. Code § 53.256. This list must contain the notice set forth at Property Code section 53.256 and must be updated within fifteen days after each occasion in which a subcontractor or supplier is added or deleted. Tex. Prop. Code § 53.256(a)(2), (b). The owner may waive the right to receive the list by a written waiver that meets the requirements of Property Code section 53.256(d). The waiver may be included in the residential construction contract or may be separate. Tex. Prop. Code § 53.256(d). There is no express penalty for failure to provide the list, and the failure to provide the list does not invalidate a lien. Tex. Prop. Code § 53.256(c). See form 7-11 for a list of subcontractors and suppliers.

Disbursement of Funds. Whenever the original contractor requests payment on a residential construction contract (whether from the owner or a third-party lender), the original contractor must provide a disbursement statement showing at minimum the name and address of every person contracting directly with the original contractor and whom the original contractor intends to pay with the requested funds. Tex. Prop. Code § 53.258. If the owner finances the construction through a third-party lender, the lender must obtain a signed disbursement statement from the original contractor for each advance and provide to the owner a statement of funds disbursed since the last disbursement statement. Tex. Prop. Code § 53.258(b). The original contractor's or the lender's failure to provide the statement does not invalidate a mechanic's lien claim, but there are criminal penalties for the intentional, knowing, or reckless provision of false or misleading information in a disbursement statement. Tex. Prop. Code § 53.258(e), (f). See form 7-20 for a disbursement statement.

Final Payment Affidavit. As a condition to final payment, the original contractor must execute and deliver to the owner an affidavit stating that the original contractor has paid each person in full for all labor and materials used in the construction of improvements on the real property (or, in the alternative, stating who has not been paid, and, if known, their address and telephone number and the amount owing). Tex. Prop. Code § 53.259(a). See form 7-21 for an affidavit of bills paid.

Practice Note: The mechanic's lien statutes pertaining to homesteads do not differentiate between the residential homestead and the business homestead. Accordingly, if a contractor intends to work on a business location owned by an individual rather than a corporate entity, the contractor should carefully evaluate whether a business homestead issue exists.

§ 7.12:18 Owner's Financial Liability

The owner is liable to an original contractor for any unpaid portion of the original construction contract that was earned by the original contractor. However, there are statutory limits on an owner's liability to subcontractors. In general, the owner's maximum liability to the subcontractors as a group under any particular original contract is the sum of—

1. the 10 percent statutory retainage the owner is required to hold back from the original contractor for thirty days

after final completion of the construction project; and

2. any funds "trapped" under a proper notice of nonpayment under Tex. Prop. Code §§ 53.081–.084.

However, the claimant traps only those funds owed by the owner to the contractor over and above offsets and back charges. *Lennox Industries v. Phi Kappa Sigma Educational & Building Ass'n*, 430 S.W.2d 404 (Tex. Civ. App.—Austin 1968, no writ), *overruled in part by Hayek v. Western Steel Co.*, 478 S.W.2d 786 (Tex. 1972), *but supported by Page v. Structural Wood Components, Inc.*, 102 S.W.3d 720 (Tex. 2003).

§ 7.12:19 Priority of Lien Claims

Except for the special preference to (1) individual artisans and mechanics as to statutory retainage under Tex. Prop. Code § 53.104 and (2) liens for preconstruction work by architects, engineers, and surveyors under Tex. Prop. Code §§ 53.021(c), 53.124(e), the priority date of a perfected mechanic's lien claim relates back to the date of the start of construction or the delivery of materials for the project under the contract between the owner and the original contractor. Tex. Prop. Code § 53.124(a). For this purpose, a subcontractor's claim priority will be determined by tracing back through the chain of subcontracts to the start of construction under the original contract with the owner. The effect is that (except for the statutory exceptions referenced above) all lien claims of all subcontractors under the same original contract will have the same priority date, regardless of the actual dates of filing of the respective lien affidavits.

Multiple Original Contracts: If there is more than one original contractor on a project and construction under the separate contracts with the different original contractors began on different dates, the date of relative lien priority for the claimant is determined by the start of construction under the particular original contract under which the claimant performed.

Priority with Respect to Third Parties: All subcontractors with a perfected lien have a priority over other creditors of the original contractor. Tex. Prop. Code § 53.121.

Priority of Claims for Removables: Mechanic's lien claimants have a preferential first priority over all other liens on removable improvements, regardless of the relative priority of filing. Tex. Prop. Code § 53.123. "Removable improvements" generally means items that can be removed without material injury to the land or other improvements. *First National Bank in Dallas v. Whirlpool Corp.*, 517 S.W.2d 262, 269 (Tex. 1974). The question of "material injury" is usually one of fact. Postremoval damage to the remaining property might also be considered in determining whether an item was a "removable" under the mechanic's lien statutes. *Exchange Savings & Loan Ass'n v. Monocrete Pty., Ltd.*, 629 S.W.2d 34, 36–37 (Tex. 1982) (removal of roofing tiles would cause material injury to townhouse as matter of law because it would expose structure to postremoval damage by elements). Because the priority preference for removables defeats prior recorded liens (*Whirlpool Corp.*, 517 S.W.2d at 269), the lien for removables can be a useful tool for extracting payment from the project owner or an existing lienholder, but it is not a self-help lien. The contractor must get a court order authorizing the removal and cannot simply resort to self-help remedies. *See* Tex. Prop. Code § 53.154.

One court has held that a subcontractor claimant must be able to identify the specific removable materials it furnished in order to assert the priority claim for removables. *See, e.g., Kaspar v. Cockrell-Riggins Lighting Co.*, 511 S.W.2d 109 (Tex. Civ. App.—Eastland 1974, no writ). But another court has held that an original contractor claimant may assert a priority claim to all removable items furnished under the original

contract, even if such items were supplied through subcontractors. *L&N Consultants, Inc. v. Richard H. Sikes*, 648 S.W.2d 368, 370–71 (Tex. App.—Dallas 1983, writ ref'd, n.r.e.).

§ 7.12:20 Payment on Perfected Claims

The owner is to use the retainage and trapped funds to pay the perfected mechanic's lien claimants on a priority class by priority class basis. If the retainage and trapped funds held by the owner are insufficient to discharge all the perfected lien claims of a particular class, the available funds are to be divided pro-rata among the claimants of the class in accordance with the relative amount of their claims.

If the owner properly disburses among the perfected claimants the full amount of the retainage and trapped funds the owner was required to hold under the Texas Property Code, the claimants cannot pursue the owner or the owner's property for the balance of their respective payment claims.

Practice Note: It is not uncommon for the retainage and trapped funds held by the owner to be less than the perfected claims. This occurs, for example, when a particular lien claimant fails to trap funds in the owner's hands but otherwise perfects the lien claim.

Practice Note: Because (1) claims of equal priority may accrue and be perfected throughout the entire construction period and for thirty days thereafter and (2) fact issues may exist as to the validity of the payment claims made by any one or more of the claimants (which will affect the calculation of the proper pro-rata division of funds among claimants), the owner is typically reluctant to make any payment on lien claims before thirty-one days after final completion of the construction project, and even then disbursement of funds carries great potential risks to the owner. Unless a global agreement can be reached among the claimants and the owner, the owner may be forced to interplead the funds or seek a judicial determination of the proper amounts owing to the respective claimants. The delay and cost of such litigation is, of course, a great incentive for the various parties to compromise and settle their claims.

Attorney's Fees: The court must award both original contractors and subcontractors equitable costs and attorney's fees in a foreclosure action. However, with respect to a lien or claim arising out of a residential construction contract, the court is not required to order the property owner to pay costs and attorney's fees. Tex. Prop. Code § 53.156.

§ 7.12:21 Judicial Enforcement of Lien

Limitations for Filing Suit: If the claimant has timely filed and perfected a mechanic's lien affidavit but the owner refuses to pay the amount properly owing to the claimant, the claimant can seek payment through a judicial foreclosure sale of the property that was the subject of the mechanic's lien affidavit. Statutory mechanic's liens can be foreclosed only by judicial action. If the claim pertains to a nonresidential construction claim, suit to foreclose the lien must be filed within two years of the later of the last day a claimant may file the lien affidavit or one year after completion, termination, or abandonment of the work under the original contract under which the lien is claimed. Tex. Prop. Code § 53.158(a). If the claim pertains to a residential construction contract, suit to foreclose the lien must be filed by the later of one year after the last day a claimant could file a lien affidavit under section 53.052 of the Property Code or one year after completion, termination, or abandonment of the original contract. Tex. Prop. Code § 53.158(b).

Jurisdiction: The state district courts have original jurisdiction over suits to foreclose a mechanic's lien, but special exceptions in chapter 25 of the Government Code grant shared

jurisdiction to the county courts in Harris, Calhoun, Hopkins, Kaufman, Nueces, Panola, Smith, and Tarrant counties.

Judicial Foreclosure Proceeds: If the owner's property goes to judicial foreclosure sale, the sales proceeds will be used to pay each class of claimant in accordance with its relative priority, for as far as the sales proceeds will go. If the available sales proceeds are not sufficient to pay all the claims of a particular priority class, the available funds will be divided pro-rata among the claimants, in accordance with the relative amount of their claims, as determined by the court. Tex. Prop. Code §§ 53.104(b), 53.122(b).

Attorney's Fees and Costs: The court must award costs and reasonable attorney's fees for a suit to foreclose on a lien or declare a lien claim invalid. However, with respect to a lien or claim arising out of a residential construction contract, the court is not required to order the property owner to pay costs and attorney's fees. Tex. Prop. Code § 53.156.

§ 7.12:22 Arbitration of Claim

While chapter 53 of the Texas Property Code establishes a statutory system for handling mechanic's lien claims on construction projects, the parties may execute contracts providing for mandatory binding arbitration of mechanic's lien claims. *Dalton Contractors v. Bryan Autumn Woods*, 60 S.W.3d 351, 353–54 (Tex. App.—Houston [1st Dist.] 2001, no pet.), *cited with approval in CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 242 (Tex. 2002); *Hearthshire Braeswood Plaza v. Bill Kelly Co.*, 849 S.W.2d 380, 390–91 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

§ 7.12:23 Removing Invalid Mechanic's Liens

Texas Property Code sections 53.160–.162 establish a summary motion procedure for removing invalid mechanic's lien claims. *See* Tex. Prop. Code §§ 53.160–.162. A suit and a summary motion must be filed. A bond may be required in connection with an order removing the lien, pending the final outcome in the litigation. Tex. Prop. Code § 53.161. The Code also establishes procedures for reviving the lien if the claimant should ultimately prevail in court. *See* Tex. Prop. Code § 53.162.

§ 7.12:24 Prompt Pay Statute

While not part of mechanic's lien statutes in Texas Property Code chapter 53, Code chapter 28, on prompt payment to contractors and subcontractors, provides significant rights to the mechanic's lien claimant. Chapter 28 provides that for private (not public) projects, on receipt from a contractor of a written request for payment of an invoiced amount, the owner has thirty-five days to make the payment (less statutory or contractual retainage) for work properly performed or materials delivered. *See* Tex. Prop. Code § 28.002(a). Once the contractor receives payment he must pay his subcontractors their respective shares of the draw not less than seven days after receipt of payment from the owner. Tex. Prop. Code § 28.002(b). In turn, these subcontractors must pay their subcontractors their proportionate share within seven days thereafter. Tex. Prop. Code § 28.002(c).

If a good-faith dispute exists concerning the amount properly payable, the owner, contractor, or subcontractor may not withhold more than (1) 110 percent of the amount in dispute on residential construction projects and (2) 100 percent of the amount in dispute on nonresidential construction projects. Tex. Prop. Code § 28.003.

Contractors and subcontractors have a statutory right to suspend work on private nonresidential construction projects if the owner does not make payment in accordance with the statute. The work cannot be suspended, however, until the tenth day after the claimant gives notice to the owner that payment has not been received and notifies the owner of the intent to suspend performance. Tex. Prop. Code § 28.009(a). If there is construction financing on the project, the same notices must be given to the lender. Tex. Prop. Code § 28.009(b). Once work is suspended, the claimant is not required to perform further work until the amount due is paid, plus the cost of shutting down and restarting work. Tex. Prop. Code § 28.009(c)(1). The claimant is not responsible for damages arising from the claimant's suspension of work unless the claimant was notified in writing before suspension either that payment has been made or a good-faith dispute exists concerning the payment. Tex. Prop. Code § 28.009(c)(2). The notice of good faith must include a list of specific reasons for nonpayment. Tex. Prop. Code § 28.009(d). If a reason given for nonpayment is allegedly defective or incomplete work, the claimant must be given reasonable time to either adjust its payment claim or correct the defective work. Tex. Prop. Code § 28.009(d).

§ 7.13 Constitutional Mechanic's Lien on Real Property

§ 7.13:1 Scope and Utility of Lien

The Texas Constitution grants every original contractor a constitutional lien "upon the buildings and articles made or repaired by them for the value of their labor done thereon, or material furnished therefor." Tex. Const. art. XVI, § 37. This lien is "self-executing" in that it exists without any requirement of giving notice or filing an affidavit, but it must be enforced through a judicial foreclosure suit. *Hayek v. Western Steel Co.*, 478 S.W.2d 786, 790 (Tex. 1972); *see also* Tex. Const. art. XVI, § 37 interp. commentary (Vernon 1993).

Practice Note: The constitutional lien is most often used in situations in which either no attempt was made to perfect a statutory lien or the claimant failed to properly perfect a statutory lien.

Benefits Original Contractors: Only original contractors may claim a constitutional lien. "Original contractor" means only those in privity with the property owner. *Da-Col Paint Manufacturing Co. v. American Indemnity Co.*, 517 S.W.2d 270, 273 (Tex. 1974). Subcontractors are derivative claimants and therefore have no constitutional, common-law, or contractual lien on the owner's property. *First National Bank v. Sledge*, 653 S.W.2d 283, 285 (Tex. 1983). A materialman supplying materials to another materialman will not qualify. *Huddleston v. Nislar*, 72 S.W.2d 959, 962 (Tex. Civ. App.—Amarillo 1934, writ ref'd).

Sham Contracts: A person who labors, specially fabricates materials, or furnishes labor or materials under a direct contractual relationship with another person is deemed to be an original contractor in direct contractual relationship with the owner if the owner contracted with the other person for the construction or repair and (1) the owner can effectively control that person through the ownership of voting stock, interlocking directorships, or otherwise; (2) that other person can effectively control the owner through the ownership of voting stock, interlocking directorships, or otherwise; or (3) the contract was made without good-faith intention of the parties that the other person was to perform the contract. Tex. Prop. Code § 53.026(a)(1), (3). Such owner-controlled contractors are commonly called "sham contractors."

Limitations of Constitutional Lien: Many types of work are not covered by the constitutional lien, such as claims for water or sewer

lines, landscaping, and other similar work not considered a "building." *See, e.g., Campbell v. City of Dallas*, 120 S.W.2d 1095, 1097 (Tex. Civ. App.—Waco 1938, writ ref'd) (water and sewer lines); *Black, Sivalls & Bryson v. Operators' Oil & Gas Co.*, 37 S.W.2d 313, 316 (Tex. Civ. App.—Eastland 1931, writ dism'd) (repairing grade after a flood). See section 7.13:2 below for discussion of the term *building*.

The unrecorded constitutional lien will be defeated by any person who purchases or liens the subject property in good faith, for value, and without notice of the constitutional lien claim. *Wood v. Barnes*, 420 S.W.2d 425, 429 (Tex. Civ. App.—Dallas 1967, writ ref'd n.r.e.). In contrast, the properly perfected and recorded statutory lien claim will be good against any subsequent purchaser or lender. *Detering Co. v. Green*, 989 S.W.2d 479 (Tex. App.—Houston [1st Dist.] 1999, no writ); *Wood*, 420 S.W.2d at 429. See section 7.13:5 below.

Practice Note: Because the constitutional lien is both limited in scope and cut off by a sale to a bona fide purchaser, the original contractor should always attempt to perfect a statutory lien and treat the constitutional lien as a remedy of last resort if the original contractor fails to timely perfect a statutory lien under the Property Code.

§ 7.13:2 Eligibility—Real Property

Because the constitutional lien is restricted to work or material furnished for construction or repair of buildings or articles, defining the terms *building* and *article* becomes important. Although the constitutional provision refers to buildings and not the underlying land, decisional law has consistently found the lien to attach also to the land on which the building sits. *See, e.g., Myers v. Houston*, 30 S.W. 912, 913 (Tex. 1895); *Ferrell v. Ertel*, 100 S.W.2d 1084, 1088 (Tex. Civ. App.—Fort Worth 1936, writ dism'd). "Building" has been defined to include a pier. *See Ambrose & Co. v. Hutchison*, 356 S.W.2d 215, 216–17 (Tex. Civ. App.—Fort Worth 1962, no writ). Some actual construction must be made before a constitutional lien attaches. *See Branecky v. Seaman*, 688 S.W.2d 117, 120 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

§ 7.13:3 Enforcement Generally

The lien claimant must file suit to enforce the lien. However, there is no requirement of notice or fulfillment of other statutory obligations before suit is filed. *Dee's Cabinet Shop, Inc. v. Weber*, 562 S.W.2d 945, 947 (Tex. Civ. App.—Fort Worth 1978, no writ). When a suit for foreclosure of real property under a constitutional lien is filed, the attorney should also file a notice of lis pendens to protect the claimant's priority against a bona fide sale or encumbrance. *See* Tex. Prop. Code § 13.004.

§ 7.13:4 Enforcement against Public Property or Homestead

A constitutional lien cannot attach to public buildings or grounds or to a homestead unless the claimant has complied with other constitutional or statutory requirements for perfecting such a lien. *Atascosa County v. Angus*, 18 S.W. 563 (Tex. 1892) (public buildings); *J.D. McCollom Lumber Co. v. Whitfield*, 59 S.W.2d 1106, 1107 (Tex. Civ. App.—Austin 1933, writ ref'd) (homesteads).

§ 7.13:5 Enforcement against Third Parties

A claimant's constitutional lien is valid against the property owner even if the claimant takes no affirmative steps, such as recording the contract, to perfect the lien. *Brick & Tile, Inc. v. Parker*, 186 S.W.2d 66, 67 (Tex. 1945). This self-executing aspect of the lien, however, does not protect the claimant if the property is sold or mortgaged to a bona fide purchaser. Third parties may cut off the constitutional lien claimant's

rights to the property unless they have notice of the claim. *Irving Lumber Co. v. Alltex Mortgage Co.*, 446 S.W.2d 64, 72 (Tex. Civ. App.—Dallas 1969), *aff'd*, 468 S.W.2d 341 (Tex. 1971).

If the constitutional lien involves construction, constructive notice of the constitutional lien protects the lien claimant. Some courts have held that anyone acquiring an interest in property while it is under construction has constructive notice of a potential constitutional lien. *Inman v. Clark*, 485 S.W.2d 372, 374 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ); *Tomlinson v. Higginbotham Bros. & Co.*, 229 S.W.2d 920, 922 (Tex. Civ. App.—Eastland 1950, no writ). The party claiming bona fide purchaser status has the burden of proving the absence of actual or constructive notice; it is an affirmative defense. *Contract Sales Co. v. Skaggs*, 612 S.W.2d 652, 653 (Tex. Civ. App.—Dallas 1981, no writ).

If the property is involved in bankruptcy, the trustee or debtor-in-possession can avoid a constitutional lien unless some notice of the lien has been recorded. *See In re Mid-America Petroleum, Inc.*, 83 B.R. 937, 843 (Bankr. N.D. Tex. 1988); *McEvoy v. Ron Watkins, Inc.*, 105 B.R. 362, 364–65 (Bankr. N.D. Tex. 1987).

§ 7.14 Constitutional Lien on Personal Property

The Texas Constitution grants every original contractor a constitutional lien "upon the buildings and articles made or repaired by them for the value of their labor done thereon, or material furnished therefor." Tex. Const. art. XVI, § 37.

For a petition and application to foreclose a constitutional lien on personal property, see form 7-22 in this chapter.

§ 7.14:1 Eligibility—Personal Property

The term *articles made* is restricted to articles specially fabricated according to the purchaser's specifications, rather than articles manufactured for sale on the open market, such as refrigerators and ranges installed in an apartment complex. *First National Bank in Dallas v. Whirlpool Corp.*, 517 S.W.2d 262, 268 (Tex. 1974). If the articles are specially made in accordance with the ultimate purchaser's instructions, the lien will attach. *In re A&M Operating Co.*, 182 B.R. 986, 991 (Bankr. E.D. Tex. 1993), *rev'd in part*, 182 B.R. 997 (Bankr. E.D. Tex. 1995), *aff'd*, 84 F.3d 433 (5th Cir. 1996).

§ 7.14:2 Possessory Rights in Property

Unlike a claimant who may have a right to possession by virtue of a lien arising from Tex. Prop. Code ch. 70, a constitutional lien claimant has no authority under the constitutional provision itself to keep or repossess the repaired article pending payment. *Garcia v. Rutledge*, 649 S.W.2d 307, 311 (Tex. App.—Amarillo 1982, no writ). If he does so solely on the basis of the constitutional lien, he may be liable for conversion. *Clifton v. Jones*, 634 S.W.2d 883, 886 (Tex. App.—El Paso 1982, no writ). The right to this constitutional lien, which may be foreclosed through the courts, and any right to retain possession until the debt is paid are two separate and distinct rights. *Paul v. Nance Buick Co.*, 487 S.W.2d 426, 428 (Tex. Civ. App.—El Paso 1972, no writ). Therefore the attorney should strongly consider coupling a petition for writ of sequestration with the constitutional lien suit. See section 8.16 in this manual regarding sequestration and form 7-23 in this chapter for an application and affidavit for writ of sequestration in a suit to foreclose a constitutional lien.

§ 7.15 No Personal Liability of Owner

A constitutional lien by itself does not create any personal liability in the owner. *Fox v. Christopher & Simpson Iron Works Co.*, 199 S.W. 833, 835 (Tex. Civ. App.—Galveston 1917, writ ref'd).

§ 7.16 Attorney's Fees

A constitutional lien itself does not provide for payment of attorney's fees. *Rhoades v. Miller*, 414 S.W.2d 942, 944 (Tex. Civ. App.—Tyler 1967, no writ). The lien claimant may be entitled to attorney's fees either under a contractual provision for their payment or under Tex. Civ. Prac. & Rem. Code ch. 38. *See Wood v. Barnes*, 420 S.W.2d 425, 429–30 (Tex. Civ. App.—Dallas 1967, writ ref'd n.r.e.). See part III. in chapter 1 of this manual regarding attorney's fees.

§ 7.17 Priority of Constitutional Lien

If property involved in construction is the subject of a constitutional lien, lien priorities among competing claimants are generally determined by the date of inception of the liens. *See University Savings & Loan Ass'n v. Security Lumber Co.*, 423 S.W.2d 287, 293–96 (Tex. 1967).

If the property subject to the constitutional lien is chattel, actual notice may be required because establishing constructive notice of the lien would be impossible under ordinary circumstances. *See Continental Radio Co. v. Continental Bank & Trust Co.*, 369 S.W.2d 359, 362 (Tex. Civ. App.—Houston 1963, writ ref'd n.r.e.) (lien asserted against airplane).

If the property is a chattel subject to a competing claim under the Uniform Commercial Code, resolution of the priority conflict depends in part on whether the constitutional lien claimant has possession of the chattel. *Garcia v. Rutledge*, 649 S.W.2d 307, 311 (Tex. App.—Amarillo 1982, no writ). However, if possession is authorized by another statute, such as Tex. Prop. Code § 70.001, a valid constitutional lien may take priority over a perfected security interest under Tex. Bus. & Com. Code § 9.333. *See Nelms v. Gulf Coast State Bank*, 516 S.W.2d 421, 424 (Tex. Civ. App.—Houston [1st Dist.] 1974), *aff'd*, 525 S.W.2d 866 (Tex. 1975).

The attorney representing a party who wishes to assert a constitutional mechanic's lien for repairs should ensure that a bank holding a security interest in the same property has a record of the mechanic's lien. If the bank becomes insolvent and is then subject to FDIC receivership, a mechanic's lien of which the bank has no record cannot be enforced against the FDIC. *See D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942). The existence of federal recording statutes governing certain types of property may also preempt state statutes governing mechanic's liens. *See Aero Support Systems, Inc. v. FDIC*, 726 F. Supp. 651, 653 (N.D. Tex. 1989).

[Sections 7.18 through 7.20 are reserved for expansion.]

III. Governmental Mechanic's Liens

§ 7.21 Bond Claims in State and Local Public Works Contracts

§ 7.21:1 State and Local Projects Generally

Because mechanic's liens cannot be asserted against public works in Texas, the legislature has provided subcontractors with alternative methods to secure their rights to payment for work on government projects. *See City of LaPorte v. Taylor*, 836 S.W.2d 829, 831–32 (Tex. App.—Houston [1st Dist.] 1992, no writ). These methods include maintaining a lien on money due the prime contractor and pursuing a claim on a payment bond. The amount of money involved in a contract for public works determines the relief that a subcontractor can pursue.

A "governmental entity" refers to a governmental or quasi-governmental authority authorized by state law to make a public work contract. This could include a department, board, or agency of the state or a school district or subdivision of a school district. Tex. Gov't Code § 2253.001(1). A "public work contract" is a contract for constructing, altering, or repairing a public building or carrying out or completing any public work. Tex. Gov't Code § 2253.001(4). Public work labor or material is labor or material used to carry out this purpose. *See* Tex. Gov't Code § 2253.001(5).

Governmental Entity That Is Not a Municipality or Joint Board: If the amount of the contract does not exceed $25,000, an aggrieved party (who provides proper notice) can maintain a lien on the money, bonds, or warrants due for the work if the governmental entity is not a municipality or joint board created under subchapter D, chapter 22, of the Texas Transportation Code. Tex. Prop. Code § 53.231(a). When this type of governmental entity enters into a contract with a prime contractor for a public work project in excess of $25,000, the contractor is required to execute a payment bond in the amount of the contract. Tex. Gov't Code § 2253.021(a)(2)(A).

Municipality or Joint Board: If the amount of the contract does not exceed $50,000, an aggrieved party (who provides proper notice) can maintain a lien on the money, bonds, or warrants due for the work if the governmental entity is a municipality or joint board created under subchapter D, chapter 22, of the Texas Transportation Code. Tex. Prop. Code § 53.231(b). When a municipality or joint board created under subchapter D, chapter 22, of the Transportation Code enters into a contract with a prime contractor for a public work project in excess of $50,000, the contractor is required to execute a payment bond in the amount of the contract. Tex. Gov't Code § 2253.021(a)(2)(B).

Contracts in Excess of $100,000: If the contract is in excess of $100,000, the prime contractor must also execute a performance bond. *See* Tex. Gov't Code § 2253.021(a)(1).

A payment bond provides security to parties who contract with the prime contractor to ensure that it will be able to make payment under the contract. *See* Tex. Gov't Code § 2253.021(c). (While the government is already protected under the theory of sovereign immunity, a payment bond can also be employed to protect a private owner from claims asserted by subcontractors.) The performance bond, on the other hand, acts as security for the government should the contractor fail to complete the project. *See* Tex. Gov't Code § 2253.021(b).

§ 7.21:2 Perfection

To recover in a suit on a payment bond for a public work project, a claimant must "perfect"

his claim. Perfection of a claim simply means providing the proper notice and information required under the applicable statutes. Texas courts have recognized that the rules regarding the substance of notices should be liberally construed. *See S.A. Maxwell Co. v. R.C. Small & Associates*, 873 S.W.2d 447, 454 (Tex. App.—Dallas 1994, writ denied) (construing article 5160 of the Texas Revised Civil Statutes, repealed and replaced by Tex. Gov't Code § 2253.041). It is important to note, however, that strict compliance will be required as to rules regarding the time and manner of giving notice. Failure to timely and procedurally comply with the requirements could result in the loss of all potential recovery. *See S.A. Maxwell Co.*, 873 S.W.2d at 451.

Contracts under $25,000: The Texas Property Code requires the lien claimant to send written notice of his claim by registered or certified mail to (1) the officials of the state, county, town, or municipality whose duty it is to pay the contractor and (2) the contractor at the contractor's last known business or residence address. Tex. Prop. Code § 53.232. The notice should include—

1. the amount claimed;
2. the name of the party to whom the materials were delivered or for whom the labor was performed;
3. the dates and place of delivery or performance;
4. a description reasonably sufficient to identify the materials delivered or labor performed and the amount due;
5. a description reasonably sufficient to identify the project for which the material was delivered or the labor performed; and
6. the claimant's business address.

Tex. Prop. Code § 53.233. The notice must be sent not later than the fifteenth day of the second month following the month in which the labor was performed or the material furnished. Tex. Prop. Code § 53.234. If the claim involves an action on a bond, the claimant must sue on the bond within six months after the bond is filed. Tex. Prop. Code § 53.239.

Contracts Exceeding $25,000: To perfect a claim, the aggrieved party must mail to the prime contractor and the surety written notice of the claim. Tex. Gov't Code § 2253.041(a). "The notice must be mailed on or before the 15th day of the third month after each month in which any of the claimed labor was performed or any of the claimed material was delivered." Tex. Gov't Code § 2253.041(b). The statute also requires that the notice be accompanied by a sworn statement of account that states that—

1. the amount claimed is just and correct; and
2. all just and lawful offsets, payments, and credits known to the affiant have been allowed.

Tex. Gov't Code § 2253.041(c).

The statement of account must also include the amount of any retainage that has not become due under the terms of the contract between the beneficiary and the prime contractor or between the beneficiary and a subcontractor. Tex. Gov't Code § 2253.041(d). The aggrieved party may also enclose a copy of the written agreement and a statement of the completion or the value of the partial completion of the agreement. Tex. Gov't Code § 2253.042.

All notices must be sent by certified or registered mail. Notice to a prime contractor must be addressed to the contractor's residence or last known business address. Tex. Gov't Code § 2253.048(a), (b). Notices are effective on the day they are sent and not on the day received. *See* Tex. Gov't Code § 2253.041(b); *see also Buckner v. Anderson-Dunham, Inc.*, 482 S.W.2d 350 (Tex. Civ. App.—Eastland 1972, writ ref'd

n.r.e.) (construing article 5160, section B, of the Texas Revised Civil Statutes, repealed and replaced by Tex. Gov't Code § 2253.041).

Oral Contracts: If the contract between the parties was an oral agreement, the notice for a claim must contain—

1. the name of the party for whom the labor was performed or to whom the material was delivered;
2. the approximate date of performance or delivery;
3. a description of the public work labor or material for reasonable identification; and
4. the amount due.

Tex. Gov't Code § 2253.043(a).

The claim should be itemized and documents should be included that identify the work performed or material delivered, the job, and the destination of the delivery. Tex. Gov't Code § 2253.043(b).

Multiple Claims: If a party seeks a lump sum for several items of labor or material, the party should include in the notice a description of the labor or material provided, the name of the party for whom the labor was performed or to whom the material was delivered, and the approximate date of performance or delivery. The notice should also provide whether the contract was written or oral, the amount of the contract, and the amount claimed. Tex. Gov't Code § 2253.044. If the claim is for work or materials under a written unit price agreement, the party should attach to the sworn statement a list of units and unit prices as set under the contract and a statement of those completed or partially completed units. Tex. Gov't Code § 2253.045.

Retainage: "Retainage" refers to payments under the contract that are not required to be paid within the month after the month in which the labor is performed or materials are delivered. Tex. Gov't Code § 2253.001(7). A claim for retainage is limited to the amount specified for retainage in the contract, and in no event may it exceed 10 percent of the total contract price. Tex. Gov't Code § 2253.076(c).

To recover for a claim for retainage, written notice of the claim must be mailed to the prime contractor and the surety on or before the ninetieth day after the date of final completion of the contract. Tex. Gov't Code § 2253.046. The notice should contain the amount of the contract, any amount paid, and the outstanding balance. Tex. Gov't Code § 2253.046(b).

No Direct Contractual Relationship with Prime Contractor: It is important to note that additional notice requirements exist for second- or lower-tier subcontractors, who do not have a direct contractual relationship with the prime contractor. In addition to the notices described above, on or before the fifteenth day of the second month after the date of the beginning of delivery of material or performance of labor, the second-tier subcontractor must mail written notice to the prime contractor and send a copy of the statement to the subcontractor with whom the second-tier subcontractor has a direct contractual relationship. If the claim is for retainage, the notice must state that the contract provides for retainage and generally provide the nature of the retainage. Tex. Gov't Code § 2253.047.

Notice for Each Claim: The importance of perfecting each claim for each month is illustrated in *S.A. Maxwell Co.*, 873 S.W.2d at 451–53. In this case, the second-tier subcontractor shipped materials to a warehouse under an agreement with the subcontractor in May 1990. The subcontractor retrieved the materials from the warehouse on May 31 and June 4. When the second-tier subcontractor was not paid, he attempted to perfect his claim by sending notice on July 26, 1990, and second notice on August

15, 1990. A person not in a direct contractual relationship with the prime contractor must send notice on or before the fifteenth day of the second month after materials are delivered, and, in this case, the court held that the materials were "delivered" when the contractor picked them up, both on May 31 and June 4. Thus, to perfect a claim for the first pickup, the second-tier subcontractor had to send notice by July 15 (not July 26). Accordingly, the court held that he had not properly perfected his claim for this first delivery.

§ 7.21:3 Requests for Information

On request from anyone who provides public work, prime contractors must provide—

1. the name and last known address of the governmental entity with whom the prime contractor contracted for the public work;
2. a copy of the payment and performance bonds for the public work, including bonds furnished by or to the prime contractor; and
3. the name of the surety issuing the payment bond and the performance bond and the toll-free telephone number maintained by the Texas Department of Insurance under subchapter B, chapter 521, of the Texas Insurance Code for obtaining information concerning licensed insurance companies.

Tex. Gov't Code § 2253.024(a). The prime contractor must provide this information within ten days from receiving a request. Tex. Gov't Code § 2253.024(c).

Subcontractor's Obligations: A subcontractor must provide, on written request from a governmental entity, the prime contractor, the surety on a bond covering the public work contract, or any other person providing work under the subcontract—

1. the name and last known address of each person from whom the subcontractor purchased public work labor or material, other than public work material from the subcontractor's inventory;
2. the name and last known address of each person to whom the subcontractor provided public work labor or material;
3. a statement of whether the subcontractor furnished a bond for the benefit of its subcontractors and materialmen;
4. the name and last known address of the surety on the bond the subcontractor furnished; and
5. a copy of that bond.

Tex. Gov't Code § 2253.024(b). The subcontractor must also provide this information within ten days from receiving a request. Tex. Gov't Code § 2253.024(c).

The prime contractor or the subcontractor may require payment of the actual cost of producing this information (up to $25) if the requestor does not have a direct contractual relationship with the provider. Tex. Gov't Code § 2253.024(d). Failure to produce this information may result in the prime contractor or subcontractor being liable to the requestor for the reasonable and necessary costs incurred in obtaining the requested information. Tex. Gov't Code § 2253.024(e).

Payment Bond Beneficiary's Obligations: If a request for information is made to the payment bond beneficiary by the prime contractor or the surety, the beneficiary must provide within thirty days—

1. a copy of any applicable written agreement or purchase order; and
2. any statement or payment request of the beneficiary that shows the amount claimed and the work performed by

> the beneficiary for which the claim is made.

Tex. Gov't Code § 2253.025(a). If it is requested, the beneficiary must also provide the estimated amount due for each calendar month in which the beneficiary performed labor or provided material. Tex. Gov't Code § 2253.025(b).

§ 7.21:4 Procedures after Perfection

Once the bond claim has been perfected, it is still incumbent on the claimant to press its claim by following up with the surety. Often negotiations result in compromise and settlement on payment of an agreed amount by the bonding company or the prime contractor (who generally is required to indemnify the bonding company acting as surety). In other cases, it is necessary for the claimant to file suit or institute arbitration proceedings to force the prime contractor or surety to pay the balance due under the contract.

The substantive requirements to perfect a bond claim on state and local public works contracts can be easily completed. The true hurdle is ensuring that all deadlines have been timely met and that all notices contain the necessary information. Failure to do so can result in loss of the security provided by the payment bond. Where the prime contractor becomes insolvent, failure to meet the perfection deadlines can totally eliminate any recovery on a valid claim for payment. *See S.A. Maxwell Co. v. R.C. Small & Associates*, 873 S.W.2d 447 (Tex. App.—Dallas 1994, writ denied).

§ 7.22 Bond Claims in Federal Public Works Projects

§ 7.22:1 Federal Projects Generally

The Miller Act, 40 U.S.C. §§ 3131–3134, requires the prime contractor of a federal project to furnish a payment bond to insure payment to individuals who supply labor or materials for the federal project. The Miller Act was designed as an alternative remedy to the mechanic's lien available in ordinary private construction disputes because the lien cannot attach to government property. *United States v. Aetna Casualty & Surety Co.*, 981 F.2d 448, 450 (9th Cir. 1992).

> The amount of the payment bond shall equal the total amount payable by the terms of the contract unless the officer awarding the contract determines, in a writing supported by specific findings, that a payment bond in that amount is impractical, in which case the contracting officer shall set the amount of the payment bond. The amount of the payment bond shall not be less than the amount of the performance bond.

40 U.S.C. § 3131(b)(2). The performance bond, in turn, is required to be in such amount as the officer awarding the federal contract deems adequate for the protection of the United States. 40 U.S.C. § 3131(b). The performance and payment bond requirements of the Miller Act apply to all contracts of more than $100,000 for the construction, alteration, or repair of any public building or public work of the United States. The federal acquisition regulation provides alternative payment protections for contracts that are more than $25,000 and not more than $100,000. The contracting officer selects from among these alternative protections and specifies in the solicitation of offers the payment protections selected. 40 U.S.C. § 3132.

§ 7.22:2 Perfection

In order to have the right to sue on the payment bond, a first-tier subcontractor on a federal project is not required to give any specific notice. The Miller Act provides that any subcontractor who has not been paid in full for its labor or material before the expiration of ninety days after the last day on which labor was done or material supplied has the right to sue on the pay-

ment bond for the amount unpaid at the time the suit is filed. 40 U.S.C. § 3133(b)(1). It is presumed that the general contractor has notice of the amounts due and unpaid to its own subcontractors. *See Continental Casualty Co. v. United States*, 305 F.2d 794, 797 (8th Cir.), *cert. denied*, 371 U.S. 922 (1962).

However, any second-tier subcontractor, defined as "a person having a direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing the payment bond," must perfect its claim on the bond by giving written notice to the general contractor within the ninety-day period, stating with substantial accuracy the amount claimed and the name of the party to whom the material was supplied or for whom the labor was performed. 40 U.S.C. § 3133(b)(2). The notice must be served by any means that provides written, third-party verification of delivery to the contractor at any place he maintains an office or conducts his business or at his residence; or in any manner in which the U.S. marshal for the district in which the public improvement is situated may serve summons. 40 U.S.C. § 3133(b)(2). The notice must be received by the contractor, rather than merely being mailed, within the ninety-day period. *Pepper Burns Insulation, Inc. v. Artco Corp.*, 970 F.2d 1340, 1343 (4th Cir. 1992), *cert. denied*, 506 U.S. 1053 (1993).

Unlike the procedure for bond claims in state and local public works projects, bond claims in federal projects do not require repeated notices to be sent either to the general contractor or to the surety. Notice to the principal contractor is a strict condition precedent to suit under the Miller Act by a supplier who deals with a subcontractor, but the supplier is not required to give notice to the surety before commencing suit. *Continental Casualty Co.*, 305 F.2d at 797.

§ 7.22:3 "Subcontractor" vs. "Materialman"

Although the Miller Act is to be construed liberally, it is limited by a proviso that the payment bond protects only those persons who have a contractual agreement with a prime contractor or first-tier subcontractor engaged in a federal project. Persons supplying labor or material to a mere "materialman" are not protected. *United States v. Aetna Casualty & Surety Co.*, 981 F.2d 448, 450 (9th Cir. 1992). The United States Supreme Court has defined a subcontractor as "one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract." *See Clifford F. MacEvoy Co. v. United States*, 322 U.S. 102, 109 (1944). The test for whether one is a subcontractor is based on the "substantiality and importance of his relationship with the prime contractor." *F.D. Rich Co. v. United States*, 417 U.S. 116, 123 (1974). This means that even though a supplier may have an express written contract directly with the prime contractor, the supplier may not qualify as a "subcontractor" unless the supplier's relationship with the prime contractor is "substantial" enough. If the supplier does not qualify as a subcontractor, those who provide labor or material to that supplier are dealing with a mere materialman and cannot claim protection under the Miller Act payment bond.

The Court in *F.D. Rich* reasoned, "It is the substantiality of the relationship which will usually determine whether the prime contractor can protect himself, since he can easily require bond security or other protection from those few 'subcontractors' with whom he has a substantial relationship in the performance of the contract." *F.D. Rich Co.*, 417 U.S. at 123–24.

The Court acknowledged, however, that "'this method of protection is generally inadequate to cope with remote and undeterminable liabilities incurred by an ordinary materialman.'" *F.D.*

Rich Co., 417 U.S. at 123 (quoting *Clifford F. MacEvoy Co.*, 322 U.S. at 110).

In distinguishing a subcontractor from a materialman, courts apply a balancing test with certain factors tending to weigh in favor of a subcontractor relationship—particularly if the company assumed a significant and definable part of the construction project—and other factors tending to weigh in favor of a materialman relationship.

Generally, courts have found the following factors to weigh in favor of a subcontractor relationship:

1. The product supplied is custom fabricated.
2. The product supplied is a complex integrated system.
3. A close financial interrelationship exists between the companies.
4. A continuing relationship exists with the prime contractor as evidenced by the requirement of shop drawing approval by the prime contractor or the requirement that the supplier's representative be on the job site.
5. The supplier is required to perform on site.
6. There is a contract for labor in addition to materials.
7. The term "subcontractor" is used in the agreement.
8. The materials supplied do not come from existing inventory.
9. The supplier's contract constitutes a substantial portion of the prime contract.
10. The supplier is required to furnish all the material of a particular type.
11. The supplier is required to post performance bonds.
12. There is a back charge for costs of correcting the supplier's mistakes.
13. There is a system of progressive or proportionate fee payment.

Generally, courts have found the following factors to weigh in favor of a materialman relationship:

1. A purchase order form is used by the parties.
2. The materials come from preexisting inventory.
3. The item supplied is relatively simple in nature.
4. The contract is a small percentage of the total construction costs.
5. Sales tax is included in the contract price.

Aetna Casualty & Surety Co., 981 F.2d at 451–52.

Practice Note: Lower-tier suppliers of labor or materials on federal projects would be well advised to tailor their agreements to incorporate as many of the factors weighing towards "subcontractor" classification as possible.

§ 7.22:4 Oral Contracts

The Miller Act does not require that the contract between the claimant and the general contractor or a subcontractor be in writing. There simply must be some underlying contract, whether established in a telephone call or a formal document. *United States v. William L. Crow Construction Co.*, 826 F. Supp. 647, 654 (E.D.N.Y. 1993).

§ 7.22:5 Express or Implied Contractual Relationship

As suggested by the foregoing discussion, the Miller Act protects subcontractors (as opposed

to mere materialman) and, provided they give proper notice, persons having direct contractual relationships with the subcontractor but no contractual relationship, express or implied, with the prime contractor. Recovery under the theory of implied contracts known as "quantum meruit" is appropriate when the breaching party has been unjustly enriched through its wrongful conduct, and such recovery may also be appropriate when the aggrieved party has been induced to perform beyond the scope of the express contract, resulting in a benefit to the breaching party. *United States v. Mountain States Construction Co.*, 588 F.2d 259, 262 (9th Cir. 1978). Thus under appropriate circumstances a supplier of labor or material might be able to recover on the bond even though its contract claim may be barred for lack of a signed writing or other technical defect. The supplier might be able to recover amounts greater than the contract price if change orders were performed but never documented in an express contract. The cases are unclear as to whether second-tier subcontractors or other lower-tier claimants can maintain a suit against the prime contractor or the surety based on an implied contract under the principles of quantum meruit. *See Undersea Engineering & Construction Co. v. International Telephone & Telegraph Corp.*, 429 F.2d 543 (9th Cir. 1970), *abrogated on other grounds by Avery v. United States*, 829 F.2d 817 (9th Cir. 1987) (work performed by second-tier subcontractor done under its express "sub" contract with subcontractor, thus negating implied contract with prime contractor); *but see Fidelity & Deposit Co. of Maryland v. Harris*, 360 F.2d 402 (9th Cir. 1966) (second-tier subcontractor's supplier could recover against contractor on ground of unjust enrichment).

§ 7.22:6 Procedures after Perfection

Just as in a state project, bond claimants on federal projects must pursue their claims against the surety by negotiation and, if necessary, litigation or alternative dispute resolution proceedings. Any lawsuit on a Miller Act bond must be filed in federal court in the federal district in which the contract was to be performed. Lawsuits under the Miller Act must be filed within one year after the day on which the last of the labor was performed or material was supplied by the claimant. 40 U.S.C. § 3133(b)(4).

§ 7.23 Construction Trust Fund

Chapter 162 of the Texas Property Code is a statute of last resort for a claimant who has failed to properly perfect a mechanic's lien claim under a construction contract for the improvement of real property. Chapter 162 provides that (1) all payments under a construction contract to an original contractor, a subcontractor, or an officer, director, or agent of a contractor or subcontractor and (2) all loan proceeds received by an owner, original contractor, or subcontractor or by an officer, director, or agent of an owner, contractor, or subcontractor for the purpose of improving specific real property are "trust funds" for the benefit of persons furnishing labor or materials on the construction project. Tex. Prop. Code §§ 162.001, 162.003.

However, chapter 162 does not apply to a lender, title company, closing agent, or corporate surety (Tex. Prop. Code § 162.004) or to a contractor's fee under a cost-plus contract (Tex. Prop. Code § 162.001(c)).

§ 7.23:1 Parties Liable as Trustees

An owner, original contractor, and subcontractor and their respective officers, directors, and agents who receive, control, or direct the "trust funds" (that is, the construction payments or loan proceeds) are deemed to be "trustees" of the funds. Tex. Prop. Code § 162.002.

§ 7.23:2 Beneficiaries of Trust

An artisan, laborer, mechanic, contractor, subcontractor, or materialman who labors or fur-

nishes labor or materials for the construction or repair of an improvement on real property is a beneficiary of any trust funds paid or received in connection with the improvement. Tex. Prop. Code § 162.003(a). A property owner is a beneficiary of trust funds paid or received in connection with a residential construction contract, including funds deposited into a construction account. Tex. Prop. Code § 162.003(b).

§ 7.23:3 Residential Homestead Projects

A contractor who enters into a written contract with a property owner to construct improvements to a residential homestead in an amount exceeding $5,000 shall deposit the trust funds in a construction account in a financial institution. Tex. Prop. Code § 162.006. The contractor must maintain account records in accordance with the requirements of Property Code section 162.007. *See* Tex. Prop. Code § 162.007.

§ 7.23:4 Penalties for Misapplication of Monies by Trustees

A trustee who knowingly or intentionally retains, uses, or diverts trust funds without first fully paying all current or past-due obligations incurred by the trustee to the "beneficiaries" (that is, the unpaid contractors) has misapplied the trust funds. Tex. Prop. Code § 162.031(a). If the misapplied amount exceeds $500, this is a Class A misdemeanor if there is no intent to defraud and a third-degree felony if intent to defraud is shown. Tex. Prop. Code § 162.032.

Practice Note: The statute, by imposing a statutory duty on the trustee, creates a civil cause of action for damages arising from the trustee's breach of his duties. The statute also allows the claimant to pierce the corporate veil and get to the individual who actually handled the money.

Intent to Defraud: The statute defines "intent to defraud" to include—

1. retaining, using, disbursing, or diverting trust funds with the intent to deprive the beneficiaries of the trust funds;
2. the trustee's failing to establish and maintain a separate construction account or the required account records for residential homestead improvement contracts of $5,000 or more; and
3. misapplying trust funds that were paid in reliance on a false bills-paid affidavit.

Tex. Prop. Code § 162.005(1); *see also* Tex. Prop. Code §§ 53.085, 162.006, 162.007. While the trustee is not required to open more than one bank account per project, the statute does specifically prohibit the trustee from comingling its own funds with the trust account. Failure to keep the accounts and the records is in and of itself a Class A misdemeanor. Tex. Prop. Code § 162.032(c).

Affirmative Defenses: The statute establishes three affirmative defenses for a trustee accused of misappropriation. The first is that a trustee may affirmatively plead that trust funds not paid to the beneficiary of the trust were used to pay the trustee's "actual expenses directly related to the construction or repair of the improvement." Tex. Prop. Code § 162.031(b). Thus, the trustee may use construction funds to pay overhead expenses, as long as the expenses are actually incurred and are necessary to obtain or complete the project. However, the trustee will have to prove that the payments were for actual expenses directly related to the construction. The second affirmative defense is that, after notice to the claimant, the trustee merely retained the money because of the trustee's reasonable belief that the beneficiary was not entitled to such funds or that the trustee was

otherwise authorized or required by other provisions of the Property Code to withhold the funds. The trustee must prove that it withheld payment based on a reasonable belief. Tex. Prop. Code § 162.031(b). The third affirmative defense is that the trustee paid the beneficiaries the monies they were entitled to receive no later than thirty days following written notice to the trustee of the filing of a criminal complaint or other notice of a pending criminal investigation. Tex. Prop. Code § 162.031(c).

A trustee who commingles trust funds with other funds in the trustee's possession does not defeat a trust created by chapter 162 of the Property Code. Tex. Prop. Code § 162.031(d).

Form 7-4

Texas Property Code section 70.006 discusses the sale of motor vehicles, motorboats, vessels, and outboard motors, including the requirements of this notice. Written notice must be given to the owner and each holder of a lien recorded on the certificate of title. Tex. Prop. Code § 70.006(a). A copy of the notice must be filed with the county tax assessor-collector's office in the county in which the repairs were made not later than thirty days after the date on which the charges accrue. Tex. Prop. Code § 70.006(a). Unless an exception exists for notice by publication under Tex. Prop. Code § 70.006(c), the notice must be sent by certified mail with return receipt requested and include the amount of the charges and a request for payment. Tex. Prop. Code § 70.006(b).

A holder of a possessory lien on a motor vehicle under Tex. Prop. Code § 70.001, other than a person licensed as a franchised dealer under the Texas Occupations Code, must include additional information in the notice. See Tex. Prop. Code § 70.006(b–1) for those requirements.

Notice of Sale under Worker's Possessory Lien

[Motor Vehicle, Motorboat, Vessel, or Outboard Motor]

[Date]

To: **[name and address of owner]**, Owner
[name and address of lienholder], Lienholder

Re: **[describe motor vehicle, motorboat, vessel, or outboard motor]**

I **[include if applicable:** , **[legal name]**, [taxpayer identification number/employer identification number] **[number]**,] have maintained possession of the [motor vehicle/motorboat/vessel/outboard motor] described above, which I have repaired at the owner's request.

A total of $**[amount]** is now due for the repair of this [vehicle/motorboat/vessel/outboard motor], and I request that the charges due be paid immediately. The charges accrued on **[date]**.

Include the following if applicable. See Tex. Prop. Code § 70.006(b–1) to determine applicability.

The physical address at which the repairs to the motor vehicle were made is **[address]**. Attached is a signed copy of the work order authorizing the repairs on the motor vehicle.

Continue with the following.

If I do not receive payment within thirty days after this notice is mailed, I intend to sell the [vehicle/motorboat/vessel/outboard motor] at public sale and to apply the proceeds of the sale to payment of the charges. I will then pay any excess to the person entitled to it.

The public sale will be at [**address, city, county**] County, Texas, on [**date**] at [**time**].

_____

[**Name**]

Certified Mail No. [**number**]
Return Receipt Requested

Attach a copy of the work order if applicable.

Form 7-14

This notice must be given to the owner by the earlier of the thirtieth day after the date the claimant's retainage agreement is completed, terminated, or abandoned; or the thirtieth day after the date the original contract is terminated or abandoned. Tex. Prop. Code § 53.057(b). The original contractor also must be sent notice if the claimant's contract is not with the original contractor. Tex. Prop. Code § 53.057(b–1). Please refer to Texas Property Code section 53.057 for additional requirements for this notice.

Notice of Agreement Providing for Retainage

[Date]

[Name and address of owner]
[Name and address of original contractor]

Re: Notice for Contractual Retainage Claim—[**describe in detail the name and location of the construction project**] ("Project")

[Salutation]

[**Name of claimant**] ("Claimant"), at [**address of claimant**], is pleased to have been selected as a [subcontractor/supplier] for the Project. Claimant's contract with [**name of contractor**], at [**address of contractor**], provides that [10/[**specify other percentage**]] percent of the contract price may be withheld as retainage. Claimant therefore respectfully submits its notice of contractual retainage agreement. This notice is required by section 53.057 of the Texas Property Code.

The general nature of the agreement is as follows: [**specify, e.g.,** 10 percent of contract price as adjusted by the change orders].

The date or dates when retainage is payable are as follows: [**specify, e.g.,** thirty days after final completion of our portion of the work on the Project].

We believe the total amount to be retained under our contract will be $[**amount**]. Also [**percent**] percent of increases to Claimant's contract by change order(s) will be subject to retainage.

This notice is not in any way to be considered a negative comment regarding Claimant's customer, [**name of customer**], and Claimant looks forward to working toward a successful completion of your Project.

Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

Certified Mail No. [**number**]
Return Receipt Requested

Form 7-17

Request for Information to Owner

[Date]

[Name and address of owner]

Re: Request for information on [specify] construction project ("Project")

[Salutation]

[Name of claimant] is furnishing [labor/materials/labor and materials] for the Project. This is to respectfully request that you, as owner of the Project, furnish to us the following information not later than the tenth day after the date you receive this request, as required by sections 53.106 and 53.159 of the Texas Property Code:

1. a sufficient legal description of the real property being improved;

2. whether there is a surety bond and, if so, the name and last known address of the surety and a copy of the bond;

3. whether there are any prior recorded liens or security interests on the Project property being improved and, if so, the name and address of the person or entity having the lien or security interest;

4. the date on which the original contract for the Project was executed; and

5. whether there is an affidavit of commencement or affidavit of completion filed, and, if so, a copy of each affidavit.

Thank you for your cooperation and prompt attention.

Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

Form 7-18

Request for Information to Original Contractor

[**Date**]

[**Name and address of original contractor**]

Re: Request for information on [**specify**] construction project ("Project")

[**Salutation**]

[**Name of claimant**] is furnishing [labor/materials/labor and materials] for the Project. This is to respectfully request that you, as original contractor for the Project, furnish to us the following information not later than the tenth day after you receive this request, as required by section 53.159 of the Texas Property Code:

1. the name and last known address of the person to whom you furnished labor and materials for the Project;

2. whether you have furnished or have been furnished any payment bonds for any work on the Project and, if so, the name and last known address of the surety or sureties and a copy of each bond; and

3. the date on which the original contract for the Project was executed.

Thank you for your cooperation and prompt attention.

Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

[Reserved]

Form 7-24

If a claimant or potential claimant is required to execute a waiver and release in exchange for or to induce the payment of a progress payment and is not paid in exchange for the waiver and release, or if a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release must substantially comply with the form below, described in Texas Property Code section 53.284(b). Tex. Prop. Code § 53.284(a), (b).

Conditional Waiver and Release on Progress Payment

Project _____

Job No. _____

On receipt by the signer of this document of a check from _____ (maker of check) in the sum of $_____ payable to _____ (payee or payees of check) and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position that the signer has on the property of _____ (owner) located at _____ (location) to the following extent: _____ (job description).

This release covers a progress payment for all labor, services, equipment, or materials furnished to the property or to _____ (person with whom signer contracted) as indicated in the attached statement(s) or progress payment request(s), except for unpaid retention, pending modifications and changes, or other items furnished.

Before any recipient of this document relies on this document, the recipient should verify evidence of payment to the signer.

The signer warrants that the signer has already paid or will use the funds received from this progress payment to promptly pay in full all of the signer's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above referenced project in regard to the attached statement(s) or progress payment request(s).

Date _____

_____ (Company name)

By _____ (Signature)

_____ (Title)

Form 7-25

If a claimant or potential claimant is required to execute an unconditional waiver and release to prove the receipt of good and sufficient funds for a progress payment and the claimant or potential claimant asserts in the waiver and release that the claimant or potential claimant has been paid the progress payment, the waiver and release must substantially comply with the form below, described in Texas Property Code section 53.284(c). Tex. Prop. Code § 53.284(a), (c). The notice provision must appear at the top of the document, printed in bold type at least as large as the largest type used in the document, but not smaller than ten-point type. Tex. Prop. Code § 53.284(c)(1).

NOTICE: This document waives rights unconditionally and states that you have been paid for giving up those rights. It is prohibited for a person to require you to sign this document if you have not been paid the payment amount set forth below. If you have not been paid, use a conditional release form.

Unconditional Waiver and Release on Progress Payment

Project _____

Job No. _____

The signer of this document has been paid and has received a progress payment in the sum of $_____ for all labor, services, equipment, or materials furnished to the property or to _____ (person with whom signer contracted) on the property of _____ (owner) located at _____ (location) to the following extent: _____ (job description). The signer therefore waives and releases any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position that the signer has on the above referenced project to the following extent:

This release covers a progress payment for all labor, services, equipment, or materials furnished to the property or to _____ (person with whom signer contracted) as indicated in the attached statement(s) or progress payment request(s), except for unpaid retention, pending modifications and changes, or other items furnished.

The signer warrants that the signer has already paid or will use the funds received from this progress payment to promptly pay in full all of the signer's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above referenced project in regard to the attached statement(s) or progress payment request(s).

Date _____

_____ (Company name)

By _____ (Signature)

_____ (Title)

Form 7-26

If a claimant or potential claimant is required to execute a waiver and release in exchange for or to induce the payment of a final payment and is not paid in good and sufficient funds in exchange for the waiver and release, or if a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release must substantially comply with the form below, described in Texas Property Code section 53.284(d). Tex. Prop. Code § 53.284(a), (d).

Conditional Waiver and Release on Final Payment

Project _____

Job No. _____

On receipt by the signer of this document of a check from _____ (maker of check) in the sum of $_____ payable to _____ (payee or payees of check) and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position that the signer has on the property of _____ (owner) located at _____ (location) to the following extent: _____ (job description).

This release covers the final payment to the signer for all labor, services, equipment, or materials furnished to the property or to _____ (person with whom signer contracted).

Before any recipient of this document relies on this document, the recipient should verify evidence of payment to the signer.

The signer warrants that the signer has already paid or will use the funds received from this final payment to promptly pay in full all of the signer's laborers, subcontractors, material-men, and suppliers for all work, materials, equipment, or services provided for or to the above referenced project up to the date of this waiver and release.

Date _____

_____ (Company name)

By _____ (Signature)

_____ (Title)

Form 7-27

If a claimant or potential claimant is required to execute an unconditional waiver and release to prove the receipt of good and sufficient funds for a final payment and the claimant or potential claimant asserts in the waiver and release that the claimant or potential claimant has been paid the final payment, the waiver and release must substantially comply with the form below, described in Texas Property Code section 53.284(e). Tex. Prop. Code § 53.284(a), (e). The notice provision must appear at the top of the document, printed in bold type at least as large as the largest type used in the document, but not smaller than ten-point type. Tex. Prop. Code § 53.284(e)(1).

NOTICE: This document waives rights unconditionally and states that you have been paid for giving up those rights. It is prohibited for a person to require you to sign this document if you have not been paid the payment amount set forth below. If you have not been paid, use a conditional release form.

Unconditional Waiver and Release on Final Payment

Project _____

Job No. _____

The signer of this document has been paid in full for all labor, services, equipment, or materials furnished to the property or to _____ (person with whom signer contracted) on the property of _____ (owner) located at _____ (location) to the following extent: _____ (job description). The signer therefore waives and releases any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position.

The signer warrants that the signer has already paid or will use the funds received from this final payment to promptly pay in full all of the signer's laborers, subcontractors, material-

men, and suppliers for all work, materials, equipment, or services provided for or to the above referenced project up to the date of this waiver and release.

Date _____

_____ (Company name)

By _____ (Signature)

_____ (Title)

TEXAS COLLECTIONS MANUAL

Fourth Edition

Volume 2

Austin 2011

The State Bar of Texas, through its TexasBarBooks Department, publishes practice books prepared and edited by knowledgeable authors to give practicing lawyers and judges as much assistance as possible. The competence of the authors ensures outstanding professional products, but, of course, neither the State Bar of Texas, the editors, nor the authors make either express or implied warranties in regard to the use or freedom from error of this publication. In the use or modification of these materials, each lawyer must depend on his or her own expertise and knowledge of the law.

IRS CIRCULAR 230 NOTICE: To ensure compliance with requirements imposed by the IRS, we inform you that (1) this written material was not intended or written by the author(s) to be used for the purpose of avoiding federal penalties that may be imposed on a taxpayer; (2) this written material cannot be used by a taxpayer for the purpose of avoiding penalties that may be imposed on the taxpayer; (3) this written material cannot be used in promoting, marketing, or recommending to another party any tax-related transaction or matter; and (4) a taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

The use of the masculine gender in parts of this manual is purely for literary convenience and should, of course, be understood to include the feminine gender as well.

International Standard Book Number: 978-1-892542-78-6
International Standard Book Number: 978-1-892542-93-9 (2012 Supplement)
Library of Congress Control Number: 2011920779

Printed in the United States of America

Fourth Edition, 2011

Forms

of payment may be sued without joinder of the principal obligor. *Ford v. Darwin*, 767 S.W.2d 851, 855 (Tex. App.—Dallas 1989, writ denied); *see also Martin v. First Republic Bank*, 799 S.W.2d 482, 486 (Tex. App.—Fort Worth 1990, writ denied).

Practice Note: Usually the creditor will want to pursue the guarantor of a note because the principal obligor cannot be served or will not be able to satisfy the judgment. Although it may be unnecessary under law to join the debtor, especially if the guarantor has expressly waived the requirement of joinder, the better practice is to name both the principal obligor and the guarantor as party defendants unless there is a good reason not to do so. The principal obligor may be omitted if he clearly is within one of the exceptions named in Tex. Civ. Prac. & Rem. Code § 17.001(b). *See* Tex. R. Civ. P. 31. If one of the exceptions applies, it must be pleaded and proved. If, after being joined as a defendant, the principal obligor cannot be located for service, or if it becomes evident that he meets one of the exceptions in Tex. Civ. Prac. & Rem. Code § 17.001(b), the suit can be discontinued as to him by an amended pleading.

Notes for Which Maker Is Also Guarantor: If the maker of the note also signs as a guarantor, he must file a verified denial that he is liable in his capacity as a guarantor or he will have admitted liability in that capacity. *Breckenridge v. Nationsbank of Texas, N.A.*, 79 S.W.3d 151, 158 (Tex. App.—Texarkana 2002, pet. denied).

§ 14.11:4 Discharge of Liability

A surety, guarantor, or accommodation party is discharged from liability on a contract if a right of action has accrued on the contract, the surety has given notice to the creditor to sue on the contract, and the obligee fails to prosecute such a suit. Tex. Civ. Prac. & Rem. Code §§ 43.001, 43.002(b) (formerly Business and Commerce Code sections 34.01 and 34.02).

§ 14.11:5 Surety's or Accommodation Party's Rights against Principal Obligor

A surety who because of his suretyship relation pays part or all of a judgment against his primary obligor is subrogated to the judgment creditor's rights under the judgment. Tex. Civ. Prac. & Rem. Code § 43.004(b) (formerly Business and Commerce Code section 34.04(b)). Similarly, an accommodation party who pays a negotiable instrument is entitled to reimbursement from the accommodated party and is entitled to enforce the instrument against the accommodated party. Tex. Bus. & Com. Code § 3.419(e).

§ 14.12 Sister-State or Federal Judgments Enforced through Uniform Enforcement of Foreign Judgments Act

§ 14.12:1 Enforcement Options

A creditor seeking to have a judgment of a federal court or of another state recognized in Texas may either use the affidavit procedure set out in the Uniform Enforcement of Foreign Judgments Act, Tex. Civ. Prac. & Rem. Code §§ 35.001–.007, or bring an independent action in a Texas court to enforce the sister-state judgment. Tex. Civ. Prac. & Rem. Code § 35.008. The resulting Texas judgment is then enforced as any other Texas judgment. *Lawrence Systems, Inc. v. Superior Feeders, Inc.*, 880 S.W.2d 203, 208 (Tex. App.—Amarillo 1994, writ denied). The affidavit procedure is faster and easier. The independent action is discussed at section 14.13 below.

§ 14.12:2 Procedure

The creditor or his attorney must file with the clerk of any court of competent jurisdiction an authenticated copy of the sister-state judgment and an affidavit stating the names and last

known post office addresses of the judgment debtor and judgment creditor. Tex. Civ. Prac. & Rem. Code §§ 35.003(a), 35.004(a).

The judgment creditor or the judgment creditor's attorney must promptly mail a notice of filing to the judgment debtor and file proof of mailing of the notice with the clerk of the court. Tex. Civ. Prac. & Rem. Code § 35.004(b). This notice will usually be prepared by the clerk. It must include the names and post office addresses of the judgment creditor and the creditor's Texas attorney, if there is one. Tex. Civ. Prac. & Rem. Code § 35.004(c). On receipt of proof of mailing of the notice, the clerk must note the mailing in the docket. Tex. Civ. Prac. & Rem. Code § 35.004(d).

See form 14-12 in this chapter for an affidavit for filing of a foreign judgment.

§ 14.12:3 Authentication of Judgment and Bill of Costs

A sister-state judgment or bill of costs can be authenticated in one of the following ways:

1. A copy of a judgment can be authenticated according to Tex. R. Evid. 901(b)(7) or 902. The most straightforward method of authentication seems to be obtaining a certified copy of the judgment from the court clerk. The certification should be checked, however, to see that it is self-authenticating, in conformance with Tex. R. Evid. 902. *See Sanders v. State*, 787 S.W.2d 435, 438 (Tex. App.—Houston [1st Dist.] 1990, pet. ref'd). Self-authenticated documents are presumed to be genuine, Tex. R. Evid. 902(11); however, authentication under Tex. R. Evid. 901(b)(7) does not create this presumption.

2. The judgment can be proved or admitted by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the attestation is in proper form. 28 U.S.C. § 1738. The authentication is often referred to as an exemplified copy of the judgment. The clerk's certification cannot be made by a deputy. *Edwards v. Smith*, 137 S.W. 1161, 1163 (Tex. Civ. App.—San Antonio 1911, writ dism'd). The contents of the certificates are described in *Paschall v. Geib*, 405 S.W.2d 385 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.).

3. A copy of a judgment of another state can be authenticated by the testimony of a witness who has compared the offered copy with the original record entry of the judgment; such a copy then becomes admissible as an "examined copy." *Schwartz v. Vecchiotti*, 529 S.W.2d 603, 604–05 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

4. A copy of a judgment of a federal court can apparently be authenticated by no more than the certification of the rendering court's clerk under the seal of that court. *See Intertype Corp. v. Sentinel Publishing Co.*, 206 S.W. 548, 549 (Tex. Civ. App.—San Antonio 1918, no writ).

§ 14.12:4 Defensive Matters

If the judgment debtor can show a ground on which enforcement should be stayed, the Texas court must stay enforcement if the debtor can provide the same sort of security required for staying enforcement of Texas judgments. Tex. Civ. Prac. & Rem. Code § 35.006(b); *see also* Tex. Civ. Prac. & Rem. Code § 52.006. The following are some of the grounds most often used to attack the validity of a sister-state judgment.

Merits of Original Controversy: The defendant cannot avoid a foreign judgment by pleading a matter that goes to the merits of the original controversy; on those matters the foreign judgment is conclusive, and a Texas court cannot relitigate a matter tried before a sister state's court with jurisdiction over the parties and subject matter. *Massachusetts v. Davis*, 168 S.W.2d 216, 220 (Tex. 1942); *Shaps v. Union Commerce Bank*, 476 S.W.2d 466, 468 (Tex. Civ. App.—Beaumont, writ ref'd n.r.e.), *cert. denied*, 409 U.S. 1060 (1972).

Collateral Attack on Judgment: As a general rule, a sister state's judgment that is final and nonpenal in nature can be collaterally attacked only if it is void as rendered on the following grounds:

1. The rendering court lacked jurisdiction.
2. The judgment has been paid or otherwise discharged.
3. It is a cause of action for which the forum state has not provided a court.
4. The judgment was procured by fraud.

Milwaukee County v. M.E. White Co., 296 U.S. 268, 271–72 (1935); *Williams v. State of Washington*, 581 S.W.2d 494, 496 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

Jurisdiction: The validity of a sister-state judgment will be tested against the law of that state, except that in all cases the requirements of due process must be satisfied. *O'Brien v. Lanpar Co.*, 399 S.W.2d 340, 341 (Tex. 1966); *Country Clubs, Inc. v. Ward*, 461 S.W.2d 651, 656 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.). For example, on the question of jurisdiction over a nonresident defendant, a Texas court may consider whether the defendant was properly served under the sister state's long-arm statute; the Texas court also may examine the long-arm statute of the rendering sister state to ascertain whether it afforded the defendant due process. *See Mitchim v. Mitchim*, 518 S.W.2d 362 (Tex. 1975) (court examined whether Arizona long-arm statute afforded due process); *Brown's Inc. v. Modern Welding Co.*, 54 S.W.3d 450 (Tex. App.—Corpus Christi 2001, no pet.) (denial of domestication because of failure to comply with Washington's personal jurisdiction service requirements); *Country Clubs, Inc.*, 461 S.W.2d at 656 (denial of domestication because of failure to comply with Kentucky long-arm statute).

Fraud: Full faith and credit can be denied the judgment of a sister state if it was procured through extrinsic fraud. *Chapman v. Schefsky*, 470 S.W.2d 786, 788 (Tex. Civ. App.—Waco 1971, writ ref'd n.r.e.). Extrinsic fraud refers to fraud that is collateral to the question determined in the original action and that denies the defendant the benefit of a fair adversary proceeding. *See* E.H. Schopler, Annotation, *Fraud as Defense to Action on Judgment of Sister State*, 55 A.L.R.2d 673, 687 (1957). As a result, allegedly false testimony given by the plaintiff in the original action regarding the merits of his claim is not a defense to an action on a foreign judgment. *See Shaps*, 476 S.W.2d at 468.

Public Policy: The Constitution's full-faith-and-credit clause does not require a state to apply another state's law or enforce another state's judgment in violation of its own legitimate public policy. *Nevada v. Hall*, 440 U.S. 410 (1979); *Pacific Employers Insurance Co. v. Industrial Accident Commission*, 306 U.S. 493 (1939); *see also McElreath v. McElreath*, 345 S.W.2d 722, 733, 744 (Tex. 1961); *Smith v. Young*, 620 S.W.2d 656, 660 (Tex. Civ. App.—Dallas 1981, no writ); *Williams*, 581 S.W.2d at 496; *contra GNLV Corp. v. Jackson*, 736 S.W.2d 893, 894 (Tex. App.—Waco 1987, writ denied); *Baumgardner v. Southern Pacific Co.*, 177 S.W.2d 317, 319 (Tex. Civ. App.—El Paso 1943, no writ) (Nevada gambling debt given full faith and credit).

§ 14.12:5 Statute of Limitations

An action on a foreign judgment is barred in Texas if it is barred under the laws of the jurisdiction in which it was rendered. Tex. Civ. Prac. & Rem. Code § 16.066(a). An action against a judgment debtor who has resided in Texas for ten years before the action may not be brought on a foreign judgment rendered more than ten years before the commencement of the Texas action. Tex. Civ. Prac. & Rem. Code § 16.066(b).

§ 14.13 Common-Law Action to Enforce Sister-State Judgments

As an alternative to using the notice and affidavit procedure of the Uniform Enforcement of Foreign Judgments Act as described in section 14.12 above, the creditor may have his judgment domesticated by bringing a common-law suit to enforce it. *See* Tex. Civ. Prac. & Rem. Code § 35.008.

§ 14.13:1 Procedure

A petition must be prepared, filed, and served as in any other suit. It should allege the particulars of the sister-state suit—that is, proper subject matter jurisdiction, proper service according to the laws or rules of the sister state, and the rendering of a final, valid, and subsisting judgment. An authenticated copy of the sister-state judgment should be attached to the petition. See section 14.12:3 above regarding authentication and see form 14-13 in this chapter for a petition.

§ 14.13:2 Burden of Proof

Once the plaintiff introduces a properly authenticated copy of the sister-state judgment, he creates a prima facie case of the validity of the judgment, and the burden shifts to the defendant to disprove its validity. *Mitchim v. Mitchim*, 518 S.W.2d 362, 364 (Tex. 1975); *Knighton v. International Business Machines Corp.*, 856 S.W.2d 206, 209 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

There is a split in the courts of appeals about whether this presumption applies to a default judgment taken in the sister state. Cases holding that the presumption exists include *Cash Register Sales & Services of Houston, Inc. v. Copelco Capital, Inc.*, 62 S.W.3d 278, 280 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *Minuteman Press International, Inc. v. Sparks*, 782 S.W.2d 339, 342 (Tex. App.—Fort Worth 1989, no writ); *First National Bank v. Rector*, 710 S.W.2d 100, 103 (Tex. App.—Austin 1986, writ ref'd n.r.e.); and *Hart v. Calkins Manufacturing, Inc.*, 623 S.W.2d 451, 452 (Tex. App.—Texarkana 1981, no writ). Cases holding that a default judgment is not entitled to the presumption of validity include *Jackson v. Randall*, 544 S.W.2d 439, 441 (Tex. Civ. App.—Texarkana 1976, no writ), and *Country Clubs, Inc. v. Ward*, 461 S.W.2d 651, 652 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.).

§ 14.13:3 Defensive Matters

See section 14.12:4 above for a discussion of defensive matters that can be raised.

§ 14.13:4 Attorney's Fees

No express statutory authority exists for recovery of attorney's fees, but if the parties stipulate that the law of the sister state applies to the case and attorney's fees can be recovered under that law, attorney's fees are recoverable. *See Tibbetts v. Tibbetts*, 679 S.W.2d 152, 154 (Tex. App.—Dallas 1984, no writ). See part III. in chapter 1 of this manual for a general discussion of Texas law regarding attorney's fees. Rules for the determination of the law of other states and foreign countries are set forth in Tex. R. Evid. 202–203. See the discussion of proof of foreign law at section 14.12 above.

§ 14.13:5 Limitation

A common-law suit to enforce a foreign judgment is barred under the same circumstances as a suit under the Uniform Enforcement of Foreign Judgments Act. See the discussion in section 14.12:5 above.

§ 14.14 Judgments of Courts in Foreign Countries

§ 14.14:1 Eligible Judgments

A foreign-country judgment that is final and enforceable where rendered, even though an appeal is pending or the judgment is subject to appeal, may be domesticated in Texas by the filing and notice provisions of the Texas version of the Uniform Foreign Country Money-Judgment Recognition Act, Tex. Civ. Prac. & Rem. Code §§ 36.001–.008. The judgment must be a judgment for money other than a judgment for taxes, a fine, or other penalty or for support in a matrimonial or family matter. Tex. Civ. Prac. & Rem. Code § 36.001(2).

§ 14.14:2 Procedure

Plaintiff's Procedure: The creditor or his attorney must file with the clerk of any court of competent jurisdiction and venue an authenticated copy of the foreign-country judgment and an affidavit stating the names and last known post office addresses of the judgment debtor and judgment creditor. Tex. Civ. Prac. & Rem. Code §§ 36.0041, 36.0042(a).

The clerk must promptly mail a notice of filing to the judgment debtor and note the mailing in the docket. Tex. Civ. Prac. & Rem. Code § 36.0042(b). The notice must include the names and post office addresses of the judgment creditor and the creditor's Texas attorney, if there is one. Tex. Civ. Prac. & Rem. Code § 36.0042(c). Alternatively, the creditor may mail the notice to the judgment debtor and file proof of mailing with the clerk. Tex. Civ. Prac. & Rem. Code § 36.0043.

Defendant's Procedure to Contest: If a party wishes to contest recognition, he must file a motion for nonrecognition of the judgment with the court not later than the thirtieth day, or if the party is domiciled in a foreign country not later than the sixtieth day, after the date of service of the notice. The motion must include all supporting affidavits, briefs, and other documentation. Tex. Civ. Prac. & Rem. Code § 36.0044.

Court Procedure for Motion for Nonrecognition: After a motion for nonrecognition is filed and served, the party seeking recognition must file his response to the motion, including any supporting affidavits, briefs, and other documentation, not later than the twentieth day after service on him of a copy of the motion for nonrecognition. Tex. Civ. Prac. & Rem. Code § 36.0044(c). An extension of time to file the response to the motion for nonrecognition, as well as for time to file any document that is required to establish a ground for nonrecognition but that is not available in time to file the document, may be granted. A motion is required to obtain such an extension, which may not exceed twenty days unless good cause is shown. Tex. Civ. Prac. & Rem. Code § 36.0044(d). Either party may request an evidentiary hearing on his motion. The court has the discretion to allow this hearing. Tex. Civ. Prac. & Rem. Code § 36.0044(e).

The court may at any time permit or require argument, authorities, or supporting material in addition to that required by the statute. The court may refuse to recognize the foreign-country judgment if the evidence establishes grounds for nonrecognition. However, the court may not, under any circumstances, review the foreign-country judgment in relation to any matter not specified in Tex. Civ. Prac. & Rem. Code § 36.005. Tex. Civ. Prac. & Rem. Code § 36.0044(f), (g).

§ 14.14:3 Authentication

The judgment must be authenticated in accordance with an act of Congress, a Texas statute, or a treaty or other international convention to which the United States is a party. Tex. Civ. Prac. & Rem. Code § 36.0041. See Tex. R. Evid. 902(3) regarding self-authentication of foreign public documents.

§ 14.14:4 Defensive Matters

A foreign-country judgment will not be found conclusive if—

1. the judicial system under which the judgment was rendered did not provide impartial tribunals or procedures compatible with due process of law;
2. the foreign-country court did not have personal jurisdiction over the defendant; or
3. the foreign-country court did not have jurisdiction over the subject matter.

Tex. Civ. Prac. & Rem. Code § 36.005(a).

The foreign-country judgment need not be recognized if—

1. the defendant did not receive notice of the foreign-country proceedings in sufficient time to attend;
2. the judgment was obtained by fraud;
3. the cause of action on which the judgment is based is repugnant to the public policy of Texas;
4. the judgment conflicts with another final and conclusive judgment;
5. the foreign-country proceeding was contrary to an agreement between the parties under which the dispute in question was to be settled other than by proceedings in that court;
6. the foreign country court was a seriously inconvenient forum for the trial if jurisdiction was based solely on personal service; or
7. the foreign country in which the judgment was rendered does not recognize a Texas judgment for money other than a judgment for taxes, a fine, or other penalty or for support in a matrimonial or family matter.

Tex. Civ. Prac. & Rem. Code § 36.005(b).

Jurisdictional matters are further addressed in Tex. Civ. Prac. & Rem. Code § 36.006.

§ 14.14:5 Converting Foreign Currency

The objective of civil money judgments is to place the judgment creditor in a position as close as possible to that in which he would have been if the obligation had been carried out by the judgment debtor or if the injury had not occurred. In enforcing a foreign judgment, the court should assure that neither party receives a windfall or is penalized as a result of the currency conversion. *Restatement of Foreign Relations Law of United States* § 823 cmt. c (1986). If the foreign currency has depreciated since the injury or breach, judgment should be given at the rate of exchange applicable on the date of the injury or the breach. If the foreign currency has appreciated since the injury or breach, judgment should be given at the rate of exchange applicable on the date of judgment or date of payment. *El Universal, Compania Periodistica Nacional, S.A. de C.V. v. Phoenician Imports, Inc.*, 802 S.W.2d 799, 803–04 (Tex. App.—Corpus Christi 1990, writ denied).

party. See section 27.33 in this manual regarding community and separate property.

§ 14.26:4 Joinder of Party to Instrument

An assignor, endorser, or other party not primarily liable on an instrument may be joined in a suit against the principal obligor. Tex. R. Civ. P. 30. A conditionally liable party may be sued without joining the maker or principal obligor if the principal obligor—

1. is a nonresident or resides in a place at which he cannot be reached by ordinary process of law;

2. has an unknown residence that cannot be ascertained by use of reasonable diligence;

3. is dead; or

4. is actually or notoriously insolvent.

Tex. Civ. Prac. & Rem. Code § 17.001(b). A surety cannot otherwise be sued without joinder of his principal. Tex. R. Civ. P. 31. An absolute guarantor, however, can be sued without joining the principal. See section 14.11:1 above regarding guarantors and sureties.

The exceptions to joinder of guarantors and principal obligors cannot be enlarged. An insane maker, therefore, must be joined in a suit against his guarantor. *Johnson v. First Mortgage Loan Co.*, 135 S.W.2d 806, 810–11 (Tex. Civ. App.—Austin 1939, no writ). The plaintiff, however, may sue a comaker singly and may proceed to judgment without joinder of the other comakers, even if the defendant was an accommodation party. It is the defendant's duty to join other comakers. *Reed v. Buck*, 370 S.W.2d 867, 873 (Tex. 1963).

§ 14.27 Entities as Defendants

§ 14.27:1 Entities as Defendants Generally

The petition should name every entity and individual against whom the creditor would impose liability. Rules about names under which various entities, rather than individuals, can or should be named as defendants are discussed in the following sections. A defendant's entity status should be alleged, and the name, address, and capacity of an individual who can accept service for the entity should be stated. *See Reynolds v. Haws*, 741 S.W.2d 582, 589 (Tex. App.—Fort Worth 1987, writ denied) (entity not party to suit without being named in pleadings). The petition should name as defendants all individuals (for example, partners, shareholders, directors) against whom personal liability is sought. *See Ray Malooly Trust v. Juhl*, 186 S.W.3d 568 (Tex. 2006) (holding that a trust is not a legal entity and civil suits may be maintained only by or against parties having an actual or legal existence). Service of process is discussed in chapter 16 of this manual. See forms 14-14 through 14-20 in this chapter for clauses for party designation.

§ 14.27:2 Texas Corporation or Limited Liability Company

A corporation or limited liability company should be sued in its corporate name. *See* Tex. Bus. Orgs. Code § 2.101(1). The statute also applies to nonprofit corporations; *see* Tex. Bus. Orgs. Code § 2.109 (professional corporations). A dissolved corporation may be sued in its corporate name within three years after dissolution. Tex. Bus. Orgs. Code § 11.356. The statute also applies to nonprofit corporations and limited liability companies; *see* Tex. R. Civ. P. 29; *see also* Tex. Bus. Orgs. Code § 2.109 (professional corporations). If individual liability for directors, shareholders, or members is sought, those individuals must be identified and named as defen-

dants. See part II. in chapter 6 of this manual. See forms 14-14 through 14-20 in this chapter for additional clauses for party designation.

§ 14.27:3 Foreign Corporation

A foreign corporation that is transacting or has transacted business in Texas can be sued in Texas, even if it is not registered to transact business in this state. Tex. Bus. Orgs. Code § 9.051. Allegations pertaining to service on the corporation will vary depending on the status of the corporation's registration. See chapter 16 in this manual.

Entering into a contract by mail or by other means with a Texas resident is doing business in Texas for the purpose of allowing long-arm jurisdiction, if any part or all of the contract is to be performed in Texas by either party. Also, the act of recruiting Texas residents, directly or through an intermediary located in Texas, for employment inside or outside Texas is deemed doing business in Texas. Tex. Civ. Prac. & Rem. Code § 17.042. The petition should allege the specific basis for jurisdiction. The liability of shareholders of a foreign corporation for corporate debts, liabilities, and obligations for which they are not otherwise liable by statute or agreement is governed by the laws of the jurisdiction of incorporation of the foreign corporation. Tex. Bus. Orgs. Code § 1.104.

§ 14.27:4 When Corporation Must Be Represented by Attorney

A corporation must be represented in litigation by an attorney. *Handy Andy, Inc. v. Ruiz*, 900 S.W.2d 739, 741 n.1 (Tex. App.—Corpus Christi 1994, writ denied); *Moore v. Elektro-Mobil Technik GmbH*, 874 S.W.2d 324, 327 (Tex. App.—El Paso 1994, writ denied); *Electronic Data Systems, Inc. v. Tyson*, 862 S.W.2d 728, 737 (Tex. App.—Dallas 1993, no writ). The only exception is for suit in small claims court. Tex. Gov't Code § 28.003(e).

§ 14.27:5 Partnerships

A partnership may be sued in the name of the partnership. Tex. R. Civ. P. 28. All general partners are jointly and severally liable for all obligations of the partnership. Tex. Bus. Orgs. Code § 152.304. A suit against the partnership, with service on one or more partners, authorizes judgment against the partnership and the partner(s) actually served. Tex. Civ. Prac. & Rem. Code § 17.022. An individual partner who enters an appearance, although not served, will also be subject to individual liability. *Bentley Village, Ltd. v. Nasits Building Co.*, 736 S.W.2d 919, 923 (Tex. App.—Tyler 1987, no writ).

Long-arm jurisdiction can attach to a foreign partnership doing business in Texas (see section 14.27:3 above). *See* Tex. Civ. Prac. & Rem. Code § 17.042. See forms 14-14 through 14-20 in this chapter for clauses for party designation.

§ 14.27:6 Business Operating under Assumed Name

A partnership, private corporation, unincorporated association, or individual doing business under an assumed name may be sued under the assumed name, partnership name, or common name. Tex. R. Civ. P. 28. For clarity, it is the better practice to allege both the assumed name and the name of the partnership, association, individual, or corporation operating under that name. See section 14.28:2 below. A court, in its discretion, may substitute the true name of the defendant in the judgment; the plaintiff is not necessarily required to replead. *Trails East v. Mustafa*, 713 S.W.2d 422, 424 (Tex. App.—Fort Worth 1986, no writ); *but see Bailey v. Vanscot Concrete Co.*, 894 S.W.2d 757, 760–61 (Tex. 1995). See also the discussion in section 17.53:9 in this manual.

Form 14-12

This affidavit should be filed at the time a foreign judgment is filed under the Uniform Enforcement of Foreign Judgments Act, Tex. Civ. Prac. & Rem. Code §§ 35.001–.007. Tex. Civ. Prac. & Rem. Code § 35.004(b) requires the judgment creditor or the judgment creditor's attorney to mail a notice of filing to the judgment debtor and file proof of mailing of the notice with the court clerk. See the related discussion at section 14.12:2 in this chapter.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Affidavit—Filing of Foreign Judgment

BEFORE ME, the undersigned authority, on this day personally appeared [**name of affiant**], who swore on oath that the following facts are true:

"My name is [**name of affiant**]. I have personal knowledge of the facts stated in this affidavit. I am authorized to make this affidavit on behalf of Plaintiff[s], [**name[s] of plaintiff[s]**].

"Plaintiff[s] own[s] a judgment against [**name of defendant**], Defendant. The last known post office address of Defendant is [**address, city, state**]. The last known post office address of Judgment Creditor, [**name of judgment creditor**], is [**address, city, state**]."

_____
[**Name of affiant**]
Affiant

SIGNED under oath before me on _____.

_____
Notary Public, State of Texas

Attach a properly authenticated copy of the foreign judgment.

[Reserved]

Chapter 15

Jurisdiction and Venue

Chapter 15

Jurisdiction and Venue

§ 15.1 Jurisdictional Limits of Trial Courts

§ 15.1:1 Jurisdiction Generally

"Subject-matter jurisdiction refers to the kinds of controversies a court has authority to hear, as determined by the constitution, jurisdictional statutes, and the pleadings." *Perry v. Del Rio*, 53 S.W.3d 818, 824 (Tex. App.—Austin), *appeal dismissed*, 66 S.W.3d 239 (Tex. 2001). When a statute creates a right and prescribes a remedy to enforce that right, a court has subject-matter jurisdiction to act in the manner provided by the statute that created that right. *Tarrant Appraisal District v. Gateway Center Associates, Ltd.*, 34 S.W.3d 712, 714 (Tex. App.—Fort Worth 2000, no pet.).

Texas courts have limited subject-matter jurisdiction; they have no power to act other than that specifically given by the Texas Constitution or by statute. Subject-matter jurisdiction is essential to the authority of a court to decide a case. *Texas Ass'n of Business v. Texas Air Control Board*, 852 S.W.2d 440, 443 (Tex. 1993). Subject-matter jurisdiction is an issue that may not be waived by the parties and may be raised for the first time on appeal. *Texas Ass'n of Business*, 852 S.W.2d at 445; *see also Acosta v. State*, 70 S.W.3d 921, 922–23 (Tex. App.—El Paso 2002, no pet.); *Ex parte Cross*, 69 S.W.3d 810, 813 (Tex. App.—El Paso 2002, no pet.) (question of law subject to sua sponte review by the court of appeals).

For a court to exercise subject-matter jurisdiction over a case, a party must allege facts that affirmatively demonstrate the court's jurisdiction to hear that case. *Mogayzel v. Texas Department of Transportation*, 66 S.W.3d 459, 463 (Tex. App.—Fort Worth 2001, pet. denied). When incurable defects are shown on the face of a plaintiff's pleadings, the court lacks subject-matter jurisdiction. *City of Longview v. Head*, 33 S.W.3d 47, 54 (Tex. App.—Tyler 2000, no pet.) (dismissal required when subject-matter jurisdiction lacking regardless of stage of proceeding). Any decision rendered by a court not having jurisdiction is void. *Cleveland v. Ward*, 285 S.W. 1063, 1071 (Tex. 1926), *overruled on other grounds by Walker v. Packer*, 827 S.W.2d 833, 842 (Tex. 1992); *In re Burlington Northern & Santa Fe Railway Co.*, 12 S.W.3d 891, 895 (Tex. App.—Houston [14th Dist.] 2000, mandamus denied); *Solomon, Lambert, Roth & Associates v. Kidd*, 904 S.W.2d 896, 901 (Tex. App.—Houston [1st Dist.] 1995, no writ). Subject-matter jurisdiction is a power that exists by operation of law and may not be conferred on any court by consent of the parties or by waiver. *Burke v. Satterfield*, 525 S.W.2d 950, 953 (Tex. 1975); *Walls Regional Hospital v. Altaras*, 903 S.W.2d 36, 40–41 (Tex. App.—Waco 1994, no writ); *Nash v. Civil Service Commission*, 864 S.W.2d 163, 166 (Tex. App.—Tyler 1993, no writ). In contrast, although a court may not have jurisdiction over a party, that party may appear and consent to personal jurisdiction. *Campsey v. Brumley*, 55 S.W.2d 810, 812 (Tex. Comm'n App. 1932, holding approved). When jurisdiction has been properly acquired, no subsequent event will serve to divest the court of jurisdiction. *Color Tile, Inc. v. Ramsey*, 905 S.W.2d 620, 622 (Tex. App.—Houston [14th Dist.] 1995, no writ).

The amount claimed generally determines which court has jurisdiction. See section 15.2 below. Many statutory courts have special jurisdictional requirements, and the attorney should always consult the statute creating the particular court. The following sections summarize the jurisdictional scheme of Texas trial courts.

§ 15.1:2 Justice Court

Justice courts, as creatures of statute, are governed by a legislative grant of jurisdiction. *Color Tile, Inc. v. Ramsey*, 905 S.W.2d 620, 622 (Tex. App.—Houston [14th Dist.] 1995, no writ). Justice courts have original jurisdiction of—

1. civil matters in which the amount in controversy is $10,000 or less, exclusive of interest (unless the district or county court has exclusive jurisdiction over the case);
2. forcible entry and detainer cases;
3. foreclosures of mortgages and enforcement of liens on personal property when the amount in controversy is otherwise within the justice court's jurisdiction; and
4. cases arising under chapter 707 of the Transportation Code, outside a municipality's territorial limits.

Tex. Gov't Code § 27.031(a).

A justice of the peace has also the power to issue writs of attachment, garnishment, and sequestration in cases in which the court otherwise has jurisdiction, Tex. Gov't Code § 27.032, and the power to issue distress warrants, Tex. R. Civ. P. 610.

§ 15.1:3 Small Claims Court

Small claims courts, presided over by justices of the peace, exist in each county. They have concurrent jurisdiction with justice courts in actions for the recovery of money in which the amount involved, excluding costs, does not exceed $10,000. Tex. Gov't Code § 28.003(a).

No action can be brought in small claims court by any person primarily engaged in the business of lending money at interest, by a collection agency or agent, or by an assignee of a claim. Tex. Gov't Code § 28.003(b). A person may be represented by an attorney in small claims court. Tex. Gov't Code § 28.003(c).

§ 15.1:4 Constitutional County Court

Constitutional county courts have—

1. concurrent jurisdiction with justice courts if the amount in controversy exceeds $200 but does not exceed $10,000, exclusive of interest;
2. concurrent jurisdiction with district courts if the amount in controversy exceeds $500 but does not exceed $5,000, exclusive of interest; and
3. the power to issue writs necessary to enforce the court's jurisdiction, specifically including writs of mandamus, attachment, garnishment, injunction, sequestration, certiorari, and supersedeas.

Tex. Const. art. V, § 16; Tex. Gov't Code §§ 26.042(a), 26.051.

Among other matters, the constitutional county court does not have jurisdiction in a suit for the enforcement of a lien on land or a suit for the trial of the right to property valued at $500 or more and levied on under a writ of execution, sequestration, or attachment. Tex. Gov't Code § 26.043(2), (6). To enforce their jurisdictional authority, constitutional county courts have extensive writ jurisdiction. *See* Tex. Gov't Code §§ 26.050–.051.

§ 15.1:5 Statutory County Court (County Court at Law)

Statutorily created county courts at law that have concurrent jurisdiction with constitutional county courts also have concurrent jurisdiction with district courts if the amount in controversy, as alleged in the petition, exceeds $500 but does not exceed $100,000, excluding interest, statutory or punitive damages and penalties, and attorney's fees and costs. Tex. Gov't Code § 25.0003(c)(1). The statutes relating to statutory county courts of each county are in chapter 25 of the Texas Government Code. The statute creating the particular court should always be consulted. *See, e.g.*, Tex. Gov't Code § 25.0592 (Dallas County), § 25.0732 (El Paso County), § 25.0862 (Galveston County) (examples of statutory county courts that have concurrent jurisdiction with the district court in civil cases regardless of amount in controversy); *see also* Tex. Gov't Code § 25.1252 (Jefferson County), § 25.1542 (Lubbock County), § 25.2292 (Travis County) (examples of counties that have raised the maximum jurisdictional amount for the statutory county courts). A statutory county court may issue writs of injunction, mandamus, sequestration, attachment, garnishment, certiorari, supersedeas, and all writs necessary to enforce its jurisdiction. Tex. Gov't Code § 25.0004(a). The statutory county court has concurrent jurisdiction with district courts in eminent domain cases (Tex. Prop. Code § 21.001) and with constitutional county courts in probate matters (unless a county has a statutory probate court) (Tex. Gov't Code § 25.0003(d)–(e)).

§ 15.1:6 District Court

District courts are courts of general jurisdiction and have exclusive, original jurisdiction over cases that are not within the subject-matter jurisdiction of any other court. Tex. Const. art. V, §§ 1, 8. Neither the Texas Constitution nor the Texas Government Code prescribes a minimum or maximum amount in controversy for district court jurisdiction. *See* Tex. Const. art. V, § 8; Tex. Gov't Code §§ 24.007–.008. The previously required $500 minimum was deleted by the legislature from both the constitution and the civil statutes in 1985. The 1985 codification of the jurisdictional statutes was not intended to substantively change the law, however. Tex. Gov't Code § 1.001(a). The appellate courts disagree on what the minimum amount in controversy should be in the district courts. *See Chapa v. Spivey*, 999 S.W.2d 833, 835–36 (Tex. App.—Tyler 1999, no pet.) (finding that minimum should remain $500); *cf. Arteaga v. Jackson*, 994 S.W.2d 342 (Tex. App.—Texarkana 1999, pet. denied) (holding that minimum should be $200.01); *Arnold v. West Bend Co.*, 983 S.W.2d 365, 366 n.1 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (holding that minimum should be $200.01). Although the question of a minimum jurisdictional amount for the district courts remains open, the Texas Supreme Court has concluded that when a "nonsubstantive" codification and prior law cannot be reconciled, the codification must be given effect instead of the repealed statute. *Fleming Foods of Texas, Inc. v. Rylander*, 6 S.W.3d 278, 286 (Tex. 1999); *see also Smith v. Clary Corp.*, 917 S.W.2d 796, 799 n.3 (Tex. 1996); *Peek v. Equipment Service Co.*, 779 S.W.2d 802, 803–04 n.4 (Tex. 1989). The supreme court has recognized that the district courts may no longer have a jurisdictional minimum amount in controversy. *See Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 75 n.4 (Tex. 2000).

District courts may have concurrent jurisdiction with one or more inferior courts. District courts may issue writs of mandamus, injunction, sequestration, attachment, garnishment, certiorari, supersedeas, and all other writs necessary to enforce their jurisdiction. Tex. Gov't Code § 24.011.

§ 15.2 Jurisdictional Amount in Controversy

§ 15.2:1 Amount in Controversy Generally

Although in some cases jurisdiction is determined by subject matter, it is usually dictated by the amount in controversy. That amount is ascertained from the plaintiff's pleadings, unless the defendant alleges and proves that the allegations are fraudulently made for the purpose of conferring jurisdiction that otherwise would not exist. *Lane v. Davis*, 337 S.W.2d 292, 293–94 (Tex. Civ. App.—San Antonio 1960, no writ). The plaintiff may not arbitrarily reduce a liquidated claim to an amount within the jurisdictional limits of the justice courts. *Hooper Lumber Co. v. Texas Fixture Co.*, 230 S.W. 141 (Tex. 1921). The plaintiff's pleadings, not the proof of his allegations or the result of the case, determine jurisdiction. *Brannon v. Pacific Employers Insurance Co.*, 224 S.W.2d 466, 469 (Tex. 1949); *Campsey v. Brumley*, 55 S.W.2d 810, 812 (Tex. Comm'n App. 1932, holding approved). Each type of court has its own formula for calculating the amount in controversy. Whether attorney's fees, costs, or penalties are added to the debt when figuring the amount in controversy depends on the governing statute of the court in question. Many of the statutes creating the county courts at law have specific items that may or may not be included in the amount in controversy. *See, e.g., Sears, Roebuck & Co. v. Big Bend Motor Inn, Inc.*, 818 S.W.2d 542 (Tex. App.—Fort Worth 1991, writ denied).

For an unliquidated claim, the plaintiff's petition need state only that the damages sought are within the jurisdictional limits of the court. Tex. R. Civ. P. 47(b). Omitting the amount in controversy from the petition does not necessarily deprive the court of jurisdiction, unless lack of jurisdiction is clear from the pleadings. The plaintiff may prevail if the jurisdictional amount in controversy is proved at trial; failure to plead damages is a defect in pleading subject to special exceptions and amendment. *Peek v. Equipment Service Co.*, 779 S.W.2d 802, 804–05 (Tex. 1989).

Special rules apply in the case of multiple claims against one defendant or foreclosure of a lien; see sections 15.2:3 and 15.2:7 below.

§ 15.2:2 Amount of Debt

Only the amount due and unpaid at the time suit is instituted is included in computing the amount in controversy. *See Metropolitan Life Insurance Co. v. Evans*, 96 S.W.2d 152, 153 (Tex. Civ. App.—Beaumont 1936, no writ). The amount due and unpaid is the balance after applying all credits, not the amount of the original debt. *See Salter v. Nelson*, 341 S.W.2d 567, 568 (Tex. Civ. App.—Fort Worth 1960, no writ). Any expected reduction in the claimed amount because of an intended offset from another transaction is not included. *Manly v. Citizens National Bank*, 110 S.W.2d 993, 994 (Tex. Civ. App.—Eastland 1937, no writ).

§ 15.2:3 Multiple Claims

When a plaintiff makes separate, independent, but joinable claims against multiple parties, each claim is judged on its own merit. *Borrego v. del Palacio*, 445 S.W.2d 620, 622 (Tex. Civ. App.—El Paso 1969, no writ). If one plaintiff asserts several claims against one defendant, the total of the separate claims determines the amount in controversy. Tex. Gov't Code § 24.009 (district courts); *Box v. Associates Investment Co.*, 389 S.W.2d 687, 689 (Tex. Civ. App.—Dallas 1965, no writ).

§ 15.2:4 Interest

Interest as damages (for example, interest accruing from the loss of use of money) is included in calculating the amount in controversy. On the other hand, interest eo nomine, that is, in the

name of interest (for example, interest defined by statute or fixed by the parties to a contract) is not included in determining the amount in controversy. *Bankers Health & Accident Co. v. Adair*, 153 S.W.2d 273, 273–74 (Tex. Civ. App.—San Antonio 1941, no writ). The jurisdictional statutes usually exclude interest in determining the amount in controversy. *See, e.g.*, Tex. Gov't Code § 26.042(a) (county courts). The attorney should carefully decide whether to include interest in determining the amount in controversy based on whether the interest is eo nomine or interest as damages. *See, e.g., Eanes v. Haynes*, 135 S.W.2d 190 (Tex. Civ. App.—Eastland 1939, no writ); *Oppenheim v. Hood*, 33 S.W.2d 265 (Tex. Civ. App.—Dallas 1930, writ ref'd).

§ 15.2:5 Attorney's Fees

A demand for attorney's fees is generally considered part of the amount in controversy and is considered in fixing the court's jurisdiction. *Johnson v. Universal Life & Accident Insurance Co.*, 94 S.W.2d 1145 (Tex. 1936); *Long v. Fox*, 625 S.W.2d 376, 378 (Tex. App.—San Antonio 1981, writ ref'd n.r.e.). Attorney's fees are excluded from calculation of the amount in controversy for statutory county courts, however. Tex. Gov't Code § 25.0003(c)(1); *see also Whitley v. Morning*, 814 S.W.2d 537, 538 (Tex. App.—Tyler 1991, no writ).

§ 15.2:6 Costs

Costs of court are not included in computing the amount in controversy. *See National Life & Accident Insurance Co. v. Halfin*, 99 S.W.2d 997, 998 (Tex. Civ. App.—San Antonio 1936, no writ).

§ 15.2:7 Foreclosure of Lien

The jurisdictional amount is determined by the value of the property on which foreclosure is sought if the value exceeds the amount of the debt. *Southwestern Drug Corp. v. Webster*, 246 S.W.2d 241 (Tex. Civ. App.—Amarillo 1951, no writ).

§ 15.2:8 Immunity

When a governmental agency is sued, the adverse party must affirmatively establish in its pleadings the state's consent to be sued. *University of Texas Medical Branch at Galveston v. Mullins*, 57 S.W.3d 653, 656 (Tex. App.—Houston [14th Dist.] 2001, no pet.). A trial court lacks subject-matter jurisdiction over a suit against a governmental unit absent the state's consent to a suit. *Texana Community MHMR Center v. Silvas*, 62 S.W.3d 317, 321 (Tex. App.—Corpus Christi 2001, no pet.). The state's consent to suit may be alleged "by reference to a statute or to express legislative permission." *Mullins*, 57 S.W.3d at 656 (quoting *Texas Department of Transportation v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999)).

§ 15.2:9 Plea to the Jurisdiction

By filing a plea to the jurisdiction, a party may contest the trial court's subject-matter jurisdiction. To determine whether a court has subject-matter jurisdiction over a case challenged by a plea to the jurisdiction, the trial court must look solely to the pleadings. *University of Texas Medical Branch at Galveston v. Mullins*, 57 S.W.3d 653, 656 (Tex. App.—Houston [14th Dist.] 2001, no pet.). A trial court is required to examine evidence to determine whether it has subject-matter jurisdiction before proceeding with the case. Because a court must not act without determining whether it has subject-matter jurisdiction to do so, the court should hear evidence as necessary to determine the issue before proceeding with the case. However, inquiry into the substance of the claims presented by the plaintiff should not go further than is required to establish jurisdiction. *Bland Independent School District v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000).

§ 15.3 Suit in Federal Court

§ 15.3:1 Choice of Federal or State Forum Generally

Federal jurisdiction is available if there is diversity of citizenship between the litigants and the amount in controversy exceeds $75,000. 28 U.S.C. § 1332(a). Factors to consider in filing suit in federal court include venue and procedural rules and the status of the dockets. Comprehensive discussion of federal practice is beyond the scope of this manual, but a few important matters are discussed below.

§ 15.3:2 Pleadings

The plaintiff's initial pleading is called a complaint. Fed. R. Civ. P. 7(a). The ground for federal jurisdiction must affirmatively appear in the complaint. Fed. R. Civ. P. 8(a).

§ 15.3:3 Jurisdiction of Corporation

A corporation is deemed a citizen of the state in which it is incorporated *and* of the state in which its principal place of business is located. *See* 28 U.S.C. § 1332(c)(1). Diversity jurisdiction, therefore, does not exist if either party is a corporation and the other party's domicile is in the same state with the corporation's principal place of business *or* its place of incorporation.

§ 15.3:4 Venue

28 U.S.C. § 1391 discusses venue generally and governs all civil actions brought in U.S. district courts, except as otherwise provided by law. *See* 28 U.S.C. § 1391(a)(1). Proper venue must be determined without regard to whether the action is local or transitory in nature, except as otherwise provided by law. 28 U.S.C. § 1391(a)(2).

A civil action based on diversity jurisdiction can be brought only in—

1. a judicial district in which any defendant resides, if all defendants reside in the state in which the district is located;
2. a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred or in which a substantial part of the property that is the subject of the action is situated; or
3. a judicial district in which any defendant is subject to personal jurisdiction with respect to the action, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(b).

A natural person, including an alien lawfully admitted for permanent residence in the United States, is deemed to reside in the judicial district in which that person is domiciled. 28 U.S.C. § 1391(c)(1).

> An entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its principal place of business.

28 U.S.C. § 1391(c)(2). A defendant that does not reside in the United States may be sued in any judicial district, and the joinder of such a defendant must be disregarded in determining where the action may be brought with respect to other defendants. 28 U.S.C. § 1391(c)(3).

If a corporation is subject to personal jurisdiction in a state with more than one judicial district, the corporation is deemed to reside in any district in that state within which its contacts

would be sufficient to subject it to personal jurisdiction if that district were a separate state. If there is no such district, the corporation is deemed to reside in the district in which it has the most significant contacts. 28 U.S.C. § 1391(d).

§ 15.4 Venue

§ 15.4:1 Venue Generally

Venue is the place in which a plaintiff has a legal right to file suit regardless of the defendant's objections. Unlike subject-matter jurisdiction, but like in personam jurisdiction, venue can be conferred by consent or waiver. Tex. R. Civ. P. 86, 255.

If the creditor has a choice of where to file suit, his attorney should consider such factors as travel expenses for counsel and witnesses, docket congestion, and how a local judge and jury will respond to the creditor, his counsel, and the nature of the claim asserted.

Venue facts do not have to be pleaded unless the defendant raises the issue of improper venue. If that happens, the attorney should amend the petition, pleading facts to support the choice of venue.

When properly pleaded, all venue facts are taken as true unless they are specifically denied by the adverse party. Tex. R. Civ. P. 87(3)(a); *Sanes v. Clark*, 25 S.W.3d 800, 803 (Tex. App.—Waco 2000, pet. denied).

When one or more plaintiffs is joined in a suit, each must independently establish proper venue. Tex. Civ. Prac. & Rem. Code § 15.003(a); *American Home Products Corp. v. Clark*, 38 S.W.3d 92, 94 (Tex. 2000).

If the plaintiff's venue allegations are specifically denied, the plaintiff must support his pleading by prima facie proof, in the form of an affidavit complying with Tex. R. Civ. P. 87(3), that the cause of action accrued in the county of suit. Tex. R. Civ. P. 87(2)(b). No party, however, may ever be required for venue purposes to support the existence of a cause of action by prima facie proof. At the venue hearing, the pleadings must be taken as conclusive on the issue of the existence of a cause of action. Tex. R. Civ. P. 87(3). A finding of improper venue is remedied by transfer of the cause to a county of proper venue rather than a dismissal of the cause. Tex. Civ. Prac. & Rem. Code § 15.063(1).

There is no interlocutory appeal from a venue determination. Tex. Civ. Prac. & Rem. Code § 15.064(a). On appeal from the trial on the merits, if venue was improper, it is not harmless error, but is reversible error. Tex. Civ. Prac. & Rem. Code § 15.064(b). A transfer of venue on the basis of convenience is unique in that it is the only venue determination that is not subject to appellate review. Tex. Civ. Prac. & Rem. Code § 15.002(b).

§ 15.4:2 General Venue Rule

The general venue rule is that suit must be brought—

1. in the county in which all or a substantial part of the events giving rise to the claim occurred;
2. in the county of the defendant's residence at the time the cause of action accrued if the defendant is a natural person;
3. in the county of the defendant's principal office in Texas if the defendant is not a natural person; or
4. if the first three provisions do not apply, in the county in which the plaintiff resided at the time of the accrual of the cause of action.

Tex. Civ. Prac. & Rem. Code § 15.002(a).

The principal office of a defendant is the office at which the decision makers for the organization within Texas conduct the daily affairs of the organization. The mere presence of an agency or representative does not establish a principal office. Tex. Civ. Prac. & Rem. Code § 15.001(a).

For a brief discussion of venue in federal court, see section 15.3:4 above. For justice court venue rules, see Tex. Civ. Prac. & Rem. Code §§ 15.081–.100. Other venue provisions exist; some are discussed in section 15.4:3 below. See also part II. in chapter 19 of this manual.

§ 15.4:3 Mandatory or Permissive Venue Generally

The general venue statutes contain provisions for mandatory venue in certain situations and permissive venue in others. Mandatory venue provisions supersede the general venue rule. *See* Tex. Civ. Prac. & Rem. Code § 15.001. "Proper venue" means venue as provided in the mandatory venue statute or by the permissive venue rules and the general venue rule when the mandatory rules do not apply. Tex. Civ. Prac. & Rem. Code § 15.001(b). The attorney should always review the numerous subdivisions of the venue statutes found at Tex. Civ. Prac. & Rem. Code §§ 15.001–.100 to determine whether the nature of the suit or of the parties falls within the general rule or one of the provisions for mandatory or permissive venue. The more commonly encountered venue provisions applicable to suits on debts are described briefly in the following sections, but the attorney should remember that on occasion one of the venue provisions not discussed here may apply.

§ 15.4:4 Venue in Suit on Consumer Debt

In an action founded on a contractual obligation of the defendant to pay money arising out of or based on a consumer transaction for goods, services, loans, or extensions of credit intended primarily for personal, family, household, or agricultural use, suit by a creditor on or by reason of the obligation may be brought in either the county in which the defendant signed the contract or the county in which the defendant resides when the action is commenced. A consumer cannot waive this venue right in the contract. Tex. Civ. Prac. & Rem. Code § 15.035(b). In most such cases, filing in another county is a violation of the Texas Deceptive Trade Practices Act, unless the plaintiff did not know or have reason to know that the county in which suit was filed was not a proper county. Tex. Bus. & Com. Code §§ 17.46(b)(23), 17.50.

Under the federal Fair Debt Collection Practices Act, an action brought by a debt collector must be brought in either the county in which the consumer signed the contract or the county in which the consumer resides when the action is commenced. 15 U.S.C. § 1692i(a)(2). Failure to file suit in a county of proper venue renders the debt collector liable for damages. 15 U.S.C. § 1692k. See section 2.18 in this manual.

§ 15.4:5 Written Contract (Nonconsumer)

In a breach-of-contract action, proper venue in the county in which all or a substantial part of the events or omissions took place includes the county in which the contract was formed, was to be performed, and was allegedly breached. *See Krchnak v. Fulton*, 759 S.W.2d 524, 526 (Tex. App.—Amarillo 1988, writ denied); *see also* Tex. Civ. Prac. & Rem. Code § 15.002(a)(1).

If a written contract expressly names a definite place in which suit can be brought, a suit on that contract can be brought either in that place or in the defendant's domicile. Tex. Civ. Prac. & Rem. Code § 15.035(a).

§ 15.4:6 Multiple Defendants

If the plaintiff establishes proper venue against one defendant, venue is proper against all other defendants in all claims or actions arising out of the same transaction, occurrence, or series of transactions or occurrences. Tex. Civ. Prac. & Rem. Code § 15.005. In a suit in which two or more defendants are joined, any action or omission by one defendant in relation to venue, including a waiver of venue by one defendant, does not impair or diminish the right of any other defendant to properly challenge venue. Tex. Civ. Prac. & Rem. Code § 15.0641.

§ 15.4:7 Multiple Claims

If the plaintiff properly joins two or more claims or causes of action arising from the same transaction, occurrence, or series of transactions or occurrences, and one of the claims or causes of action is governed by a mandatory venue provision, the mandatory venue of that claim or cause of action will control. Tex. Civ. Prac. & Rem. Code § 15.004. Rules for multiple plaintiffs and intervening plaintiffs can be found at Tex. Civ. Prac. & Rem. Code § 15.003. These rules are not discussed in this manual.

§ 15.4:8 Transient Person

A transient person may be sued in any county in which he may be found. Tex. Civ. Prac. & Rem. Code § 15.039.

§ 15.4:9 Decedent's or Ward's Estate

If the suit is against an executor, administrator, or guardian to establish a money demand against the estate he represents, the suit may be brought in the county in which the estate is administered. Tex. Civ. Prac. & Rem. Code § 15.031. See generally chapter 29 of this manual.

§ 15.4:10 Agreement of Parties

If the parties file a written consent to a change of venue, the court may transfer the cause to a court in any other county if the receiving court has jurisdiction of the subject matter. Tex. R. Civ. P. 255. In a suit filed in justice court, the court, on written consent of the parties or their attorneys, may also change the venue to any other justice court in the same county. Tex. R. Civ. P. 530. This written consent can be filed at any time. Tex. Civ. Prac. & Rem. Code § 15.063.

§ 15.4:11 Inability to Obtain Impartial Trial

On the application of either party, if supported by the party's affidavit and by affidavits of at least three credible persons residing in the county in which the suit is pending, a change of venue may be granted for any of these reasons:

1. There is so great a prejudice against the party that he cannot obtain a fair and impartial trial in that county.
2. There is "a combination against him instigated by influential persons," so that the party cannot expect a fair and impartial trial.
3. An impartial trial cannot be had in that county.
4. Other sufficient cause, as determined by the court, exists.

Tex. R. Civ. P. 257.

If a change is granted, transfer will be to—

1. any county of proper venue in the same or an adjoining district if filed in district court;
2. any adjoining county of proper venue if filed in a county court; or

3. if 1. or 2. is not applicable, then to any county of proper venue.

If a county of proper venue other than the county of suit cannot be found, the cause must be removed to—

1. any county in the same or an adjoining district or to any district in which an impartial trial can be had, if suit is filed in district court; or

2. any adjoining county or to any district in which an impartial trial can be had, if suit is filed in county court, but the parties may agree that venue be changed to some other county, and the order of the court must conform to their agreement.

Tex. R. Civ. P. 259.

Similar provisions apply to suits in justice court. Tex. R. Civ. P. 528.

§ 15.4:12 Change of Venue Based on Convenience of Parties and Witnesses and in Interest of Justice

A suit may be transferred for the convenience of the parties and witnesses and in the interest of justice to any other county of proper venue on motion of a defendant filed and served concurrently with or before the filing of the answer. Before transferring the case, the court must find that—

1. maintenance of the action in the county of suit would work an injustice to the movant considering the movant's economic and personal hardship;

2. the balance of interests of all the parties predominates in favor of the action's being brought in the other county; and

3. transfer of the action would not work an injustice to any other party.

Tex. Civ. Prac. & Rem. Code § 15.002(b).

Chapter 16

Service of Process

Forms

Chapter 16

Service of Process

§ 16.1 Issuance of Citation

The citation is the document used to notify the defendant that he has been sued. Requisites of the citation—form, notice, and copies—are set forth in Tex. R. Civ. P. 99. When the petition is filed, the clerk of the court should be requested to issue the citation. A copy of the citation must be retained by the clerk in the court's file. Tex. R. Civ. P. 99(a).

§ 16.2 Kinds of Service

There are three kinds of service:

1. *Personal Service*—delivery of the citation and petition to the defendant in person or to an authorized representative of a corporate defendant or other entity; see section 16.3 below.
2. *Substituted or Alternate Service*—service on someone other than the named defendant or service by leaving the citation and petition at the defendant's usual place of business; see section 16.4.
3. *Constructive Service*—publication of citation in lieu of actual service on someone; see section 16.5.

Some form of service must be accomplished. Even if the defendant has actual notice of the suit, lack of proper service will void a default judgment. *Wilson v. Dunn*, 800 S.W.2d 833, 836–37 (Tex. 1990); *Deanne v. Deanne*, 689 S.W.2d 262, 263 (Tex. App.—Waco 1985, no writ). The plaintiff must exercise diligence in the issuance and service of citation if the lawsuit was filed close to the deadline for the applicable statute of limitation. The mere filing of a suit, without diligence in effecting service, will not toll limitations. *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 830 (Tex. 1990); *Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex. 1990) (per curiam).

§ 16.3 Personal Service

A defendant should be served in person whenever possible. This gives the most effective notice. Alternate forms of service are not usually permitted unless personal service is impractical. Personal service may be made by any person authorized to serve citation and other notices under Tex. R. Civ. P. 103 by—

1. delivering a true copy of the citation, with the petition attached and the date of delivery endorsed on it, to the defendant in person, or
2. mailing a true copy of the citation, with petition attached, to the defendant by registered or certified mail.

Tex. R. Civ. P. 106(a). No one who is a party or who is interested in the outcome of the suit may serve process. Tex. R. Civ. P. 103. A nonresident or a resident defendant who is temporarily out of the state can be served in the sister state by "any disinterested person who is not less than eighteen years of age, in the same manner as provided in Rule 106." Tex. R. Civ. P. 108. A party in a foreign country may be served according to the provisions of Tex. R. Civ. P. 108a. Service on a business entity is discussed beginning at section 16.10 below.

The manner of service must strictly comply with the Texas Rules of Civil Procedure. *Smith v.*

Commercial Equipment Leasing Co., 678 S.W.2d 917, 918 (Tex. 1984) (actual manner of service—certified mail—conflicted with terms of citation, which specified personal service only).

§ 16.4 Substituted Service on Individual

If personal service cannot be effected, substituted service may be used.

> Upon motion supported by affidavit stating the location of the defendant's usual place of business or usual place of abode or other place where the defendant can probably be found and stating specifically the facts showing that service has been attempted under either (a)(1) or (a)(2) at the location named in such affidavit but has not been successful, the court may authorize service
>
> (1) by leaving a true copy of the citation, with a copy of the petition attached, 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.

Tex. R. Civ. P. 106(b).

Constables and other process servers usually have their own "rule 106" affidavits. Caution should be exercised in using their affidavits, as the validity of any future default judgment may depend on the form and content of the affidavit and more generally on the diligence of the officer in attempting personal service before substituted service is sought. *See Medford v. Salter*, 747 S.W.2d 519, 520 (Tex. App.—Corpus Christi 1988, no writ). Failure to secure the affidavit voids any attempt at substituted service and any judgment based on that service. *Wilson v. Dunn*, 800 S.W.2d 833, 836 (Tex. 1990).

Tex. R. Civ. P. 106 does not require that both personal service and service by mail be attempted before substituted service is sought. *Harrison v. Dallas Court Reporting College, Inc.*, 589 S.W.2d 813, 815 (Tex. Civ. App.—Dallas 1979, no writ). There is also no requirement that the service be attempted at both the defendant's residential and business addresses. *Pratt v. Moore*, 746 S.W.2d 486, 488 (Tex. App.—Dallas 1988, no writ). A specific showing of what attempts were made to serve the defendant must appear in the affidavit, however, and failure to show the specific attempts will render the substituted service invalid. *Medford*, 747 S.W.2d at 520. The affidavit must also state that service was attempted at the location of the defendant's usual place of business or usual place of abode or other place where the defendant can probably be found. *See Garrels v. Wales Transportation, Inc.*, 706 S.W.2d 757, 759 (Tex. App.—Dallas 1986, no writ).

The substituted service order must be followed strictly. *Smith v. Commercial Equipment Leasing Co.*, 678 S.W.2d 917, 918 (Tex. 1984); *Becker v. Russell*, 765 S.W.2d 899 (Tex. App.—Austin 1989, no writ) (return failed to state that rule 106 order was posted at front door with citation and petition as required by order); *Hurd v. D.E. Goldsmith Chemical Metal Corp.*, 600 S.W.2d 345 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ) (return failed to state that address at which papers were left was defendant's usual place of business).

Service on the defendant's agent, unless the agent is affirmatively shown to be the defendant's agent for service of process, will not suffice. *Encore Builders v. Wells*, 636 S.W.2d 722,

723 (Tex. App.—Corpus Christi 1982, no writ). Service on the defendant's attorney, without explicit authorization, does not constitute effective service. The court can give this explicit authorization under Tex. R. Civ. P. 106(b) if the court finds that this service will be reasonably effective to give the defendant notice of the suit. *See Leach v. City National Bank of Laredo*, 733 S.W.2d 578, 580 (Tex. App.—San Antonio 1987, no writ).

Caveat: Service under Tex. R. Civ. P. 106(b) is not effective on a corporation. For substituted service on a corporation, see the discussion in section 16.11:1 below.

See forms 16-1 through 16-4 in this chapter for forms for substituted service.

§ 16.5 Service by Publication

§ 16.5:1 Grounds for Citation by Publication

Citation by publication is authorized if—

1. the residence of any party defendant is unknown to the plaintiff;
2. the defendant is a transient person and after due diligence the plaintiff has been unable to locate him; or
3. the defendant is absent from or is a nonresident of Texas and the plaintiff has attempted but failed to obtain personal service of nonresident notice pursuant to rule 108.

Tex. R. Civ. P. 109. *See also Wood v. Brown*, 819 S.W.2d 799, 800 (Tex. 1991).

In most jurisdictions, the clerk will issue a citation based on the affidavit, and a motion and court order will not be required (the approach used in this manual). Because a few courts require a motion, the attorney should ascertain what the court (or clerk) will require. Although Tex. R. Civ. P. 109 permits the plaintiff or his agent or attorney to execute the affidavit, the attorney should avoid swearing to facts about the defendant's whereabouts. The affidavit should be executed by the plaintiff or his agent. The attorney should not swear to the truth of the facts on which the application is based, especially if the information is derived from a client or other person; only persons with actual knowledge should sign affidavits incorporating these facts. See section 1.32:5 in this manual. Before preparing the affidavit, the attorney should discuss with the plaintiff the diligence used in trying to learn the defendant's whereabouts, the basis for statements that the defendant is out of the state, efforts to serve the defendant under Tex. R. Civ. P. 108, and other relevant facts, for inclusion in the affidavit.

Suits against unknown shareholders of a defunct corporation or against unknown heirs of a decedent may be based on service by publication. Tex. R. Civ. P. 111. It is the court's duty, before granting judgment, "to inquire into the sufficiency of the diligence exercised in attempting to ascertain the residence or whereabouts of the defendant." Tex. R. Civ. P. 109. The affidavit for service by publication should specify facts showing diligence instead of merely reciting that diligence was used.

Diligence is not shown and a judgment of foreclosure and tax sale can be set aside after citation by publication if a search of county tax rolls or attorney's files would have produced the taxpayer's address; a search of city records may be insufficient. *Doue v. City of Texarkana*, 786 S.W.2d 474, 477 (Tex. App.—Texarkana 1990, writ denied).

§ 16.5:2 Alternative to Service by Publication

On motion, the court may order a method of service different from publication if the alternative would be as likely as publication to give the

defendant actual notice. Tex. R. Civ. P. 109a. Citation by publication should be used only as a last resort when other methods are impractical.

§ 16.5:3 Problems with Service by Publication

Citation by publication will not be effective to support an in personam judgment against a nonresident of Texas. *Sgitcovich v. Sgitcovich*, 241 S.W.2d 142, 146 (Tex. 1951), *cert. denied*, 342 U.S. 903 (1952). Even a slight defect in the procedure may render a default judgment invalid. *Fleming v. Hernden*, 564 S.W.2d 157, 159 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.). If the plaintiff obtains a judgment rendered on service of citation by publication without the defendant's having appeared in person or by an attorney of his own selection, the court on good cause can grant a new trial based on an affidavit filed within two years after signing of the judgment. Tex. R. Civ. P. 329a.

§ 16.5:4 Procedure for Service by Publication

The citation must be printed in a newspaper published in the county in which the suit is pending (or if the suit involves land, the county in which the land is located) or, if no newspaper is published there, in an adjoining county. The citation must be published once a week for four consecutive weeks, the first publication being at least twenty-eight days before the return date. Tex. R. Civ. P. 116. Citation is sent to the sheriff or constable of the county of publication or to the clerk of the court in which the case is pending. Tex. R. Civ. P. 116.

The officer's return includes a printed copy of the publication and states when it was published. Tex. R. Civ. P. 117. Requisites of the citation are in Tex. R. Civ. P. 114. Usually the attorney submits the plaintiff's affidavit to the clerk of the court in which the case is pending, who issues the citation and may also serve the citation by publication. Some courts have required a motion and hearing before ordering citation by publication. For an affidavit and a letter to the clerk requesting citation by publication, see forms 16-7 and 16-8 in this chapter.

§ 16.5:5 Appointment of Attorney Ad Litem

If service has been made by publication and no answer has been filed or appearance entered within the prescribed time, the court must appoint an attorney ad litem to defend the suit on behalf of the defendant. Tex. R. Civ. P. 244; *see Cahill v. Lyda*, 826 S.W.2d 932, 933 (Tex. 1992). See forms 16-11 through 16-13 in this chapter for a motion for appointment of attorney ad litem and for orders appointing and discharging the attorney.

§ 16.5:6 Citation by Publication by Private Process Server Questionable

Although Tex. R. Civ. P. 103 authorizes service (without restricting the type of service) by any person authorized by law or by written order of the court who is not less than eighteen years old, Tex. R. Civ. P. 116 states that "[t]he citation, when issued, shall be served by the sheriff or any constable of any county of the State of Texas or by the clerk of the court in which the case is pending." A close reading of these two rules raises a question of whether citation by publication can be made by a process server other than a sheriff, constable, or clerk of the court.

§ 16.6 Service by Officer or Process Server

The clerk will typically send the citation to the sheriff or constable for service, but any other person eighteen years or older authorized by law or by written court order may be used instead. The order authorizing a person to serve process

may be made without written motion, and no fee may be imposed for issuance of the order. Service by registered or certified mail, if requested, must be made by the clerk of the court in which the case is pending. Tex. R. Civ. P. 103.

Often, a constable or a private process server can effect service more quickly than a sheriff. Sheriffs are usually busy handling criminal matters and other emergencies. The plaintiff's attorney may request that the clerk send documents to be served directly to the constable, sheriff, or private process service or back to the attorney. Having the citation sent to the attorney is recommended because the attorney or his staff can check the documents for accuracy before forwarding them to the appropriate officer, and this method provides an opportunity for the attorney to ask the person serving process to send the return back to the attorney instead of the clerk to make certain the return is correct. If additional instructions are needed, they can be provided. This procedure provides a more direct and personal contact with the officer to effect service and learn more quickly about problems the officer may be having in effecting service.

Sheriffs and constables are not restricted to service in their own counties. Citation and other notices "may be served anywhere by (1) any sheriff or constable or other person authorized by law or, (2) by any person authorized by law or by written order of the court who is not less than eighteen years of age." Tex. R. Civ. P. 103. Tex. Loc. Gov't Code § 86.021(d) provides that a constable may execute process anywhere in the county in which his precinct is located or in a contiguous county, "[r]egardless of the Texas Rules of Civil Procedure," but the constable may not retain a fee for serving civil process. There is no statute governing where a sheriff may serve process. The Local Government Code provides that the sheriff "shall execute all process and precepts directed to the sheriff by legal authority." Tex. Loc. Gov't Code § 85.021(a).

§ 16.7 Procedure for Service

§ 16.7:1 Involvement of Attorney and Staff

The procedure recommended in this manual calls for the creditor's attorney to be more involved in service of process than is customary in most other kinds of litigation. This additional work is warranted because it helps ensure that service is accomplished correctly. Also, the procedure will be more efficient because it will avoid last-minute, time-consuming corrective measures that might otherwise be required.

Strict compliance with applicable statutory provisions and the court's orders regarding issuance and service of citation is required to support a default judgment. Virtually any deviation will be sufficient to set aside a default judgment on appeal by writ of error. *See, e.g., McKanna v. Edgar*, 388 S.W.2d 927 (Tex. 1965).

§ 16.7:2 Filing of Petition

If the defendant is to be served in the county in which the petition is filed, the clerk will typically collect the officer's fee at the time of filing and forward the citation directly to the officer. If the defendant is to be served in another county, the clerk usually will not collect the officer's fee but will send the citation to the plaintiff's attorney for the attorney to forward, with the fee for service, to the out-of-county officer. It is recommended that in *every* case, including same-county service, the attorney request the clerk to send the citation to the attorney's office. This procedure allows the attorney to directly contact the sheriff or constable when forwarding the citation, so that he can provide specific information about the defendant's location and request that the return be sent to the attorney rather than to the clerk. See the letter at form 16-9 in this chapter. It also allows the attorney to monitor service more efficiently; see section 16.7:3 below.

§ 16.7:3 Service of Citation

When service has been accomplished, the answer day should be calculated (see section 16.15:4 below) and calendared. The attorney should ask the officer to send the completed return to the attorney rather than the clerk. The attorney should check the return for correctness and completeness, including that the correct party was served, that the capacity of the party served is shown if appropriate, and so forth (see the checklist at section 16.8), especially if a default judgment will be sought or if substituted service or service on an agent was used. The return should then be forwarded to the clerk for filing.

Processing the return through the law office removes the need to check it at the courthouse and lessens the likelihood of a later challenge to its sufficiency. It also provides an efficient way to learn the date of service and to compute the answer day, because the attorney will then not have to call the clerk for that information.

If the officer is unable to serve the citation, the attorney should request that the officer return it to the attorney and not to the court. The court will likely be unwilling to reissue the same citation to the officer if the attorney learns new information regarding the defendant's whereabouts, and a fee for an alias or pluries citation will be required.

The attorney should determine the correct filing fee in advance by contacting the clerk's office (the most reliable method) or by consulting an up-to-date schedule that has been provided by the clerk. Although basic fees are established by various statutes (see, for example, Tex. Loc. Gov't Code § 118.052), the exact fee is usually determined more easily by asking the clerk. It is also safer to do so, because most clerks will return a petition unfiled if the tendered fee is insufficient, and some clerks will not accept a petition if the tendered amount exceeds the correct fee. The same procedure should be followed for sheriff's and constable's fees and is especially advisable when working with out-of-county clerks or officers.

§ 16.7:4 Alias or Pluries Citation

Citations do not expire under Texas law. Officers, however, will typically return an unserved citation to the clerk or plaintiff's attorney after several unsuccessful service attempts have been made. Unless the first citation is defective in some manner, however, it should still be valid for service.

If the original citation has been returned unserved to the clerk, the plaintiff's attorney may request that a new citation be issued. The first new citation issued is called an "alias" citation; the second, a "pluries" citation; a subsequent renewal is called "second pluries citation" and so forth. Issuance of an alias or other subsequent citation requires payment of an additional fee.

There is no requirement that a new citation be issued when substituted service is sought. *See* Tex. R. Civ. P. 106(b).

§ 16.7:5 Procedure for Substituted Service

The officer may report that he is unable to serve the defendant in person or by mail as required by the citation but believes that he can serve an appropriate person other than the defendant under an order for substituted service. If, after communicating with the officer, the attorney deems substituted service appropriate, he should send the officer an affidavit for the officer to sign, drafted to describe the specific situation. When returned, the completed affidavit should be attached to a motion for substituted service and the motion and a proposed order should then be presented to the judge.

If the motion is denied, the judge or the clerk will usually notify the attorney of the reason for the denial. The attorney should request that, if the motion is granted, the citation be sent to the officer with the order for substituted service attached, with a copy to the attorney. Issuance of another citation, though not required, ensures that the order will be attached to a citation and that the officer will not have to search his files for the appropriate citation. Substituted service is discussed at section 16.4 above. See forms 16-1 through 16-4 in this chapter for forms for substituted service.

§ 16.7:6 Service by Certified or Registered Mail

Service of citation may be made by registered or certified mail, return receipt requested. The court clerk mails the citation, with a copy of the petition attached. Tex. R. Civ. P. 103, 106. The primary problem with service of citation by certified or registered mail is that there is no way to compel the defendant to sign for the letter; he is free to refuse delivery. Although there is no requirement that delivery be restricted to the addressee only, it is the better practice to do so.

The signature on the green return card must be that of the defendant or his authorized agent for service, unless a "rule 106(b)" order is obtained for substituted service. *See American Universal Insurance Co. v. D.B.&B., Inc.*, 725 S.W.2d 764 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.) (no showing person who signed was authorized agent); *Pharmakinetics Laboratories, Inc. v. Katz*, 717 S.W.2d 704, 706 (Tex. App.—San Antonio, 1986, no writ) (return receipt insufficient when addressed to defendant's agent but signed by unidentified person). The return of service by mail must also meet all the requirements governing the return of personal service and must contain the return receipt with the address's signature. Tex. R. Civ. P. 107(c); *see also Metcalf v. Taylor*, 708 S.W.2d 57, 58–59 (Tex. App.—Fort Worth 1986, no writ) (return failed to show either when citation was served or manner of service and was not signed by officer); *Melendez v. John R. Schatzman, Inc.*, 685 S.W.2d 137, 138 (Tex. App.—El Paso 1985, no writ). The return need not state the actual date of delivery, however, if the postmark on the return receipt is clear. *Nelson v. Remmert*, 726 S.W.2d 171, 172 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

The use of service by mail as a form of substituted service was approved by the supreme court in *State Farm Fire & Casualty Co. v. Costley*, 868 S.W.2d 298 (Tex. 1993). See section 16.4 above for a discussion of substituted service.

§ 16.8 Return of Service

Before filing the officer's return with the clerk, the attorney should review the return to make sure it meets the requirements of applicable law and will, if appropriate, support alternate service or service on an agent. A person who knowingly or intentionally falsifies a return of service may be prosecuted for tampering with a governmental record as provided by chapter 37 of the Texas Penal Code. Tex. Civ. Prac. & Rem. Code § 17.030(d).

1. The citation must be endorsed with the hour and date the officer or other authorized person received it, the manner in which he executed it, and the time and place the process was served; it must be signed officially by the officer or authorized person. The citation must be executed and returned "without delay." Tex. R. Civ. P. 16, 105.
2. The officer or authorized person must complete a return of service that may, but need not, be endorsed on or attached to the citation. Tex. R. Civ. P. 107(a). *See also* Tex. Civ. Prac. & Rem. Code § 17.030(b)(1)(A).

3. The return, along with any document to which it is attached, must include—

   a. the cause number and case name;

   b. the court in which the case is filed;

   c. a description of what was served;

   d. the date and time the process was received for service;

   e. the person or entity served;

   f. the address served;

   g. the date of service or attempted service;

   h. the manner of delivery of service or attempted service;

   i. the name of the person who served or attempted to serve the process; and

   j. if the person who served or attempted to serve the process is a process server certified under order of the Texas Supreme Court, his identification number and the expiration date of his certification.

   Tex. R. Civ. P. 107(b). *See also* Tex. Civ. Prac. & Rem. Code § 17.030(b)(2).

4. If the defendant is a corporation or partnership, the return must show the name of the individual to whom the citation and petition were delivered and that person's title or capacity. *See Cox Marketing, Inc. v. Adams*, 688 S.W.2d 215, 218 (Tex. App.—El Paso 1985, no writ).

5. If the citation was served by mail under rule 106, the return must contain the return receipt (green card), signed by the addressee. Tex. R. Civ. P. 107(c).

6. If the citation was not served, the return must show the diligence used by the officer or authorized person to execute the citation, the cause of failure to execute it, and where the defendant is to be found, if ascertainable. Tex. R. Civ. P. 107(d).

7. The citation must be signed by the officer or authorized person who serves or attempts to serve the citation. If signed by someone other than a sheriff, constable, or clerk of the court, the return must either be verified or signed under penalty of perjury. A return signed under penalty of perjury must include the statement prescribed in Tex. R. Civ. P. 107(e). *See* Tex. R. Civ. P. 107(e). *See also* Tex. Civ. Prac. & Rem. Code § 17.030(c).

8. If the citation was served by an alternative method authorized by the court (*see* Tex. R. Civ. P. 106), the proof of service must be made in the manner ordered by the court. Tex. R. Civ. P. 107(f).

9. The return and any document to which it is attached must be filed with the court and may be filed electronically or by facsimile, if available. Tex. R. Civ. P. 107(g). *See also* Tex. Civ. Prac. & Rem. Code § 17.030(b)(1)(B).

10. If substituted service will be requested, the first return must clearly show the attempted service by regular methods. *See* Tex. R. Civ. P. 106, 107.

11. If the citation was served on the secretary of state because the corporate defendant's registered agent could not be found (Tex. Bus. Orgs. Code § 5.251), the return for the first, unserved citation must show "the diligence used by the officer in executing the citation or the cause of his failure to execute it." *David A. Carl Enter-*

prises v. Crow-Shutt # 14, 553 S.W.2d 118, 120 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ). See section 16.11:1 below. A showing of diligence requires a specific factual statement describing how the officer actually attempted to serve the defendant, not merely a general statement that reasonable diligence was used. *See Medford v. Salter*, 747 S.W.2d 519, 520 (Tex. App.—Corpus Christi 1988, no writ).

12. If the citation was served on the secretary of state for any reason, the return must show that the secretary of state was served with duplicate copies of the process. Tex. Bus. Orgs. Code § 5.252; Tex. Civ. Prac. & Rem. Code § 17.045(a).

§ 16.9 Out-of-State Service on Individual

A resident defendant's absence from the state does not prevent his being served; the rule provides for service by a disinterested person who is at least eighteen years of age with the same effect as if he had been served with citation within the state. Service on a nonresident individual can also be had. *See* Tex. R. Civ. P. 108. Also, if the defendant engaged in business in Texas, service can be had under the long-arm statute, Tex. Civ. Prac. & Rem. Code §§ 17.041–.045, discussed at section 16.14 below. See forms 14-14 through 14-20 in this manual for clauses for party designation.

§ 16.10 Service on Partnership

Service on any partner will support a judgment against the partnership and against the individual partner actually served. Tex. Civ. Prac. & Rem. Code §§ 17.022, 31.003. If the partnership has an office, place of business, or agency in a state or county other than that in which the partnership "resides," citation may be served on any agent or clerk employed there if the action grew out of that business and the suit was brought in that county. Tex. Civ. Prac. & Rem. Code § 17.021(a). Service on an agent or clerk is also permissible if no partner can be found "after diligent search and inquiry." Tex. Civ. Prac. & Rem. Code § 17.021(b). A foreign partnership engaging in business in Texas may be served under the long-arm statute, discussed at section 16.14 below. Individual liability for partnership debts is discussed briefly at sections 6.26 through 6.28 in this manual. See forms 14-17 and 14-18 for clauses for party designation.

If a default judgment against a partnership or unincorporated association is attacked by writ of error, the judgment will not stand unless the plaintiff shows strict compliance with the requirements of Tex. Civ. Prac. & Rem. Code § 17.021(a). *See Ashley Forest Apartments (Lindsay Enterprises) v. Almy*, 762 S.W.2d 293, 294–95 (Tex. App.—Houston [14th Dist.] 1988, no writ).

The citation must also comply with the requirement of Tex. R. Civ. P. 99 that it be "directed to the defendant." To withstand an attack on a default judgment against a partnership, the citation must be directed to the partnership and not just a partner. *ISO Production Management 1982, Ltd. v. M&L Oil & Gas Exploration, Inc.*, 768 S.W.2d 354, 355–56 (Tex. App.—Waco 1989, no writ). A judgment may stand against an individual partner not served if he files an answer or otherwise appears either personally or through his attorney. *Bentley Village, Ltd. v. Nasits Building Co.*, 736 S.W.2d 919, 923 (Tex. App.—Tyler 1987, no writ).

Service may be had on a limited partnership by serving any general partner or the registered agent for service of process. Tex. Bus. Orgs. Code §§ 5.201, 5.255(2). If the registered agent is an organization as described in Tex. Bus. Orgs. Code § 5.201(b)(2)(B), any employee of

the organization may receive service at the registered office. Tex. Bus. Orgs. Code § 5.201(d). If the limited partnership fails to appoint or maintain an agent for service of process or if the registered agent cannot be found with reasonable diligence, service may be had through the secretary of state. Tex. Bus. Orgs. Code § 5.251. No special statutes exist regarding service on a limited liability partnership. The rules applicable to partnerships apply.

§ 16.11 Service on Business Corporation

§ 16.11:1 Texas Corporation

The president, all vice-presidents, and the registered agent are agents for service on a corporation, and citation may be served on any one of them. Tex. Bus. Orgs. Code §§ 5.201, 5.255(1). The record must show that the person to be served is one of the statutorily designated persons. If neither the pleading nor the citation show that the person served was the statutory designee, a default judgment will not stand. *Cox Marketing, Inc. v. Adams*, 688 S.W.2d 215, 217 (Tex. App.—El Paso 1985, no writ).

If the registered agent is an organization as described in Tex. Bus. Orgs. Code § 5.201(b)(2)(B), any employee of the organization may receive service at the registered office. Tex. Bus. Orgs. Code § 5.201(d). If the corporation has failed to appoint or maintain a registered agent or if with reasonable diligence the registered agent cannot be found at the registered office, service may be effected on the Texas secretary of state. Tex. Bus. Orgs. Code § 5.251. *See also* Tex. Bus. Orgs. Code § 5.252. Because a specific procedure is provided by the Business Organizations Code, the attorney should not use the substituted service procedure set out in Tex. R. Civ. P. 106 for a corporation if attempts to serve the corporation have been unsuccessful. In such a case, "the officer's [unserved] return must itself show the diligence used by the officer to execute the citation and the cause of his failure to execute." For service on the secretary of state to support a default judgment, there must be "affirmative proof" in the record to show reasonable diligence, and no presumption will be indulged to aid the officer's return. *David A. Carl Enterprises v. Crow-Shutt # 14*, 553 S.W.2d 118, 120 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ); *see also Advertising Displays, Inc. v. Cote*, 732 S.W.2d 360, 363 (Tex. App.—Houston [14th Dist.] 1987, no writ) (describing efforts that demonstrated "reasonable diligence").

The record must show that the secretary of state forwarded the process, notice, or demand by certified mail, with return receipt requested, addressed to the corporation at its most recent address on file with the secretary of state. Tex. Bus. Orgs. Code § 5.253. If a defendant corporation fails to keep the secretary of state notified of its current address, a default judgment based on the faulty address will stand. *Tankard-Smith, Inc. General Contractors v. Thursby*, 663 S.W.2d 473, 475–76 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.); *see TXXN, Inc. v. D/FW Steel Co.*, 632 S.W.2d 706, 707–08 (Tex. App.—Fort Worth 1982, no writ). Also, absent fraud or mistake, the failure of the corporation to claim the notice sent by the secretary of state will not void a default judgment. *Zuyus v. No'Mis Communications, Inc.*, 930 S.W.2d 743, 746–47 (Tex. App.—Corpus Christi 1996, no writ).

§ 16.11:2 Foreign Corporation Required to Register to Conduct Business in Texas

If a foreign corporation is transacting business in Texas, it may be required to register and have a registered agent in Texas. Tex. Bus. Orgs. Code §§ 9.001, 9.004. Service on such a corporation is the same as for a domestic corporation—on the president, any vice-president, or the registered agent. Tex. Bus. Orgs. Code

§§ 5.201, 5.255(1). If the registered agent is an organization as described in Tex. Bus. Orgs. Code § 5.201(b)(2)(B), any employee of the organization may receive service at the registered office. Tex. Bus. Orgs. Code § 5.201(d). If there is no registered agent or if he cannot be found at the registered office with reasonable diligence, the secretary of state is an agent for service. Tex. Bus. Orgs. Code § 5.251. See section 16.11:1 above.

For a default judgment against a foreign corporation to stand, an affirmative showing must be made by the plaintiff on the face of the record, by proof independent of the allegations in the petition, recitals in the citation, or statements in the officer's return, that the person served was in fact the defendant's agent for service. *NBS Southern, Inc. v. Mail Box, Inc.*, 772 S.W.2d 470, 471–72 (Tex. App.—Dallas 1989, writ denied); *but see Conseco Finance Servicing v. Klein Independent School District*, 78 S.W.3d 666, 671–72 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (holding that a recital in the petition naming the registered agent is sufficient prima facie evidence unless the defaulted defendant proves otherwise). A default judgment against a foreign corporation was held to be void when the pleadings referred only to the defendant's "address" (a post office box) and not to the "home office"; that the defendant received actual notice was irrelevant. *Bank of America, N.T.S.A. v. Love*, 770 S.W.2d 890, 891–92 (Tex. App.—San Antonio 1989, writ denied); *see also Carjan Corp. v. Sonner*, 765 S.W.2d 553, 555 (Tex. App.—San Antonio, 1989, no writ) (citation sent to "last known mailing address" did not establish that citation was sent to "home office" address when petition did not indicate that the address was "home office"); *Seeley v. KCI USA, Inc.*, 100 S.W.3d 276 (Tex. App.—San Antonio 2002, no pet.) (court refused to infer that the address listed in the petition was the defendant's home office address); *but see Mahon v. Caldwell, Haddad, Skaggs, Inc.*, 783 S.W.2d 769, 771 (Tex. App.—Fort Worth 1990, no writ) (service on defendant individually and as a partner at his "place of business" rather than at "home or home office" address complied with long-arm service requirements; if only one address given in a contract as the business address, the home business address is the "home address" or "home office"). The better practice, however, is to state in the petition and citation that the defendant's address is the defendant's "home or home office" address. *See World Distributors, Inc. v. Knox*, 968 S.W.2d 474, 477–78 (Tex. App.—El Paso 1998, no writ).

If a foreign corporation is formed when a certificate of formation (or similar instrument) filed with a foreign governmental authority takes effect, the law of the jurisdiction in which the foreign governmental authority is located governs the formation and internal affairs of the corporation. Tex. Bus. Orgs. Code § 1.102. If the foreign corporation is not formed by the filing instrument, the law governing the corporation's formation and internal affairs is that of the jurisdiction of formation. Tex. Bus. Orgs. Code § 1.103. See Tex. Bus. Orgs. Code § 1.002(43) for a definition of the term *formation*.

§ 16.11:3 Foreign Corporation Not Having Certificate of Authority to Conduct Business in Texas

In many cases that might give rise to a collection suit (for example, conducting an isolated transaction completed within thirty days and not in the course of a number of repeated, like transactions), a foreign corporation may do business in Texas without being required to register. *See* Tex. Bus. Orgs. Code § 9.002. In these cases, citation may be served under the Texas long-arm statute, discussed at section 16.14 below.

If a foreign corporation's registration is revoked, the secretary of state is the agent of the foreign corporation for service of process. Tex. Bus. Orgs. Code § 5.251.

§ 16.11:4 Professional Corporation

The Texas Business Organizations Code does not contain specific provisions regarding service on a professional corporation. Rules applicable to a for-profit corporation, therefore, apply. Tex. Bus. Orgs. Code § 2.109. See section 16.11:1 above.

§ 16.11:5 Allegations in Pleadings

Form 14-16 in this manual contains party designations for a suit against a corporate defendant.

§ 16.12 Service on Nonprofit Corporation

§ 16.12:1 Texas Nonprofit Corporation

Service on a nonprofit corporation may be effected by serving the president, any vice-president, or the registered agent of the corporation. Tex. Bus. Orgs. Code §§ 5.201, 5.255(1). If a committee is authorized to perform the corporation's chief executive function, each member of the committee is an agent of the corporation. Tex. Bus. Orgs. Code § 5.255(5). If the registered agent is an organization as described in Tex. Bus. Orgs. Code § 5.201(b)(2)(B), any employee of the organization may receive service at the registered office. Tex. Bus. Orgs. Code § 5.201(d). If there is no registered agent or he cannot be found at the registered office with reasonable diligence, the secretary of state can be served. Tex. Bus. Orgs. Code § 5.251. See section 16.11:1 above.

§ 16.12:2 Foreign Nonprofit Corporation

Citation for a foreign nonprofit corporation authorized to transact business in Texas may be served on the president, any vice-president, the registered agent, or any member of a committee performing the chief executive function of the corporation. Tex. Bus. Orgs. Code §§ 5.201, 5.255(1), (5). If the registered agent is an organization as described in Tex. Bus. Orgs. Code § 5.201(b)(2)(B), any employee of the organization may receive service at the registered office. Tex. Bus. Orgs. Code § 5.201(d). If there is no registered agent or he cannot be found at the registered office with reasonable diligence, the secretary of state is an agent for service. Tex. Bus. Orgs. Code § 5.251. See section 16.11:2 above. A corporation engaging in business in Texas without maintaining a designated registered agent in the state may be served under the long-arm statute, discussed at section 16.14 below.

§ 16.13 Service on Other Business Entities

§ 16.13:1 Professional Association

Service on a professional corporation may be effected on each person who is a governing person of the corporation or the registered agent. Tex. Bus. Orgs. Code §§ 5.201, 5.255(4). If the registered agent is an organization as described in Tex. Bus. Orgs. Code § 5.201(b)(2)(B), any employee of the organization may receive service at the registered office. Tex. Bus. Orgs. Code § 5.201(d).

§ 16.13:2 Limited Liability Company

Service on a limited liability company may be effected on the managers or members, if any, or on the registered agent of the company. Tex. Bus. Orgs. Code §§ 5.201, 5.255(3). If the registered agent is an organization as described in Tex. Bus. Orgs. Code § 5.201(b)(2)(B), any employee of the organization may receive service at the registered office. Tex. Bus. Orgs. Code § 5.201(d). If the company fails to appoint or maintain an agent or the agent cannot be found through reasonable diligence, service may

be effected through the secretary of state. Tex. Bus. Orgs. Code § 5.251.

§ 16.13:3 Service on Association or Joint-Stock Company

Citation for a domestic or foreign unincorporated joint-stock company or association may be served on the president, secretary, treasurer, or general agent. Tex. Rev. Civ. Stat. art. 6134. But see Tex. Civ. Prac. & Rem. Code § 17.023, which provides that citation may be served by (1) serving the president, vice-president, cashier, assistant cashier, or treasurer of the association; (2) serving the local agent of the association in the county in which the suit is brought; or (3) leaving a copy of the citation at the principal office of the association during office hours. If no officer on whom citation may be served resides in the county in which suit is brought and the association has no agent in that county, citation may be served on any agent representing the association in Texas.

Party designations for pleading an unincorporated entity as a defendant are at form 14-19 in this manual.

§ 16.14 Service under Texas Long-Arm Statute

§ 16.14:1 Jurisdictional and Statutory Reach of Long-Arm Statute

By its terms, the Texas long-arm statute reaches any foreign corporation, nonresident natural person, foreign partnership, foreign association, or foreign joint-stock company doing business in Texas. Tex. Civ. Prac. & Rem. Code §§ 17.041–.045. "Doing business" is defined, albeit nonexclusively, in Tex. Civ. Prac. & Rem. Code § 17.042. See also *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199 (Tex. 1985), in which the supreme court dispensed entirely with the statutory requirements of doing business in Texas in order to find jurisdiction over the defendant because the defendant sold a product that could be reasonably expected to find its way through the stream of commerce to Texas.

As a practical matter, the reach of long-arm jurisdiction has become coextensive with the "minimum contacts" doctrine first expressed by the U.S. Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

The requirements for exercise of long-arm jurisdiction are as follows:

1. The nonresident defendant must have purposefully established minimum contacts with Texas. In this regard, there must be a substantial connection between the defendant and Texas arising out of the action or conduct of the defendant in Texas. If specific jurisdiction is asserted, the cause of action must arise out of or relate to the defendant's contacts with Texas; if general jurisdiction is asserted, there must have been continuous and systematic contacts between the defendant and Texas and a showing of substantial activities by the defendant in Texas.
2. The assertion of personal jurisdiction must comport with fair play and substantial justice. The defendant must present a compelling case that the presence of some consideration would render jurisdiction unreasonable.

CSR Ltd. v. Link, 925 S.W.2d 591, 594–95 (Tex. 1996); *Guardian Royal Exchange Assurance v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226–29 (Tex. 1991).

§ 16.14:2 Person to Be Served

Service on Registered Agent: The registered agent of an entity may be served on behalf of the entity. Tex. Bus. Orgs. Code § 5.201(b)(1). The registered agent may be (1) an individual who is

a Texas resident and has consented to serve as the registered agent of the entity or (2) an organization that is registered or authorized to do business in Texas and has consented to serve as the registered agent of the entity. Tex. Bus. Orgs. Code § 5.201(b)(2). If the registered agent is an organization as described in Tex. Bus. Orgs. Code § 5.201(b)(2)(B), any employee of the organization may receive service at the registered office. Tex. Bus. Orgs. Code § 5.201(d). The designation or appointment of a person as registered agent by an organizer is an affirmation that the person named in the filing instrument has consented to serve in that capacity. Tex. Bus. Orgs. Code § 5.2011.

Service on Secretary of State: Citation may be served on the secretary of state in the following situations:

1. The defendant does not maintain a place of regular business in Texas or a designated agent, regardless of any statutory requirement. Service on the secretary of state is permissible only if service cannot be effected on the person in charge of the defendant's business in Texas (see discussion above). *See McKanna v. Edgar*, 388 S.W.2d 927, 929 (Tex. 1965).
2. The nonresident defendant has not appointed or maintained in Texas a designated agent for service when required to do so.
3. Two unsuccessful attempts have been made on different business days to serve each designated registered agent.
4. The defendant is not required to designate an agent for service, but becomes a nonresident after a cause of action arises but before the cause is matured by suit in a court of competent jurisdiction.

Tex. Civ. Prac. & Rem. Code § 17.044.

If the secretary of state is served, duplicate copies of the citation and petition must be delivered and the pleading must state the name and home or home office address of the defendant. Tex. Civ. Prac. & Rem. Code § 17.045(a). To sustain a default judgment, the record must contain proof, such as a certificate from the secretary of state, that the defendant was in fact served by the secretary of state. *Whitney v. L&L Realty Corp.*, 500 S.W.2d 94, 96 (Tex. 1973). If the petition does not allege that the defendant performed a specific act in Texas, the defendant's evidence that he is a nonresident of Texas will negate jurisdiction. *Siskind v. Villa Foundation for Education, Inc.*, 642 S.W.2d 434, 438 (Tex. 1982). A default judgment based on long-arm service by the secretary of state will not be sustained unless the petition contains allegations that, if true, would make the defendant amenable to process by use of the long-arm statute, and there is proof in the record that the defendant was, in fact, served in the manner required by statute. *See McKanna*, 388 S.W.2d at 927; *South Mill Mushrooms Sales v. Weenick*, 851 S.W.2d 346, 350 (Tex. App.—Dallas 1993, writ denied).

To comply strictly with the long-arm statute, substituted service on an individual nonresident with no regular place of business and no registered agent for service of process in Texas requires that the secretary of state be provided with a home address, not a business address, for service. *Chaves v. Todaro*, 770 S.W.2d 944, 946 (Tex. App.—Houston [1st Dist.] 1989, no writ); *see also Bannigan v. Market Street Developers, Ltd.*, 766 S.W.2d 591, 592–93 (Tex. App.—Dallas 1989, no writ) (mailing petition to "merchant's notice address" did not strictly comply with statute, which requires plaintiff to provide secretary of state with "home" or "home office" address). The address must be current; providing the secretary of state with an out-of-date address for a nonresident doing business in Texas will render a default judgment void on direct attack. On a collateral attack, recitations of due service on the face of the judgment would probably suf-

fice. *Bludworth Bond Shipyard v. M/V Caribbean Wind*, 841 F.2d 646, 650 & n.7 (5th Cir. 1988).

It is not necessary that the secretary of state personally be served. *Capitol Brick, Inc. v. Fleming Manufacturing Co.*, 722 S.W.2d 399, 400 (Tex. 1986). For letters for service of citation on the secretary of state, see forms 16-5 and 16-6 in this chapter.

Service on Person in Charge of Nonresident Defendant's Business: If the defendant is not required to maintain a registered agent for service of process and the action arises from the nonresident's business in Texas, citation may be served on the person who, at the time of service, is in charge of any business in which the nonresident defendant is engaged in Texas. A copy of the process and notice of service on that person must be sent to the defendant or to the defendant's principal place of business by registered mail or by certified mail, return receipt requested. Tex. Civ. Prac. & Rem. Code §§ 17.043, 17.045(c), (d).

Service on Administrators of Nonresident Decedents and on Agents of Nonresident Incompetents: If the secretary of state was the agent for service of process on a nonresident decedent, the secretary of state is the agent for the decedent's nonresident administrator, executor, or personal representative or, if no personal representative is appointed, for the deceased's heir under the law of the foreign jurisdiction. Tex. Civ. Prac. & Rem. Code § 17.044(c).

If the secretary of state is an agent for service of process on a nonresident who is adjudged incompetent, the secretary of state is an agent for service of process on the nonresident's guardian or personal representative. Tex. Civ. Prac. & Rem. Code § 17.044(d).

If the secretary of state is served with duplicate copies of process as an agent for a nonresident administrator, executor, heir, guardian, or personal representative of a nonresident, the secretary of state shall require a statement of the person's name and address and shall immediately mail a copy of the process to the person. Tex. Civ. Prac. & Rem. Code § 17.045(e).

For letters for service of citation on the secretary of state, see forms 16-5 and 16-6 in this chapter.

§ 16.15 Sheriff or Constable Reluctant to Serve Citation

The attorney occasionally will encounter difficulty in getting a sheriff or constable to serve a defendant whose whereabouts are known. Often, the problems result from the officers' busy schedules. The attorney should provide the officer with as much information as possible and stay directly in touch with the officer to supply additional information as required.

§ 16.15:1 Statutory Remedies

The Local Government Code requires that "[t]he sheriff shall execute all process and precepts directed to the sheriff by legal authority and shall return the process or precept to the proper court on or before the date the process or precept is returnable," and, for failing to do so or for making a false return, the sheriff will be liable for up to $100 to the court to which the process is returnable and will be liable to the injured party for all damages sustained. Tex. Loc. Gov't Code § 85.021. A similar duty is imposed on constables, subjecting them to a fine of from $10 to $100 and costs, for the benefit of the injured party. Tex. Loc. Gov't Code §§ 86.021, 86.024. An officer commits a class A misdemeanor if, with intent to obtain a benefit or to harm another, he intentionally or knowingly violates a law relating to his office or employment. Tex. Penal Code § 39.02(a)(1), (b). See section 16.6 above regarding where sheriffs or constables may serve citations.

§ 16.15:2 Practical Remedies

When dealing with a sheriff or constable who seems reluctant to carry out his duty, it is more desirable to persuade him to act than to force the issue. Possible actions the attorney could take to encourage the officer to serve process on the defendant include—

1. writing the officer, advising him that the attorney knows the defendant is available for service, sending him copies of the statutes and rulings mentioned in section 16.15:1 above, and pointing out his liability;
2. writing or calling the county attorney in the officer's county, advising him of the situation and requesting that he attempt to persuade the sheriff or constable to carry out his statutory duty so that legal action against the officer can be avoided; and
3. writing the officer, advising him of the facts and requesting a copy of his bond or the name of the insurance company that provided his bond. A sheriff or constable cannot take office without furnishing a bond, and an officer who intends to be in office for any period will not want a claim made against his bond.

If suit was filed in a county other than that in which service is to be made, it is usually helpful to remind the officer that any action to enforce sanctions against him will be in the court in which suit was filed and not in his home county.

§ 16.15:3 Service by Private Process Server

It is not always necessary to rely on the local sheriff or constable to serve citation. A process server may be authorized to serve citation or the court may order service by any person eighteen years old or older, as long as that person is neither a party nor interested in the outcome of the litigation. Tex. R. Civ. P. 103. A process server certified under order of the Texas Supreme Court must include his identification number and the expiration date of his certification in his return of service. Tex. R. Civ. P. 107(b)(10). *See also* Tex. Civ. Prac. & Rem. Code § 17.030(b)(2)(J). The return must be signed by the authorized person serving or attempting to serve the citation, and, if that person is not a sheriff, constable, or clerk of the court, the return must either be verified or signed under penalty of perjury. Tex. R. Civ. P. 107(e). See Tex. R. Civ. P. 107(e) for the statement that must be included in a return signed under penalty of perjury.

§ 16.15:4 Appearance Deadline and Time for Default Judgment

In district and county courts, the deadline for the defendant's appearance is 10:00 A.M. on the Monday next after the expiration of twenty days after the date of service. Tex. R. Civ. P. 99. For justice courts, the deadline is 10:00 A.M. on the Monday next after the expiration of ten days from the date of service. Tex. R. Civ. P. 534.

If citation was effected by publication for a suit filed in district or county court, the deadline is 10:00 A.M. on the first Monday after the expiration of forty-two days from the date of issuance of the citation. If the case is filed in justice court, the deadline is the first day of the first term of court that convenes after the expiration of forty-two days from the date of issuance of citation. Tex. R. Civ. P. 114.

A default judgment cannot be granted until proof of service has been on file with the clerk for ten days, exclusive of the day of filing and the day of judgment. Tex. R. Civ. P. 107(h). A default judgment can be obtained when the defendant has been served with process outside the state under the provisions of rule 108 or 108a. *See* Tex. R. Civ. P. 107 cmt. If the defen-

dant places his answer in the mail before the deadline, he has met the deadline if the clerk receives it no later than ten days after the deadline. Tex. R. Civ. P. 5; *Milam v. Miller*, 891 S.W.2d 1, 2 (Tex. App.—Amarillo 1994, writ ref'd).

[Reserved]

Form 16-5

The petition must show grounds for service on the secretary of state and in many cases must therefore first be amended (for example, to allege efforts to serve the registered agent). Before sending the duplicate citations to the officer or other authorized person, the attorney should make sure the return to be signed will state that duplicate copies were served; if necessary, this information should be typed on the return before it is forwarded to the officer.

The secretary of state's office recommends that the attorney send the citation with petition attached to the constable, Precinct 1, of Travis County. The address, as of May 2012, is shown on this form. Two checks, one each to the constable and the secretary of state, should be included. Contact the respective offices for the correct amount of each fee. The secretary of state's citation unit may be called at 512-463-5560, and the Precinct 1 Travis County constable may be reached at 512-854-7510.

It is good practice, although not required, to obtain proof that the officer received the citation.

Letter Transmitting Citation for Service on Secretary of State

[Date]

[Name of constable]
Constable, Precinct 1, Travis County
1811 Springdale Road, Suite 120
Austin, TX 78721

Re: Order for Substituted Service
[style of case]
Cause No. **[number]**
[designation and location of court]

[Salutation]

Enclosed are duplicate copies of the citation and petition in the referenced cause to be served on the secretary of state of Texas. In addition to serving duplicate copies of the citation and petition, please deliver to the secretary of state the enclosed letter and check.

Please complete your return by inserting the hour and date of receipt and of service and the manner of service and by signing it in your official capacity. Please mail the completed return to me in the enclosed addressed, stamped envelope.

My check for your fee is enclosed. If you have a question or need additional information, please telephone me (collect if long distance).

Thank you for your immediate attention to this matter.

Sincerely yours,

_____

[Name of attorney]

Certified Mail No. **[number]**
Return Receipt Requested

Enc.

Prepare a letter to secretary of state (form 16-6).

§ 17.12 Statute of Frauds

§ 17.12:1 Statute of Frauds Generally

The phrase *statute of frauds* refers to a principle carried forward from English statutory law into several Texas statutes, providing that certain types of promises or agreements are not enforceable unless the promise or agreement or a memorandum of it is in writing and signed by the party to be charged or by someone lawfully authorized to sign for him.

The purpose of the statute of frauds is to prevent fraud and perjury in certain types of transactions by requiring the agreement to be evidenced by a signed writing. *Davis v. Crockett*, 398 S.W.2d 302, 305 (Tex. Civ. App.—Dallas 1965, no writ).

§ 17.12:2 Transactions Covered by Various Statutes of Frauds

Texas law requires that certain transactions be memorialized by a signed writing, including the following:

1. A contract for the sale of goods for a price of $500 or more. Tex. Bus. & Com. Code § 2.201(a).
2. A loan agreement in which the amount involved exceeds $50,000. Tex. Bus. & Com. Code § 26.02(b). This does not apply to credit card, charge card, or open-end account agreements. Tex. Bus. & Com. Code § 26.01(a)(2). See section 17.12:3 below for further requirements.
3. A promise by an executor or administrator to answer out of his own estate for the debt or damage due from his decedent. Tex. Bus. & Com. Code § 26.01(b)(1).
4. A promise by one person to answer for the debt, default, or miscarriage of another. Tex. Bus. & Com. Code § 26.01(b)(2).
5. An agreement made on consideration of marriage or on consideration of nonmarital conjugal cohabitation. Tex. Bus. & Com. Code § 26.01(b)(3).
6. A contract for the sale of real estate. Tex. Bus. & Com. Code § 26.01(b)(4).
7. A lease of real estate for a term longer than one year. Tex. Bus. & Com. Code § 26.01(b)(5).
8. An agreement which is not to be performed within one year from the making of the agreement. Tex. Bus. & Com. Code § 26.01(b)(6).
9. A promise or agreement to pay a commission for the sale or lease of an oil or gas mining lease, an oil or gas royalty, minerals, or a mineral interest. Tex. Bus. & Com. Code § 26.01(b)(7).
10. An agreement, promise, contract, or warranty of cure relating to medical care and results made by a physician or health-care provider other than a pharmacist. Tex. Bus. & Com. Code § 26.01(b)(8).
11. A security interest in collateral other than property in the possession or under the control of the secured party or, if the collateral is a certified security, that has been delivered to the secured party under Tex. Bus. & Com. Code § 8.301. Tex. Bus. & Com. Code § 9.203(b)(3)(A)–(D). (Note that revised chapter 9 contemplates creation of a security agreement by "authentication," which includes execution by means other than signing a writing. *See* Tex. Bus. & Com. Code § 9.102(a)(7); *see also* Tex. Bus. & Com. Code § 9.102(a)(70) (definition of "record").)

12. A trust in either real or personal property (with specified exceptions for personal property trusts). Tex. Prop. Code § 112.004.

13. A contract to employ a real estate broker to buy or sell real estate. Tex. Occ. Code § 1101.806(c).

14. A contract between a principal and a sales representative in which the sales representative is soliciting wholesale orders within the state. Tex. Bus. & Com. Code § 54.002.

15. A contract for legal services between attorney and client. Tex. Gov't Code § 82.065.

§ 17.12:3 Loan Agreement

The rights and obligations of the parties to a loan agreement controlled by Tex. Bus. & Com. Code § 26.02 are determined solely from the terms of the written loan agreement. Any prior or contemporaneous oral agreements between the parties are superseded by and merged into the loan agreement. Tex. Bus. & Com. Code § 26.02(c), (d).

A financial institution (as defined in Tex. Bus. & Com. Code § 26.02(a)(1)) must give written notice to the obligor of the applicable statute of frauds and merger provisions of section 26.02. This notice must be either in a separate writing signed by the debtor or obligor or incorporated into one or more of the loan documents signed by him.

The notice must be in type that is bold-faced, capitalized, underlined, or otherwise set out from surrounding written material so as to be conspicuous and must state substantially as follows:

> 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.

Tex. Bus. & Com. Code § 26.02(e). Although the statutory notice form above refers to subsequent agreements, the statute itself does not.

§ 17.12:4 Exceptions

In addition to specific statutory exceptions to the statute of frauds, oral contracts governed by the statute of frauds may be enforced in the following situations.

Main Purpose: If the promise is to pay the debt, default, or miscarriage of another, an oral promise is enforceable if (1) the promisor intentionally accepts primary responsibility for the debt, as opposed to acting as a surety, (2) the promise is supported by new and independent consideration, (3) the consideration for the promise is a benefit accruing directly to the promisor personally, and (4) the obtaining of that benefit is the promisor's main or leading purpose in making the promise. *Haas Drilling Co. v. First National Bank*, 456 S.W.2d 886, 890 (Tex. 1970); *Gulf Liquid Fertilizer Co. v. Titus*, 354 S.W.2d 378, 382–83 (Tex. 1962).

Promissory Estoppel: If the oral promise is to sign a written agreement that itself complies with the statute of frauds, it is enforceable if the promisor should have expected the promise to result in some definite and substantial injury to the promisee, the injury occurred, and the court must enforce the promise to avoid injustice. *Nagle v. Nagle*, 633 S.W.2d 796, 800 (Tex. 1982); *"Moore" Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934 (Tex. 1972).

Chapter 19

Trial Procedure

I. Pretrial and Trial Procedure Generally

§ 19.1 Affidavit Concerning Cost and Necessity of Services

In a civil action other than a sworn account procedure, "an affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary" unless a controverting affidavit is properly filed. Tex. Civ. Prac. & Rem. Code § 18.001(a), (b).

The procedure for affidavits concerning cost and necessity of services is governed by Tex. Civ. Prac. & Rem. Code § 18.001. The requirements are as follows:

1. The affidavit must be taken before an officer authorized to administer oaths, be made by either the person who provided the service or the person in charge of records showing the service provided and the charge, and contain an itemized statement of the service and charge. Tex. Civ. Prac. & Rem. Code § 18.001(c).
2. The affidavit must be served on all other parties at least thirty days before the presentation of evidence. Tex. Civ. Prac. & Rem. Code § 18.001(d).
3. A party intending to controvert a claim reflected by an affidavit so filed and served must serve a copy of the counteraffidavit on all other parties no later than thirty days after receipt of the copy of the affidavit and at least fourteen days before evidence is presented or, with leave of the court, at any time before the commencement of evidence at trial. Tex. Civ. Prac. & Rem. Code § 18.001(e).
4. The counteraffidavit must be taken before a person authorized to administer oaths, be made by a person qualified to testify in contravention of all or part of any of the matter contained in the initial affidavit, and give reasonable notice of the basis on which the party filing it intends to controvert the claim reflected by the initial affidavit. Tex. Civ. Prac. & Rem. Code § 18.001(f).

See form 19-3 in this chapter for an affidavit concerning cost and necessity of services.

§ 19.2 Service of Pleadings and Motions

§ 19.2:1 When Service Required

The first sentence of rule 21 provides that "[e]very pleading, plea, motion or application to the court . . . unless presented during a hearing or trial, shall be filed with the clerk of the court in writing, shall state the grounds therefor, shall set forth the relief or order sought, and at the same time a true copy shall be served on all other parties, and shall be noted on the docket." Tex. R. Civ. P. 21. Throughout the rule, service

is required on "all other parties" rather than on "the adverse party."

§ 19.2:2 Methods of Service

Service may be made by delivering a copy of the notice or document to the party to be served or his duly authorized agent or attorney of record. Delivery may be made in person, by agent, by courier receipted delivery, by registered or certified mail to the last known address of the person, by telephonic document transfer to the recipient's current telecopier number, or by a different method if directed by the court. Service by registered or certified mail must be made through the United States Postal Service and is complete when deposited if the mail is properly addressed and postpaid. Service by telephonic document transfer after 5:00 P.M. local time of the recipient is deemed served on the following day. Tex. R. Civ. P. 21a.

After one copy of a pleading is served on a party, that party may obtain another copy of the same pleading on tendering reasonable payment for copying and delivering. Tex. R. Civ. P. 21.

Service of notice may be made by a party to the suit or his attorney of record, by a sheriff or constable, or by any other person competent to testify. Tex. R. Civ. P. 21a.

If multiple parties are represented by different attorneys, one copy of the pleadings shall be delivered or mailed to each attorney in charge. Tex. R. Civ. P. 21. The depositing of multiple copies with the county clerk is not an alternative method of service.

§ 19.2:3 Extended Response Period

Three days are added to any prescribed response period if a notice, a motion, or any paper is served by telephonic document transfer or by mail. Tex. R. Civ. P. 21a.

§ 19.2:4 Prima Facie Evidence of Notice

Rule 21a requires the party or attorney of record to certify to the court in a signed writing on the filed instrument that notice has been served in compliance with rule 21a. Rule 21 contains an identical requirement. The certificate of service is prima facie evidence of service. Tex. R. Civ. P. 21a. See form 1-6 in this manual for a certificate of service.

Rule 21 does not require that the certificate of service detail the method of service used. *See* Tex. R. Civ. P. 21; *Smith v. Mike Carlson Motor Co.*, 918 S.W.2d 669, 673 (Tex. App.—Fort Worth 1996, no writ). Likewise, rule 21 does not require a showing of actual receipt of notice by opposing counsel. *Gonzales v. Surplus Insurance Services*, 863 S.W.2d 96, 101–02 (Tex. App.—Beaumont 1993, writ denied) (intended recipient engaged in instances of selective acceptance and refusal of certified mail related to case); *Costello v. Johnson*, 680 S.W.2d 529, 531 (Tex. App.—Dallas 1984, writ. ref'd n.r.e.) (record not required to affirmatively show receipt of notice). Rule 21a creates a presumption that a document that is properly sent is received by the addressee. Although the presumption may be rebutted by an offer of proof of nonreceipt, the presumption has the force of a rule of law in the absence of proof to the contrary. *Thomas v. Ray*, 889 S.W.2d 237, 238 (Tex. 1994); *Meek v. Bishop Peterson & Sharp, P.C.*, 919 S.W.2d 805, 809 (Tex. App.—Houston [14th Dist.] 1996, writ denied). Although not required by rules 21 and 21a, the better practice is to recite in the certificate of service the particular mode used to effect service and have available for the court's review evidence of service (for example, courier receipt, facsimile confirmation, certified mail receipt, domestic return receipt, certificate of mailing, or postal receipt). See rule 21a for a complete list of the methods of service.

§ 19.2:5 Time for Service

Unless a specific rule provides otherwise and unless the application is presented during a hearing or trial, any application for a court order and notice of hearing must be served on all other parties at least three days before the time specified for the hearing. Tex. R. Civ. P. 21. See Tex. R. Civ. P. 4 regarding computation of time.

§ 19.3 Setting of Pretrial Hearings

§ 19.3:1 Hearings Generally

The minimum time required for setting a matter for hearing varies both with the matter being heard and with local rules and practice.

Once the court clerk sets a hearing date and time, all parties must be notified in writing of the setting as soon as possible.

§ 19.3:2 Submission Docket

An increasing number of courts are handling pretrial motions with a submission docket. Instead of oral argument, the court considers only the motion and response submitted. Therefore a supporting brief may often prove useful.

The procedure regarding submission dockets varies among courts, but generally the procedure is to obtain a submission date and time, which is the official date and time when the court will consider the motion and response. This submission date is the functional equivalent of a hearing date for purposes of filing motions and responses.

[Sections 19.4 through 19.10 are reserved for expansion.]

II. Venue

§ 19.11 Sources of Venue Law

§ 19.11:1 Texas Civil Practice and Remedies Code Chapter 15, Generally

In the absence of a conflict with a specific statutory provision, the venue provisions of sections 15.001–.100 of the Texas Civil Practice and Remedies Code apply to all civil proceedings. *See Maddox v. Surber*, 677 S.W.2d 226 (Tex. App.—Houston [1st Dist.] 1984, no writ) (citing repealed article 1995, now Tex. Civ. Prac. & Rem. Code § 15.016). The holding in *Maddox* is based on the principle that if the legislature states a specific exception, it intends the statute to apply in all cases not excepted. *See State v. Richards*, 301 S.W.2d 597, 600 (Tex. 1957); *Graue-Haws, Inc. v. Fuller*, 666 S.W.2d 238, 239 (Tex. App.—El Paso 1984, no writ).

§ 19.11:2 Usury

A suit for the statutory penalties for usury is controlled by section 305.006(a)(1)–(5) of the Texas Finance Code, which states that such an action shall be brought in the county in which—

1. the transaction was entered into;
2. the usurious interest was charged or received;
3. the creditor resides at the time of the cause of action if the creditor is an individual;

4. the creditor maintains its principal office if the creditor is not an individual; or

5. the obligor resides at the time of the accrual of the cause of action.

Tex. Fin. Code § 305.006(a)(1)–(5).

§ 19.11:3 Justice Courts

Venue provisions for suits in justice courts provide in part that suits on a contract in writing promising performance at any particular place may be brought in the county and precinct in which the contract was to be performed. Tex. Civ. Prac. & Rem. Code § 15.092(a).

§ 19.11:4 Deceptive Trade Practices–Consumer Protection Act

Section 15.092(a) of the Civil Practice and Remedies Code constitutes a specific statutory exception to the general law of the Deceptive Trade Practices–Consumer Protection Act, Tex. Bus. & Com. Code §§ 17.41–.63. *Vargas v. Allied Finance Co.*, 545 S.W.2d 231, 233–34 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.) (citing repealed article 2390, now Tex. Civ. Prac. & Rem. Code § 15.092(a)). In *Vargas*, the court upheld the practice of filing collection actions in distant forums in justice courts. *Vargas*, 545 S.W.2d at 234. See, however, the specific prohibition against such practice now found in Texas Business and Commerce Code section 17.46(b)(23), discussed at section 19.14 below.

§ 19.11:5 Injunctions

Venue for writs of injunction in district and county courts is governed by chapter 65 of the Civil Practice and Remedies Code, which provides that in actions for writs to stay proceedings in a suit or for execution on a judgment, venue is in the court in which the suit is pending or judgment was rendered; in actions for writs of injunction for other causes, venue is in the district or county court of the county in which a party against whom the writ is sought is domiciled. Tex. Civ. Prac. & Rem. Code § 65.023. However, if an injunction is sought only as an incidental or ancillary measure, section 65.023 does not apply, and sections 15.001–.065 control. Tex. Civ. Prac. & Rem. Code §§ 15.001–.065; *see Flewellen v. Brownfield State Bank & Trust Co.*, 517 S.W.2d 384, 388 (Tex. Civ. App.—Amarillo 1974, no writ) (citing repealed article 4656, now Tex. Civ. Prac. & Rem. Code § 65.023). Actions to restrain execution based on the invalidity of a judgment or writ must be brought in the county in which the judgment was rendered. Tex. Civ. Prac. & Rem. Code § 15.013.

§ 19.11:6 Federal Fair Debt Collection Practices Act

Under the Texas general venue statute, suit should be brought where the defendant lived at the time the cause of action accrued, not where the defendant lives at the time of the filing of the lawsuit. Tex. Civ. Prac. & Rem. Code § 15.002. However, the federal Fair Debt Collection Practices Act requires that actions brought by debt collectors against consumers must be brought either in the county in which the consumer signed the contract sued on or the county in which the consumer resides *when the action is commenced.* 15 U.S.C. § 1692i(a)(2). See part II. in chapter 2 of this manual for a discussion of the federal Fair Debt Collection Practices Act.

§ 19.12 General Venue Rule

Except as described in sections 15.011–.020, 15.031–.033, 15.035, and 15.038–.039 of the Texas Civil Practice and Remedies Code pertaining to mandatory and permissive venue, the general rule is that the suit must be brought—

1. in the county in which all or a substantial part of the events or omissions giving rise to the claim occurred;
2. in the county of the defendant's residence at the time the cause of action accrued if the defendant is a natural person;
3. in the county of the defendant's principal office in Texas, if the defendant is not a natural person; or
4. if the first three provisions do not apply, in the county in which the plaintiff resided at the time of the accrual of the cause of action.

Tex. Civ. Prac. & Rem. Code § 15.002(a)(1)–(4). Note that the venue exceptions listed in sections 15.018–.020 of the Civil Practice and Remedies Code are not mentioned in Tex. R. Civ. P. 86 and 87 concerning motions to transfer venue.

The word *accrued*, used in section 15.002 of the Civil Practice and Remedies Code, has been held not to be the equivalent of *arose*, the word used in the previous venue law. The court found that venue was proper in the county in which payment was due in a cause of action for nonpayment for services. *See Krchnak v. Fulton*, 759 S.W.2d 524, 526 (Tex. App.—Amarillo 1988, writ denied) (citing former section 15.001 of the Civil Practice and Remedies Code, now rewritten and renumbered as section 15.002). See the discussion in sections 19.13 and 19.14 below on mandatory and permissive venue exceptions. Defendants may request a transfer to any county that is proper. Tex. Civ. Prac. & Rem. Code § 15.063.

§ 19.13 Mandatory Venue

Mandatory venue exceptions may be used by plaintiffs and other parties to a lawsuit seeking a change of venue. The types of lawsuits having mandatory venue provisions include actions for lands, injunctions against suits, landlord-tenant actions, injunctions against execution of judgment, actions against a county, actions against certain political subdivisions, and certain major transactions that specify venue by agreement. See Tex. Civ. Prac. & Rem. Code §§ 15.011–.020 for a more complete list. The Code states, "An action governed by any other statute prescribing mandatory venue shall be brought in the county required by that statute." Tex. Civ. Prac. & Rem. Code § 15.016. See sections 19.11:2 through 19.11:6 above for a discussion of statutes other than sections 15.011–.020 of the Civil Practice and Remedies Code and the Rules of Civil Procedure that determine venue. The exceptions in sections 15.011–.020 are "mandatory" in that even if a suit is filed in a county in which venue is proper under the general rule or a permissive exception, a motion to transfer to a county of mandatory venue will prevail. Tex. Civ. Prac. & Rem. Code § 15.001(b)(1); *see O.F. Mossberg & Sons v. Sullivan*, 591 S.W.2d 952, 957 (Tex. Civ. App.—Austin 1979, no writ).

The venue statute and rules do not provide directions for determining venue if two or more mandatory exceptions apply that designate two or more different counties. However, "[t]he general scheme of the venue statute is that plaintiffs may choose between two *proper* venues," and the plaintiff's choice will not be defeated by a defendant's objection that a competing mandatory venue exception applies. *Marshall v. Mahaffey*, 974 S.W.2d 942, 947 (Tex. App.—Beaumont 1998, pet. denied) (quoting *Wichita County v. Hart*, 892 S.W.2d 912, 920 (Tex. App.—Austin 1994), *rev'd on other grounds*, 917 S.W.2d 779 (Tex. 1996)); *see also Wilson v. Texas Parks & Wildlife Department*, 886 S.W.2d 259, 260–61 (Tex. 1994).

§ 19.14 Permissive Venue

If the plaintiff's choice of venue is proper under either the general rule or a permissive exception,

the defendant cannot obtain a transfer by relying on a permissive exception because he must show that the county in which the action is pending is not a proper county or that mandatory venue of the action in another county is prescribed by one or more specific statutory provisions. Tex. R. Civ. P. 86(3). However, if the plaintiff has not filed in a proper county, the party seeking transfer may assert the general rule, a permissive exception to the general rule, a mandatory exception, or the provision governing multiple claims. Tex. R. Civ. P. 87(2)(a); Tex. Civ. Prac. & Rem. Code § 15.063(1).

Permissive exceptions exist for five categories of suits involving executors, administrators, and guardians; insurance; breach of warranty by a manufacturer; contracts in writing; and transient persons. Tex. Civ. Prac. & Rem. Code §§ 15.031–.033, 15.035, 15.039. This list does not attempt to identify all the actions for which there are other permissive venue provisions; Code section 15.038 states, "An action governed by any other statute prescribing permissive venue may be brought in the county allowed by that statute." Tex. Civ. Prac. & Rem. Code § 15.038. See sections 19.11:2 through 19.11:6 above for a discussion of statutes governing venue other than sections 15.001–.100 of the Civil Practice and Remedies Code and the Rules of Civil Procedure.

In most cases, suing for collection on a written consumer transaction contract in a county other than that in which the defendant resides or in which he signed the contract is a "false, misleading, or deceptive [act] or [practice]" subjecting the plaintiff to damages and penalties. Tex. Bus. & Com. Code §§ 17.46(b)(23), 17.47, 17.50. The defendant cannot waive this venue requirement by any language in the written contract. Tex. Civ. Prac. & Rem. Code § 15.035(b). A written consumer transaction contract is "a contractual obligation of the defendant to pay money arising out of or based on a consumer transaction for goods, services, loans, or extensions of credit intended primarily for personal, family, household, or agricultural use." Tex. Civ. Prac. & Rem. Code § 15.035(b). Other contracts in writing may be sued on where the defendant has his domicile, or if the defendant has contracted in writing to perform an obligation in a particular, expressly named county or place within it he may be sued in that county. Tex. Civ. Prac. & Rem. Code § 15.035(a). See sections 19.11:3 and 19.11:4 above concerning venue considerations in justice court actions or consumer transaction collection cases.

§ 19.15 Bases for Transfer of Venue

§ 19.15:1 Improper County

Rule 86 sets forth procedural requirements for a motion to transfer venue either because the county in which the action is pending is not a proper county or because mandatory venue of the action is in another county. *See* Tex. R. Civ. P. 86. See section 19.16 below on the motion to transfer venue. The general, mandatory, and permissive provisions are discussed at sections 19.12 through 19.14 above, and other laws affecting mandatory and permissive venue are discussed at section 19.11.

§ 19.15:2 Impartial Trial Cannot Be Had

A motion to transfer venue on the basis that an impartial trial cannot be had in the court in which the action is pending must be determined in accordance with rules 257 through 259. *See* Tex. R. Civ. P. 257–259. *See also* Tex. R. Civ. P. 86(1), 87(2)(c). A change of venue may be granted on the motion of either party, supported by his own affidavit and the affidavits of at least three credible residents of the county in which the suit is pending for any of the following causes: (1) that there exists in the county in which the suit is pending so great a prejudice against him that he cannot obtain a fair and

impartial trial; (2) that there is a combination against him instigated by influential persons, by reason of which he cannot expect a fair trial; (3) that an impartial trial cannot be had in the county in which the action is pending; or (4) for other sufficient cause to be determined by the court. Tex. R. Civ. P. 257.

"The court, on motion filed and served concurrently with or before the filing of the answer, shall transfer an action to another county of proper venue if . . . an impartial trial cannot be had in the county in which the action is pending." Tex. Civ. Prac. & Rem. Code § 15.063(2). It might seem, therefore, that a motion to transfer based on this ground would be untimely if filed after the answer. But this interpretation is difficult to mesh with rule 87(5), which states that "[i]f venue has been sustained as against a motion to transfer, or if an action has been transferred to a proper county in response to a motion to transfer, then no further motions to transfer shall be considered . . . *unless the motion to transfer is based on the grounds that an impartial trial cannot be had under Rules 257–259.*" Tex. R. Civ. P. 87(5) (emphasis added). Under the old plea-of-privilege practice, a challenge to venue under rule 257 could be brought at any time. *See, e.g., Portwood v. Buckalew*, 521 S.W.2d 904, 921 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.) (lawsuit pending for eight years before hearing for change of venue). Often the conditions indicating that a fair and impartial trial cannot be had in the county in which the suit is pending will not arise until litigation is well under way. Also, the right to a trial by jury and the right to due course of law are constitutionally protected rights. Tex. Const. art. I, §§ 15, 19. Texas courts have held that the right to a trial by jury is the right to an impartial jury. *Flowers v. Flowers*, 397 S.W.2d 121, 123 (Tex. Civ. App.—Amarillo 1965, no writ). In *Lone Star Steel Co. v. Scott*, 759 S.W.2d 144 (Tex. App.—Texarkana 1988, writ denied), the trial court's failure to grant a motion to transfer because of local prejudice was held to be harmless error. The motion was not made until the day of trial but was not challenged. The trial court refused to grant the motion because it was not timely made. In a footnote the court stated, "Improper venue cannot be harmless error. The error here, however, was not *improper* venue . . . [but] . . . failure to order a change of venue because of local prejudice." *Lone Star Steel Co.*, 759 S.W.2d at 147 n.1 (citations omitted, emphasis added). A concurring opinion upheld the trial court's authority to deny the unopposed motion on the grounds that it was not timely made. *Lone Star Steel Co.*, 759 S.W.2d at 157–59. However, the court of appeals for the first district reached a different conclusion in *Maranatha Temple, Inc. v. Enterprise Products Co.*, 833 S.W.2d 736 (Tex. App.—Houston [1st Dist.] 1992, writ denied). The court stated that—

> [c]ertain rights are so fundamental that their losses do not lend themselves to a harmless error analysis. We hold that a plaintiff's right to have his suit stay in the county in which he rightfully brought it, absent the rightful transfer of it to another county, is such a right.

Maranatha Temple, Inc., 833 S.W.2d at 742.

A motion to transfer venue under rule 257 must be granted unless the credibility of those making the application, their means of knowledge, or the truth of the facts set out in the application is attacked by the affidavit of a credible person. When thus attacked, the issue must be tried by the judge. Reasonable discovery is specifically permitted, as well as the attachment to an affidavit or the incorporation by reference in an affidavit of relevant discovery materials, such as deposition testimony on file. Tex. R. Civ. P. 258. See section 19.16:4 below on discovery.

If the motion under rule 257 is granted, the cause is transferred to another court according to the rules of preference specified in rule 259.

§ 19.15:3 Statutory Forum Non Conveniens

Section 15.002(b) of the Texas Civil Practice and Remedies Code provides a forum non conveniens transfer of venue. On the defendant's motion (filed and served either before or concurrently with the answer), a court of proper venue may transfer an action to any other county of proper venue, if the court finds that—

(1) maintenance of the action in the county of suit would work an injustice to the movant considering the movant's economic and personal hardship;

(2) the balance of interests of all the parties predominates in favor of the action being brought in the other county; and

(3) the transfer of the action would not work an injustice to any other party.

Tex. Civ. Prac. & Rem. Code § 15.002(b).

§ 19.15:4 Written Consent of Parties

Section 15.063 of the Civil Practice and Remedies Code and Tex. R. Civ. P. 86(1) permit the parties to file a written consent to transfer venue to another county of proper venue at any time. *See also Farris v. Ray*, 895 S.W.2d 351, 352 (Tex. 1995). However, section 15.063 read with the applicable rules appears to require the court to transfer venue only if a motion to transfer on written consent of the parties is filed and served concurrently *with or before* the filing of the answer. Transfer is discretionary with the court if the written consent of the parties is filed *after* the answer has been filed. The Civil Practice and Remedies Code uses mandatory language: "The court, on motion filed and served concurrently with or before the filing of the answer, *shall* transfer an action to another county of proper venue if . . . written consent of the parties . . . is filed at any time." Tex. Civ. Prac. & Rem. Code § 15.063 (emphasis added). In contrast, rule 87(2)(c) provides that the motion "shall be determined in accordance with Rule 255," and rule 255 states that on written consent of the parties filed with the court, the court *may* transfer the trial to the court in "any other county having jurisdiction of the subject matter of such suit."

The words *at any time* used in section 15.063 conflict with the broader provision that requires the filing of the motion to transfer before or concurrently with the answer; however, it is reasonable to assume that the intent of section 15.063 is to give the parties the absolute right to select another county of proper venue before the court becomes involved in the action, whereas once the trial is in progress the court should have the discretion to deny a written consent of the parties in the interest of judicial efficiency.

A motion to transfer is required to satisfy the mandatory transfer provision of section 15.063. However, the rules refer to filing a "motion" and to filing a "written consent"; therefore, a formal motion to transfer under the discretionary transfer provision of rule 255 may not be required.

§ 19.16 Motion to Transfer Venue

§ 19.16:1 Requirements of Motion

An objection to improper venue is waived if not made by written motion filed before or concurrently with any other plea, pleading, or motion, except a special appearance motion provided for in rule 120a. Tex. R. Civ. P. 86(1). A motion to transfer venue is waived by any action invoking the active jurisdiction of the trial court or by inaction on the part of the movant. *Grozier v. L-B Sprinkler & Plumbing Repair*, 744 S.W.2d 306, 309–10 (Tex. App.—Fort Worth 1988, writ denied). A motion objecting to improper venue may be in a separate instrument filed concurrently with or before the filing of the movant's first responsive pleading, or the motion may be

combined with other objections and included in the movant's first responsive pleading. Tex. R. Civ. P. 86(2).

A motion to transfer venue must state—

1. that the action should be transferred to the specific county of proper venue and that such a transfer is requested;
2. that the action should be transferred because the county in which it is pending is not proper or because mandatory venue in another county is prescribed by one or more specific provisions, clearly designated; and
3. the legal and factual basis for the transfer.

Tex. R. Civ. P. 86(3). If the defendant seeks transfer to a county in which the cause of action or a part thereof accrued, he may plead hypothetically "that if a cause of action exists, then the cause of action or part thereof accrued in the specific county to which transfer is sought," and this allegation will not constitute an admission that the cause of action against him in fact exists. If transfer is sought on this basis, the defendant must support his motion by prima facie proof. Tex. R. Civ. P. 87(2)(b). Prima facie proof is also required to establish a mandatory exception to the general venue rule as a ground for transfer of venue. Tex. R. Civ. P. 87(3)(c).

Because all properly pleaded venue facts must be taken as true unless specifically denied (see section 19.16:5 below), the defendant's motion to transfer should specifically deny the venue facts pleaded in the original petition. A motion to transfer venue that specifically denied that the cause of action arose in the county of suit and generally denied that any permissive exception to the general venue statute applied was found insufficient because it did not specifically deny that the contract was payable in the county of suit. *Gonzalez v. Nielson*, 770 S.W.2d 99, 102 (Tex. App.—Corpus Christi 1989, writ denied).

Verification of the motion to transfer is not required. Tex. R. Civ. P. 86(3).

Several older cases have held that a district court does not have the power to change the venue of a suit on its own motion. Such an order, if entered, is void, and the proper method to prevent its enforcement is to enjoin the clerk of the court from execution of the transfer order. *See, e.g., Wight v. Moss*, 87 S.W.2d 837, 838 (Tex. Civ. App.—Dallas 1935, no writ).

§ 19.16:2 Plaintiff's Response to Pleaded Venue Facts

A response to the defendant's motion to transfer is not required except that (1) when a venue fact pleaded in the petition is specifically denied by the defendant, the plaintiff must make prima facie proof of that fact; and (2) when a venue fact is properly pleaded in the defendant's motion, the plaintiff must specifically deny it or it will be taken as true. Tex. R. Civ. P. 86(4), 87(3)(a).

Prima facie proof requires an affidavit (see section 19.16:6 below) to be attached to the response. *See* Tex. R. Civ. P. 87(3)(a). Verification of a response is not required. Tex. R. Civ. P. 86(4). Except on leave of court, any response or opposing affidavits must be filed at least thirty days before the hearing on the motion to transfer. Tex. R. Civ. P. 87(1).

§ 19.16:3 Movant's Reply to Response

The party seeking transfer of venue may reply to any response made to his motion, although he is not required to do so. The reply may be accompanied by additional affidavits supporting the motion to transfer. Except on leave of court, any reply and any additional affidavits must be filed at least seven days before the hearing on the motion to transfer. Tex. R. Civ. P. 87(1). A reply gives the movant the opportunity to make prima facie proof of venue facts specifically denied in

the nonmovant's response. *See* Tex. R. Civ. P. 86(4), 87(3)(a).

§ 19.16:4 Discovery

Rule 88 provides that discovery shall not be abated or affected by pendency of a motion to transfer. Tex. R. Civ. P. 88.

Deposition transcripts, responses to requests for admissions, answers to interrogatories, and other discovery products containing information relevant to venue may be considered by the court in making a venue determination if they are attached to or incorporated by reference in an affidavit. Tex. R. Civ. P. 88. Such an affidavit may be made by a party, a witness, or an attorney who has knowledge of the discovery. Tex. R. Civ. P. 88. A similar discovery provision is set forth for motions to transfer that are based on the ground that an impartial trial cannot be had. Tex. R. Civ. P. 258.

§ 19.16:5 Burden of Proof

The plaintiff seeking to maintain venue in the county of suit must adequately plead in the original petition and/or in his response to the motion to transfer those venue facts that support his choice of venue. *See* Tex. R. Civ. P. 87(2)(a). In addition, he must supply prima facie proof of venue facts the defendant has specifically denied, and he must specifically deny the venue facts pleaded by the defendant. Any properly pleaded venue facts not specifically denied will be taken as true. Tex. R. Civ. P. 87(3)(a). See form 19-4 in this chapter for a response to motion to transfer venue and form 19-5 for an affidavit opposing transfer. See also form 19-6 for an order overruling motion to transfer venue.

The plaintiff may seek to maintain venue under the general venue rule, a mandatory or permissive venue provision, or the law governing venue in multiple claims. Tex. R. Civ. P. 87(2)(a); *see* Tex. Civ. Prac. & Rem. Code § 15.002 (general rule); §§ 15.011–.020 (mandatory venue); §§ 15.031–.033, 15.035, 15.038–.039 (permissive venue); § 15.062 (multiple claims).

If the plaintiff adequately pleads and makes prima facie proof that venue is proper in the county of suit, the case will not be transferred unless the adverse party establishes that an impartial trial cannot be had where the action is pending or establishes a ground of venue in a different county by prima facie proof of a mandatory venue exception. Tex. R. Civ. P. 87(3)(c).

Any venue facts pleaded by the defendant seeking transfer must be taken as true unless specifically denied by the plaintiff. Once denied, the movant's facts must be supported by prima facie proof. Tex. R. Civ. P. 87(3)(a). The defendant must prove through his pleadings, affidavits, and attachments that venue is maintainable in the county to which transfer is sought on the basis of the general venue rule, a mandatory or permissive exception, or the law governing venue in multiple claims. Tex. R. Civ. P. 87(2)(a). See section 19.16:6 below for a discussion of proof if the motion is based on a claim that the defendant cannot get an impartial trial in the county in which the action is pending.

If a motion to transfer is based on the parties' filed written consent, specific venue facts should be alleged that will establish that the court to which transfer is sought has jurisdiction of the subject matter of the suit. *See* Tex. R. Civ. P. 87(2)(c), 255.

§ 19.16:6 Prima Facie Proof

To make prima facie proof it is necessary to first properly plead the venue facts and then support them by affidavit or affidavits. Affidavits may be accompanied by "duly proved" attachments. Affidavits must be made on personal knowledge, set forth specific facts "as would be admissible in evidence," and show affirmatively

that the affiant is competent to testify. Tex. R. Civ. P. 87(3)(a). *See also Cox Engineering, Inc. v. Funston Machine & Supply Co.*, 749 S.W.2d 508, 512 (Tex. App.—Fort Worth 1988, no writ) (error not preserved if no affidavits filed).

Generally, in determining venue the trial court may consider only the pleadings and affidavits. The court may consider relevant information in depositions, responses to requests for admission, answers to interrogatories, and other discovery products attached to or incorporated by reference in an affidavit of a party, a witness, or an attorney who has knowledge of such discovery. Tex. R. Civ. P. 88; *Cox Engineering, Inc.*, 749 S.W.2d at 512.

A motion to transfer on the ground that a fair and impartial trial cannot be had must be supported by the affidavits of the party seeking transfer and of at least three credible persons who are residents of the county in which the suit is pending. Tex. R. Civ. P. 257; *see also* Tex. R. Civ. P. 86(1), 258 (concerning attacking such affidavits, discovery, and use of deposition testimony), 259 (priorities for selecting court to which transfer on such ground is made).

§ 19.16:7 Proof of Merits Not Required

In all venue hearings, no factual proof concerning the merits of the case is required to establish venue. The court must determine venue questions from the pleadings and affidavits. Tex. Civ. Prac. & Rem. Code § 15.064(a). The existence of a cause of action, if pleaded properly, is established as alleged by the pleadings. But if the allegations are specifically denied, the plaintiff must make prima facie proof that the cause of action, or a part thereof, accrued in the county of suit. Tex. R. Civ. P. 87(2)(b). The venue statute and the rules distinguish between proof concerning the merits of a case and proof concerning the situs of the accrual of a cause of action.

§ 19.16:8 Filing and Service

A copy of any instrument filed pursuant to rule 86 must be served in accordance with rule 21a. Tex. R. Civ. P. 86(5); *see* Tex. R. Civ. P. 21a. "Any instrument" includes the motion to transfer venue, any amendments or a response to the motion, a reply to the response, supporting affidavits, and attachments, including discovery products. *See* Tex. R. Civ. P. 86.

The written motion objecting to improper venue must be filed before or concurrently with the movant's first responsive pleading, which would be any plea, pleading, or motion except a special appearance motion. An objection to improper venue is waived if the motion is not timely filed. Tex. R. Civ. P. 86(1), (2). The motion to transfer must be filed and served concurrently with or before the filing of the answer. Tex. Civ. Prac. & Rem. Code § 15.063. However, the rules provide that a written consent of the parties to transfer venue may be filed at any time. Tex. R. Civ. P. 86(1). See section 19.15:4 above. There is also some question whether a motion to transfer on the ground that an impartial trial cannot be had in the county of suit may be filed after the first responsive pleading. See section 19.15:2.

The movant must request a setting on the motion to transfer and provide each party with at least forty-five days' notice of the hearing. Any response or opposing affidavits must be filed at least thirty days before the hearing, and any reply to the response and additional affidavits must be filed at least seven days before the hearing. Leave of court must be obtained to alter these requirements. Tex. R. Civ. P. 87(1). There are special provisions for motions by parties added after a venue hearing. See section 19.19:2 below.

§ 19.16:9 Basis of Determination

The court must determine the motion to transfer venue on the basis of the pleadings, any stipula-

tions made by and between the parties, and properly filed affidavits, attachments, and discovery products. Tex. Civ. Prac. & Rem. Code § 15.064(a); Tex. R. Civ. P. 87(3)(a), (b), 88. See sections 19.16:5 through 19.16:7 above regarding proof.

All venue challenges are determined by the court, without a jury. Tex. R. Civ. P. 87(4).

§ 19.16:10 Time for Determination

The court is specifically required to make its determination of the motion to transfer promptly and in a reasonable time before trial. Tex. R. Civ. P. 87(1). Although a trial court may rule on a venue motion without a hearing, the movant has a duty to request a hearing to urge the motion within a reasonable time. Failure to do so may result in a waiver. *Grozier v. L-B Sprinkler & Plumbing Repair*, 744 S.W.2d 306, 311–12 (Tex. App.—Fort Worth 1988, writ denied); *Whitworth v. Kuhn*, 734 S.W.2d 108, 111 (Tex. App.—Austin 1987, no writ); *see also* Tex. R. Civ. P. 87(1). No waiver resulted in a case in which a motion was filed and a hearing was immediately set but other parties moved for continuance and thereafter continued to file amended pleadings, resulting in a three-year delay on the hearing. *Accent Energy Corp. v. Gillman*, 824 S.W.2d 274, 276–77 (Tex. App.—Amarillo 1992, writ denied).

§ 19.17 When Motion to Transfer Venue Sustained

§ 19.17:1 Procedure

If a motion to transfer venue is sustained, the case is not dismissed but is transferred to the proper court. Tex. R. Civ. P. 89.

If the motion is sustained on the ground that a fair and impartial trial cannot be had in the county in which the suit was originally filed, specific provisions govern selection of the court to which the case will be transferred. Tex. R. Civ. P. 259. Otherwise, the court will look to the general venue rule, the movant's request and the venue exception on which it is based, or the agreement of the parties.

§ 19.17:2 Costs and Fees

If a motion to transfer venue is sustained, the costs incurred before the time the suit is filed in the transferee court are taxed against the plaintiff. Tex. R. Civ. P. 89.

The clerk of the transferee court must mail notification to the plaintiff or his attorney that transfer is completed and that the filing fee in the proper court is due and payable within thirty days of the mailing of the notification. If the filing fee is not timely paid, any court of the transferee county to which the case might have been assigned may dismiss the case on its own motion or the motion of a party without prejudice to the refiling of the case. Tex. R. Civ. P. 89.

§ 19.17:3 Procedure for Plaintiff's Attorney

The plaintiff's attorney should ask the clerk of the original court to ascertain the costs payable in that court before transfer and indicate on the transferred file that he is the plaintiff's attorney of record. The attorney should ask the clerk of the transferee court for the cause number of the transferred case and the specific court the case is assigned to, if appropriate.

§ 19.18 Rehearing and Appeal

§ 19.18:1 No Rehearing

Once a motion for transfer of venue has been either granted or denied, no further motions for transfer will be heard by the court "regardless of whether the movant was a party to the prior proceedings or was added as a party subsequent to

the venue proceedings, unless the motion to transfer is based on the grounds that an impartial trial cannot be had under Rules 257–259 or on the ground of mandatory venue, provided that such claim was not available to the other movant or movants." Tex. R. Civ. P. 87(5); *see Dorchester Master Limited Partnership v. Anthony*, 734 S.W.2d 151, 152 (Tex. App.—Houston [1st Dist.] 1987, no writ) (rule 87(5) expressly precludes second venue determination and such an order is void). See section 19.15:2 above concerning a possible conflict between this provision and a provision of section 15.063 of the Texas Civil Practice and Remedies Code regarding the time for filing a motion to transfer based on the ground that an impartial trial cannot be had. See section 19.19:2 below concerning the requirement that a subsequently added party must timely file a motion to transfer to preserve the venue issue on appeal if he is precluded from having a pretrial venue hearing.

§ 19.18:2 Appeal

There are no interlocutory appeals from the determination of a motion to transfer venue. Tex. Civ. Prac. & Rem. Code § 15.064(a); Tex. R. Civ. P. 87(6); *Guardian Savings & Loan Ass'n v. Williams*, 731 S.W.2d 107, 108 (Tex. App.—Houston [1st Dist.] 1987, no writ).

A party may apply for a writ of mandamus with an appellate court to enforce the mandatory venue provisions of chapter 15 of the Civil Practices and Remedies Code. Tex. Civ. Prac. & Rem. Code § 15.0642.

The restriction of defendants' remedies by the elimination of interlocutory appeals has been offset to some degree by an enactment providing that "[o]n appeal from the trial on the merits, if venue was improper it shall in no event be harmless error and shall be reversible error." Tex. Civ. Prac. & Rem. Code § 15.064(b). The appellate courts are required to consider the "entire record," including the record of the trial on the merits of the case, in determining whether venue was proper. This statute abolishes the harmless-error rule in venue cases. Tex. Civ. Prac. & Rem. Code § 15.064(b); *see* Tex. R. App. P. 44.1. *But see Lone Star Steel Co. v. Scott*, 759 S.W.2d 144, 147 n.1 (Tex. App.—Texarkana 1988, writ denied) (applying harmless-error rule to trial court's failure to grant motion for change of venue because of local prejudice). The supreme court has deemed the procedure mandated by section 15.064 "fundamentally flawed because it allows appellate review of venue on a basis different from that on which it was decided." *Ruiz v. Conoco, Inc.*, 868 S.W.2d 752, 757 (Tex. 1993). *See also Hendrick v. McMorrow*, 852 S.W.2d 22, 24–25 (Tex. App.—Beaumont 1993, no writ).

The threat of reversal was apparently intended to act as a deterrent to fraud, mistake, and negligence during proceedings for the determination of venue. During the introduction of evidence at trial, the attorney should note the possibility that the entire trial record will be available for consideration by the appellate court if the issue of improper venue is raised on appeal.

§ 19.19 Multiple Parties and Claims

§ 19.19:1 Rules for Transfer

If venue is proper as to a single defendant, the court has venue of all defendants in all claims or actions arising out of the same transaction, occurrence, or series of transactions or occurrences. Tex. Civ. Prac. & Rem. Code § 15.005; *see* Tex. R. Civ. P. 37–43, 51, 97 (regarding multiple parties and claims). Venue of the "main action" establishes venue of a properly joined counterclaim, cross-claim, or third-party claim. Tex. Civ. Prac. & Rem. Code § 15.062(a).

Chapter 15 of the Civil Practice and Remedies Code does not provide guidance on handling a case involving two or more defendants who are each seeking transfer to different counties under

different mandatory exceptions. *See* Tex. Civ. Prac. & Rem. Code §§ 15.001–.020. A similar problem existed under prior law. *See Geophysical Data Processing Center v. Cruz*, 576 S.W.2d 666 (Tex. Civ. App.—Beaumont 1978, no writ) (under former plea-of-privilege practice, entire cause of action against all defendants transferred on grounds that all parties indispensable and causes of action not severable); *see also International Harvester Co. v. Stedman*, 324 S.W.2d 543 (Tex. 1959) (disposition depended on whether cause was severable).

§ 19.19:2 Subsequently Added Parties

Parties added after the determination of a motion to transfer venue are not entitled to a hearing on any venue challenge except that an impartial trial cannot be had in the county in which the suit is pending or that of a mandatory exception that was not available to the other movant or movants. If a subsequently added party is precluded by this rule from having a motion to transfer considered, he may raise the propriety of venue on appeal, *provided* he has timely filed a motion to transfer. Tex. R. Civ. P. 87(5); *see Hendrick Medical Center v. Howell*, 690 S.W.2d 42, 44 (Tex. App.—Dallas 1985, no writ), *abrogated on other grounds by In re Team Rocket, L.P.*, 256 S.W.3d 257 (Tex. 2008). A subsequently added party challenging venue on the basis of a permissive exception should file a motion to transfer venue concurrently with or before filing his answer to preserve his challenge even though the matter may not be raised until an appeal is taken from the final judgment.

[Section 19.20 is reserved for expansion.]

III. Law of Other Jurisdictions

§ 19.21 When Foreign Law Used

In collections litigation, the need to apply the law of another jurisdiction may arise in either of two situations:

1. The plaintiff's suit may be based on a contract enforceable under the laws of another jurisdiction. (Judicial notice of the law of another jurisdiction is discussed in sections 19.22 through 19.24 in this chapter.)
2. The plaintiff may be attempting to enforce a judgment obtained in another jurisdiction and, in response to the defendant's plea that the foreign court did not have jurisdiction, may need to prove the validity of the service of process or the validity of the jurisdiction on which the judgment is based. (Enforcement of foreign judgments is discussed at sections 14.12 through 14.14 in this manual.)

§ 19.22 Proving Up Law of Foreign State

§ 19.22:1 Motion for Judicial Notice

A motion for judicial notice under rule 202 can be used to establish the law of a sister state. Under Tex. R. Evid. 202—

> A court upon its own motion may, or upon the motion of a party shall, take judicial notice of the constitutions, public statutes, rules, regulations, ordinances, court decisions, and common law of every other state . . . . A party requesting that judicial notice be taken of such matter shall furnish the court sufficient information to

> enable it properly to comply with the request . . . . A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. Judicial notice of such matters may be taken at any stage of the proceeding. The court's determination shall be subject to review as a ruling on a question of law.

Tex. R. Evid. 202.

The Texas Supreme Court has held that it is unnecessary to plead foreign law that differs from Texas law if a motion has been made for judicial notice. *See Daugherty v. Southern Pacific Transportation Co.*, 772 S.W.2d 81, 83 (Tex. 1989). However, because notice is an important consideration in cases involving foreign law, the better practice is to plead the law of the sister state.

A motion for judicial notice under rule 202 cannot be used to establish the law of another nation (see section 19.24 below). See form 19-7 in this chapter for a motion for judicial notice and form 19-8 for an order taking judicial notice.

§ 19.22:2 Sufficient Information

> Rule 202 requires the moving party to furnish sufficient information to the trial court for it to determine the foreign law's applicability to the case and to furnish all parties any notice that the court finds necessary. . . . The determination of compliance with these requirements is within the discretion of the trial court.

Daugherty v. Southern Pacific Transportation Co., 772 S.W.2d 81, 83 (Tex. 1989). The motion should contain a significant recitation of the foreign state's law and a citation to where the law can be found. *Pittsburgh Corning Corp. v. Walters*, 1 S.W.3d 759, 769–70 (Tex. App.—Corpus Christi 1999, pet. denied). The better practice is to attach copies of the statutes or decisions to the motion. See Tex. R. Evid. 901(b)(7) regarding authentication and identification of public records, documents, and publications and Tex. R. Evid. 902 regarding self-authentication of domestic public documents and records.

§ 19.22:3 Notice

It is recommended that notice of the motion for judicial notice be given to the adverse party, although Tex. R. Evid. 202 provides that necessity for such notice is left to the discretion of the judge. *See also Daugherty v. Southern Pacific Transportation Co.*, 772 S.W.2d 81, 83 (Tex. 1989). Under rule 202, absent prior notification, the request for an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed may be made after notice has been taken.

§ 19.22:4 Effect of Granted Motion

If the motion is granted, the court is presumed to have the same judicial knowledge of foreign laws as it has of its own state's laws. *Marsh v. Millward*, 381 S.W.2d 110, 112 (Tex. Civ. App.—Austin 1964, writ ref'd n.r.e.).

§ 19.22:5 Review of Motion

Tex. R. Evid. 202 expressly states that the determination of sister-state law by motion for judicial notice shall be subject to review as a question of law. But see section 19.23 below for a discussion of review of sister-state law under the common-law rule.

§ 19.23 Proving Up Law of Foreign State (Common-Law Method)

In addition to proof of sister-state law by a motion for judicial notice under Tex. R. Evid. 202, the existence of sister-state law may be brought before the court by the common-law method of formal pleading and proof. Under the common-law method, whether the law of another state exists is a fact question for the jury. Once the fact of the law is established, the questions of the applicability, competency, and construction of the sister-state law are for the court. *Commercial Credit Equipment Corp. v. West*, 677 S.W.2d 669, 673 (Tex. App.—Amarillo 1984, writ ref'd n.r.e.), *abrogated on other grounds by Greathouse v. Charter National Bank-Southwest*, 851 S.W.2d 173, 175 (Tex. 1992). In one case, the court ruled that if the sister-state law consists entirely of statutes and reports of judicial decisions, the construction and effect of the law are issues for the court; however, if judicial decisions of a sister state are conflicting, or inferences of fact must be drawn, or if the only proof offered is the parol testimony of expert witnesses as to the construction of a sister-state statute, the question of what the foreign law is becomes one of fact for the jury. *St. Louis & Santa Fe Railway v. Conrad*, 99 S.W. 209, 210–11 (Tex. Civ. App. 1906, no writ). The court in one case found that where the pleading gave sufficient notice to the opposing party of the intent to rely on sister-state law, the court could properly take judicial notice of such law. *Gould v. Awapara*, 365 S.W.2d 671, 673–74 (Tex. Civ. App.—Houston 1963, no writ). The trend in Texas is to treat determinations of foreign law as questions of law; however, it appears that the determination of sister-state law by pleading and proof is limited to appellate review as a question of fact. Common-law pleading and proof of sister-state law should be rejected whenever possible in favor of a motion for judicial notice. See Tex. R. Evid. 901(b)(7) regarding identification and authentication of public records, documents, and publications and Tex. R. Evid. 902 regarding self-authentication of domestic public documents and records.

§ 19.24 Determination of Law of Another Nation

Rule 203 states:

> A party who intends to raise an issue concerning the law of a foreign country shall give notice in the pleadings or other reasonable written notice, and at least 30 days prior to the date of trial such party shall furnish all parties copies of any written materials or sources that the party intends to use as proof of the foreign law. If the materials or sources were originally written in a language other than English, the party intending to rely upon them shall furnish all parties both a copy of the foreign language text and an English translation. The court, in determining the law of a foreign nation, may consider any material or source, whether or not submitted by a party or admissible under the rules of evidence, including but not limited to affidavits, testimony, briefs, and treatises. If the court considers sources other than those submitted by a party, it shall give all parties notice and a reasonable opportunity to comment on the sources and to submit further materials for review by the court. The court, and not a jury, shall determine the laws of foreign countries. The court's determination shall be subject to review as a ruling on a question of law.

Tex. R. Evid. 203. The law of a foreign country cannot be determined by a motion for judicial notice under rule 203; it must be pleaded and proved. However, the rule greatly relaxes the evidentiary proof requirements and creates a

procedure comparable to judicial notice. It states that a court's determination of the law of a foreign country shall be reviewed as a question of law by appellate courts. When there is a failure of pleading or proof of the law of a foreign country, the majority of Texas decisions presume the foreign law to be identical to Texas law. *Pauska v. Daus*, 31 Tex. 67 (1868). See Tex. R. Evid. 901(b)(7) regarding identification and authentication of public records, documents, and publications and Tex. R. Evid. 902 regarding self-authentication of domestic public documents and records.

[Sections 19.25 through 19.30 are reserved for expansion.]

IV. Motion for Summary Judgment

§ 19.31 Purpose of Summary Judgment

The purpose of summary judgment is to eliminate patently unmeritorious claims or untenable defenses and to avoid delays of trial if there is no genuine issue of fact. *Swilley v. Hughes*, 488 S.W.2d 64, 68 (Tex. 1972). Summary judgment is not intended to deprive litigants of their right to a full hearing on the merits of any real issue of fact. An answer or response to an unsuccessful motion for summary judgment may produce the defendant's sworn testimony regarding his defenses, without need for further discovery on those defenses.

Summary judgment is a harsh remedy with complex and unclear procedural rules. All inferences are resolved in the nonmovant's favor. The judge (who does not risk reversal for denying a motion for summary judgment) may be hesitant to award a summary judgment because of the great statistical likelihood of reversal. *See* David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 34 Hous. L. Rev. 1303, 1364 (1998). Summary judgments are well suited for commercial litigation in which the facts are more easily established by documentary evidence; see sections 19.34 (sworn accounts) and 19.35 (promissory notes) below. The attorney should carefully weigh these considerations in determining whether filing a motion for summary judgment is warranted.

§ 19.32 Availability of Summary Judgment

§ 19.32:1 Requirement of No Genuine Issue of Material Fact

The creditor can obtain a summary judgment against the debtor if—

> (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, *there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law* on the issues expressly set out in the motion or in an answer or any other response.

Tex. R. Civ. P. 166a(c) (emphasis added).

The question "is *not* whether the summary judgment proof *raises fact issues* with reference to the essential elements of a plaintiff's claim or cause of action, but is whether the summary

judgment proof *establishes as a matter of law that there is no genuine issue of fact* as to one or more of the essential elements of the plaintiff's cause of action." *Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970).

§ 19.32:2 Requirement of Defendant's Appearance

The plaintiff may move for summary judgment at any time after the adverse party has appeared or answered. Tex. R. Civ. P. 166a(a). Summary judgment probably ceases to be available once the trial has begun. Many courts issue a docket control order that sets a specified deadline for filing dispositive motions, normally well before the date set for trial. *See* Comment, *Summary Judgment in Texas: A Selective Survey*, 14 Hous. L. Rev. 854, 861–62 (1977). Summary judgment should not be confused with judgment by default, which is available if the defendant has failed to appear and answer within certain time limits. *See* Tex. R. Civ. P. 239.

§ 19.33 Motion for Summary Judgment Generally

§ 19.33:1 Grounds

The motion must state specific grounds. Tex. R. Civ. P. 166a(c). The language of rule 166a(c) requiring that "the motion for summary judgment shall state the specific grounds" requires literal compliance. The grounds must be expressly presented in the motion. The grounds for summary judgment may not be raised only in an accompanying brief or memorandum in support. *Sysco Food Services, Inc. v. Trapnell*, 890 S.W.2d 796, 805 (Tex. 1994). The motion for summary judgment must state the specific grounds on which the judgment is sought, so that the issues will be defined and the respondent will be provided adequate information to oppose it. *Westchester Fire Insurance Co. v. Alvarez*, 576 S.W.2d 771, 772 (Tex. 1978), *overruled on other grounds by City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 673 (Tex. 1979). The movant is confined to the specific grounds set forth in the motion. *See Clear Creek Basin Authority*, 589 S.W.2d at 677–78. It is unsettled what degree of specificity is required; the form motion in this chapter (form 19-9) summarizes the elements of the cause and directs the court's attention to the specific admission, answer, or other response by which the defendant has admitted each fact establishing that element for the plaintiff.

A court may not grant summary judgment relief for more than was specifically requested in the motion. *Mafrige v. Ross*, 866 S.W.2d 590, 591 (Tex. 1993), *overruled on other grounds by Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 192 (Tex. 2001).

Summary judgment may not be granted on an issue not presented in the motion for summary judgment. *Byrd v. Woodruff*, 891 S.W.2d 689, 700 (Tex. App.—Dallas 1994, writ dism'd by agr.). "Summary judgments may not be affirmed or reversed on grounds not expressly set forth in the motions presented to the trial court." *Benavides v. Moore*, 848 S.W.2d 190, 197 (Tex. App.—Corpus Christi 1992, writ denied). Further, summary judgment may not be granted as a matter of law on a cause of action not addressed in the summary judgment proceeding. *City of Beaumont v. Guillory*, 751 S.W.2d 491, 492 (Tex. 1988) (per curiam).

§ 19.33:2 Affirmative Defenses

The movant is not required to negate affirmative defenses. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984). An unpleaded affirmative defense can be a proper basis for a summary judgment. *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 494 (Tex. 1991).

Chapter 20

Judgment

I. Judgments Generally

II. Default Judgment

Forms

Chapter 20

Judgment

I. Judgments Generally

§ 20.1 Caption

If there are multiple defendants, only the first party need be identified in the caption, because all parties will be identified in the body of the judgment (see also section 20.8 below).

§ 20.2 Appearances of Parties

Each party's participation should be described—for example, who appeared, who defended at trial, who answered but failed to defend further, who defaulted, and what method of service was used on any defendant who defaulted. A final judgment is one disposing of all issues and parties in the case. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2001). Parties who openly participate in litigation without objection may be included in the judgment, even if they are not named in the pleadings. *Elliott v. Hamilton*, 767 S.W.2d 262, 263 (Tex. App.—Beaumont 1989, writ denied). "Courts look beyond the nominal parties, and treat all those whose interests are involved in the litigation and who conduct and control the action or defense as real parties, and hold them concluded by any judgment which may be rendered." *Southern County Mutual Insurance Co. v. Ochoa*, 19 S.W.3d 452, 464–65 (Tex. App.—Corpus Christi 2000, no pet.) (citations omitted).

§ 20.3 Recital of Oral Orders

All judgments, decisions, and orders of any kind should be reduced to writing and signed by the trial judge with the date of signing stated therein. Tex. R. Civ. P. 306a(2). *But see Whitworth v. Kuhn*, 734 S.W.2d 108, 111 (Tex. App.—Austin 1987, no writ) (trial judge's failure to reduce to writing oral denial of motion to transfer venue not error when statement of facts reflected oral order).

§ 20.4 Basis of Judgment

The judgment should state whether it is based on a jury verdict or an instructed verdict, a judgment notwithstanding the verdict, or a judgment notwithstanding certain immaterial findings and based on the remaining findings.

§ 20.5 Findings of Fact

Findings of fact shall not be recited in a judgment. Tex. R. Civ. P. 299a. In any case tried in a district court or county court without a jury, any party may request the court to state in writing its findings of fact and conclusions of law. Tex. R. Civ. P. 296. The procedures to request findings of fact and conclusions of law are set forth in Tex. R. Civ. P. 296–298. If findings of fact are not requested by the losing party, all findings are deemed in favor of the judgment. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990). When findings of fact are filed by the trial court, they form the basis of the judgment on all grounds of recovery and of defense stated therein. Tex. R. Civ. P. 299.

§ 20.6 Evidence

The judgment need not describe the evidence on which it is based but should include a statement that the court heard evidence and is of the opinion that judgment should be rendered for the successful party.

§ 20.7 Conformity to Pleadings

The judgment of the court must conform to the pleadings, the nature of the case proved, and the verdict, if any. Tex. R. Civ. P. 301. When issues not raised by the pleadings are tried by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the pleadings. Tex. R. Civ. P. 67. A pleading defect not properly raised before the charge to the jury or, in a nonjury case, before judgment is signed may be waived. Tex. R. Civ. P. 90.

§ 20.8 Recitation of Judgment

The entry of the judgment must contain the full names of the parties, as stated in the pleadings, for and against whom judgment is rendered. Tex. R. Civ. P. 306. The judgment must be framed so as to give the prevailing party all the relief to which he may be entitled in law or in equity. Tex. R. Civ. P. 301. All relief granted should be described with enough specificity to support writs of enforcement. *See Ex parte Glover*, 701 S.W.2d 639, 640–41 (Tex. 1985) (failure to specify whether "interest at the rate of 10% per annum" means simple or compound interest invalidated contempt order).

§ 20.9 Finality of Judgment

For judgment to be final, it must dispose of all parties and issues in the case. *Schlipf v. Exxon Corp.*, 644 S.W.2d 453, 454 (Tex. 1982). If a judgment not intrinsically interlocutory is rendered after a conventional trial on the merits, it will be presumed for appeal purposes that the court intended to and did dispose of all parties and issues. *North East Independent School District v. Aldridge*, 400 S.W.2d 893, 897–98 (Tex. 1966).

In cases in which only one final and appealable judgment can be rendered, a judgment issued without a conventional trial is final for purposes of appeal if and only if it either actually disposes of all claims and parties before the court, regardless of its language, or states with unmistakable clarity that it is a final judgment as to all claims and all parties. *North East Independent School District*, 400 S.W.2d at 897–98. An order does not dispose of all claims and parties merely because it is titled "final," because the word "final" appears elsewhere in the order, or because it awards costs. Nor does an order completely dispose of a case merely because it states that it is appealable, as even interlocutory orders may sometimes be appealable. Rather, there must be some clear indication that the trial court intended the order to completely dispose of the entire case. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 205 (Tex. 2001). The inclusion of a Mother Hubbard clause ("all relief not granted is denied" or essentially those words) does not indicate that a judgment rendered without a conventional trial is final for purposes of appeal. *Lehmann*, 39 S.W.3d at 203–04 (overruling *Mafrige v. Ross*, 866 S.W.2d 590 (Tex. 1993), to the extent it states otherwise). Following *Lehmann*, recently decided cases have held that an order entitled "final summary judgment" that includes a Mother Hubbard clause but does not dispose of all claims and parties is not a final appealable order. *See, e.g., Youngblood & Associates, P.L.L.C. v. Duhon*, 57 S.W.3d 63, 65 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *Anderson v. Long*, 52 S.W.3d 385, 386 (Tex. App.—Fort Worth 2001, no pet.). Therefore, it is best to include language at the conclusion of the judgment that acknowledges the finality of the judgment, such as, "This judgment finally disposes of all parties and all claims and is appealable."

§ 20.10 Foreclosure of Lien

All judgments foreclosing security interests shall be that the plaintiff recover "his debt, damages and costs, with a foreclosure of the plaintiff's lien on the property subject thereto." Tex. R. Civ. P. 309. Unless the judgment is against a personal representative of an estate (see section 20.13 below), the judgment must further direct that an order of sale issue—

> to any sheriff or any constable within [Texas], directing him to seize and sell [the collateral] as under execution, in satisfaction of the judgment; and, if the property cannot be found, or if the proceeds . . . be insufficient to satisfy the judgment, then to take the money . . . remaining unpaid, out of any other property of the defendant, as in . . . ordinary executions.

Tex. R. Civ. P. 309. See form 20-14 in this chapter for additional language to be incorporated in the judgment.

§ 20.11 Money Damages Awarded

Almost every judgment based on a creditor's claim will include, as elements of damages—

1. principal debt (including net amount in case of counterclaim or other setoff or credit);
2. prejudgment interest (see section 20.17 below);
3. postjudgment interest at the highest rate allowed by law (see section 20.17:3 below);
4. attorney's fees (see part III. in chapter 1 of this manual); and
5. costs (usually recovered completely under Texas Rule of Civil Procedure 131 but may be allocated differently under rule 141 for good cause); *see* *State v. B&L Landfill, Inc.*, 758 S.W.2d 297, 300 (Tex. App.—Houston [1st Dist.] 1988, no writ) (trial court abused discretion in allotting costs contrary to rule 131 without explanation as required by rule 141).

§ 20.12 Execution on Judgment

The clerk of the court "shall issue execution to enforce [the] judgment." Tex. R. Civ. P. 622. The better practice is to include in the judgment a statement specifically authorizing execution (and, as appropriate, such other writs as a writ of possession or an order of sale) to satisfy the judgment. For an exception in the case of a decedent's estate, see section 20.13 below.

§ 20.13 Judgment against Personal Representative

Each judgment for the recovery of money against an executor, administrator, or guardian must state that "it is to be paid in the due course of administration." Tex. R. Civ. P. 313. Instead of levying by execution, the judgment creditor is to certify the judgment to the probate court for enforcement, except that a "judgment against an executor appointed and acting under a will dispensing with the action of the county court [sitting in matters of probate] in reference to such estate shall be enforced against the property of the testator in the hands of such executor, by execution, as in other cases." Tex. R. Civ. P. 313.

§ 20.14 Date of Signing

All judgments should state the date of signing. Tex. R. Civ. P. 306a(2). The date that the judgment was signed, as opposed to the date the judgment was rendered or entered, is operative for purposes of postjudgment motions and appeal. Rule 306a provides that time commences to run for appellate steps when the judge signs the judgment. *See* Tex. R. Civ. P. 306a(1); *Burrell v. Cornelius*, 570 S.W.2d 382, 384 (Tex.

1978). However, if within twenty days after the judgment is signed a party adversely affected by it or his attorney has not received notice under rule 306a(3) and does not have actual knowledge of the judgment, periods for filing post-judgment motions and for appeal will commence on the date of receipt of notice under rule 306a(3) or on the date that actual knowledge of the signing was acquired, whichever occurs first, but in no event will such periods begin more than ninety days after the original judgment or other appealable order was signed. Tex. R. Civ. P. 306a(4). *See Western Import Motors v. Mechinus*, 739 S.W.2d 125, 126 (Tex. App.—San Antonio 1987, no writ) (letter from adverse party's attorney, containing proposed judgment, request that any objections be raised in seventy-two hours, and statement that if no objections were raised in that time court would be requested to sign judgment on certain date did not constitute actual knowledge of judgment so as to preclude extension of timetable under rule 306a(4)).

§ 20.15 Proposed Judgment

Any party may prepare and submit a proposed judgment to the court for signature. Tex. R. Civ. P. 305. In doing so, the party must serve it on all other parties who have appeared and remain in the case, in accordance with rule 21a. Failure to comply with rule 305 does not affect the time for perfecting an appeal. Tex. R. Civ. P. 305. Approval of the form of proposed judgment by opposing counsel does not waive any error. *Sigma Systems Corp. v. Electronic Data Systems Corp.*, 467 S.W.2d 675, 677 (Tex. Civ. App.—Tyler 1971, no writ). Also, the failure of a party to prepare and submit a proposed judgment to the court for signature does not preclude the party from challenging the judgment entered by the court. *In re Marriage of Ames*, 860 S.W.2d 590, 592 (Tex. App.—Amarillo 1993, no writ).

The judgment must conform to the pleadings and verdict and be framed to give the party all the relief to which he may be entitled in law or in equity. Tex. R. Civ. P. 301. It should be presented for signature as soon as possible after rendition so that execution or other collection steps will not be delayed. The periods within which appellate steps must be taken and after which execution can be requested do not begin until the date the judgment is signed. *See Louwien v. Dowell*, 534 S.W.2d 421, 422 (Tex. Civ. App.—Dallas 1976, no writ) (judgment can be changed at any time if it has not been signed); Tex. R. Civ. P. 306a (periods to run from signing of judgment), 627 (execution).

§ 20.16 Notice of Judgment

When the final judgment is signed, the clerk must immediately notify the parties or their attorneys by first-class mail. Tex. R. Civ. P. 306a(3). However, the clerk's failure to send notice might extend the time to file a petition for writ of error. *See* Tex. R. Civ. P. 306a(3), (4). Service of a copy of the proposed judgment under Tex. R. Civ. P. 305 is not sufficient to constitute actual knowledge by the adverse party of the final judgment. *See Western Import Motors v. Mechinus*, 739 S.W.2d 125, 126 (Tex. App.—San Antonio 1987, no writ). To attempt to protect against a claim of no notice of final judgment, the plaintiff's attorney may want to send a certified copy of the judgment to the defendant's attorney of record by certified or registered mail, return receipt requested.

§ 20.17 Judgment Interest

A judgment of a Texas court must state the post-judgment interest rate applicable to that judgment. Tex. Fin. Code § 304.001. Judgment interest is defined as "interest on a money judgment, whether the interest accrues before, on, or after the judgment is rendered." Tex. Fin. Code § 301.002(a)(7). Interest is defined as "compensation for the use, forbearance, or detention of money." Tex. Fin. Code § 301.002(a)(4).

§ 20.17:1 Interest Rate or Time-Price Differential in Contract

A judgment of a Texas court on a contract that provides for a specific interest rate or time-price differential earns interest at a rate equal to the lesser of the rate specified in the contract, which may be a variable rate, or 18 percent per year. Tex. Fin. Code § 304.002.

§ 20.17:2 Interest Rate or Time-Price Differential Not in Contract

A judgment of a Texas court to which Texas Finance Code section 304.002 does not apply, including court costs awarded in the judgment and any prejudgment interest, earns postjudgment interest at a rate determined by the prime rate as published by the Federal Reserve Bank of New York on the date of the computation. However, if that rate is less than 5 percent, the postjudgment interest rate is 5 percent; if that rate is more than 15 percent, the postjudgment interest rate is 15 percent. Tex. Fin. Code § 304.003. The current applicable rate can be found on the Web site of the Office of Consumer Credit Commissioner at **www.occc.state.tx.us/pages/int_rates/Index.html**.

§ 20.17:3 Accrual of Postjudgment Interest

Postjudgment interest on a judgment of a Texas court accrues during the period beginning on the day the judgment is rendered and ending on the day the judgment is satisfied. Tex. Fin. Code § 304.005(a). Postjudgment interest compounds annually. Tex. Fin. Code § 304.006.

§ 20.17:4 Prejudgment Interest Generally

Prejudgment interest is "compensation allowed by law as additional damages for lost use of the money due as damages during the lapse of time between the accrual of the claim and the date of judgment." *Johnson & Higgins of Texas v. Kenneco Energy*, 962 S.W.2d 507, 528 (Tex. 1998) (citations omitted). Prejudgment interest may be authorized by statute or by general principles of equity. *Johnson & Higgins*, 962 S.W.2d at 528. Common-law prejudgment interest is calculated in the same manner as statutory prejudgment interest. *Johnson & Higgins*, 962 S.W.2d at 531–33. Prejudgment interest accrues at the same rate as postjudgment interest and is computed as simple interest. *Johnson & Higgins*, 962 S.W.2d at 532. Recovery of prejudgment interest may be requested in a prayer for general relief and must be supported by the pleadings. *Republic National Bank v. Northwest National Bank*, 578 S.W.2d 109, 117 (Tex. 1978) (written contract); *Bethel v. Butler Drilling Co.*, 635 S.W.2d 834, 842 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.) (recovery at common law). An elaborate prayer for relief is not required. A simple prayer for interest provides fair notice of a claim for prejudgment interest and authorizes the award of interest at the applicable rate. *Black Lake Pipe Line Co. v. Union Construction Co.*, 538 S.W.2d 80, 96 (Tex. 1976), *overruled on other grounds by Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989); *Brown v. Starrett*, 684 S.W.2d 145, 147 (Tex. App.—Corpus Christi 1984, no writ); *Arndt v. National Supply Co.*, 633 S.W.2d 919, 924 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.).

§ 20.17:5 Prejudgment Interest in Personal Injury, Wrongful Death, or Property Damage Case

Prejudgment Interest Required: A judgment in a wrongful death, personal injury, or property damage case earns prejudgment interest. Tex. Fin. Code § 304.102.

Prejudgment Interest Rate: The prejudgment interest rate is equal to the postjudgment interest rate applicable at the time of judgment.

Tex. Fin. Code § 304.103. Judgments in these cases earn interest at a rate that is calculated monthly and that is not less than 5 percent nor more than 15 percent, as determined by the Texas consumer credit commissioner. Tex. Fin. Code § 304.003.

Accrual of Prejudgment Interest: Except as otherwise provided by statute, prejudgment interest accrues on the amount of a judgment during the period beginning on the 180th day after the date the defendant receives written notice of a claim or on the date the suit is filed, whichever is earlier, and ending on the day preceding the date judgment is rendered. Prejudgment interest is computed as simple interest and is not compounded. Tex. Fin. Code § 304.104.

Effect of Settlement Offers: If a judgment for a claimant is less than the amount of a settlement offer of the defendant, prejudgment interest does not accrue on the amount of the judgment during the period that the offer may be accepted. Tex. Fin. Code § 304.105(a). If a judgment for a claimant is more than the amount of a settlement offer of the defendant, prejudgment interest does not accrue on the amount of the settlement during the period that the offer may be accepted. Tex. Fin. Code § 304.105(b). To prevent the accrual of prejudgment interest, a settlement offer must be in writing and delivered to the claimant or the claimant's attorney or representative. Tex. Fin. Code § 304.106. If a settlement offer does not provide for cash payment at the time of settlement, the amount of the settlement offer for the purpose of computing prejudgment interest is the cost or fair market value of the settlement offer at the time it is made. Tex. Fin. Code § 304.107.

Attorney's Fees: Accrual of prejudgment interest on attorney's fees depends on whether the fees were paid before grant of judgment. Prejudgment interest does not accrue to attorney's fees awarded by judgment (*see Hervey v. Passero*, 658 S.W.2d 148, 149 (Tex. 1983), *overruled by Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985); *Cushman & Wakefield, Inc. v. Fletcher*, 915 S.W.2d 538, 546–47 (Tex. App.—Dallas 1995, writ denied)) unless the attorney's fees were paid before the grant of judgment. *A.V.I., Inc. v. Heathington*, 842 S.W.2d 712, 717–18 (Tex. App.—Amarillo 1992, writ denied).

§ 20.18 Practical Considerations for Judgment on Note

For a judgment on a note, the practice in some courts is to attach a copy of the note to the petition and the original to the judgment. If the original of a judgment on a note is mailed to the defendant's attorney, the original of the note should not be attached, because it might get lost in the mail. The note can be attached to the judgment after the approved judgment has been returned and before it is submitted to the judge for signature.

[Sections 20.19 and 20.20 are reserved for expansion.]

II. Default Judgment

§ 20.21 Return on File for Ten Days

For a default judgment to be granted, the return of service must have been on file for ten days before judgment, excluding the day of filing and the day of judgment. *Gentry v. Gentry*, 550 S.W.2d 167 (Tex. Civ. App.—Austin 1977, no writ); Tex. R. Civ. P. 107, 239. Under rule 103 citation may be served, and under rule 107 returned, by any person at least eighteen years

old who is authorized by law or court order to serve citations. The return of service must be signed by such an authorized person, and if signed by a person other than a sheriff, constable, or clerk of the court, the return must either be verified or be signed under penalty of perjury. Tex. R. Civ. P. 107(e). A return signed under penalty of perjury must include the statement prescribed in Tex. R. Civ. P. 107(e).

§ 20.22 Certificate of Last Known Mailing Address

At or immediately before rendition of an interlocutory or final default judgment, the prevailing party or his attorney must certify to the clerk in writing the last known mailing address of the party against whom the judgment is taken. Immediately after the judgment is signed, the clerk must mail written notice to the party against whom the judgment was rendered at the address shown in the certificate. Tex. R. Civ. P. 239a. See form 20-2 in this chapter for a certificate of last known mailing address.

§ 20.23 Defendant Not in Armed Forces

If the defendant has defaulted in appearing, before entering judgment the plaintiff must file an affidavit "stating whether or not the defendant is in military service and showing necessary facts to support the affidavit" or "stating that the plaintiff is unable to determine whether or not the defendant is in military service." 50 U.S.C. app. § 521(b)(1). If it appears that the defendant is in military service, the court may not enter a judgment without appointing an attorney to represent the defendant. 50 U.S.C. app. § 521(b)(2). If the court is unable to determine whether the defendant is in military service, the court may require the plaintiff to file a bond to indemnify the defendant against any loss he may suffer by reason of the judgment should it thereafter be set aside. 50 U.S.C. app. § 521(b)(3). There are no Texas cases, statutes, or rules on this requirement, and it is not consistently enforced throughout the state. The Department of Defense Manpower Data Center (DMDC) hosts a Servicemembers Civil Relief Act Web site that will provide the current active military status of an individual. To obtain certificates of service or nonservice, the practitioner can access the public Web site at **www.dmdc.osd.mil/appj/scra/scraHome.do**. There is no charge for a certificate. If there is insufficient personal information to use this site, an individual's active duty status may be verified through the military services. Contact information for each service headquarters is listed on the Department of Defense Web site at **www.defense.gov/faq/pis/pc09sldr.html**. For general assistance, contact the DMDC by mail at Defense Manpower Data Center, Attn: Military Verification, 1600 Wilson Blvd., Suite 400, Arlington, VA 22209-2593 or by fax at 703-696-4156.

See form 20-3 in this chapter for a nonmilitary affidavit. See section 2.78:9 in this manual for additional discussion of default judgments against servicemembers.

§ 20.24 Citation

§ 20.24:1 Citation Generally

If a default judgment is directly attacked, the rules regarding issuance, service, and return of process are mandatory, and failure to show affirmatively strict compliance will render the attempted service of process invalid. *Houston Pipe Coating Co. v. Houston Freightways*, 679 S.W.2d 42, 44 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (citing *McKanna v. Edgar*, 388 S.W.2d 927, 929–30 (Tex. 1965)). The citation should be carefully checked for accuracy and completeness, because the slightest defect can be grounds for setting aside a default judgment. For additional information concerning service of citation, see chapter 16 of this manual. In *Peralta v. Heights Medical Cen-*

ter, 485 U.S. 80 (1988), a debtor attempted to set aside a default judgment by bill of review. Not only had service been defective, but the debtor had not been notified of the judgment. Nevertheless, the trial court found that the debtor would have to prove a meritorious defense to prevail. The debtor alleged denial of due process under the fourteenth amendment to the U.S. Constitution. The Texas court of appeals upheld the trial court's judgment, but the United States Supreme Court held that the meritorious defense requirement violated due process. *Peralta*, 485 U.S. at 86–87. The Court noted that had the debtor had notice of the suit he might have impleaded the party whose debt he had guaranteed, worked out a settlement, paid the debt, or sold the property himself to avoid a constable's sale without notice for less than the true value of the property. The fact that if the judgment had been set aside the debtor still could not have prevailed on the merits carried no weight with the Court. *Peralta*, 485 U.S. at 85. For a discussion of the scrutiny that courts give citations when reviewing default judgments, see Michael Pohl & David Hittner, *Judgments by Default in Texas*, 37 Sw. L.J. 421 (1983).

§ 20.24:2 Service through Secretary of State

If the defendant was served through the Texas secretary of state, the record must contain proof that citation was forwarded to the defendant; a certificate from the secretary of state is sufficient. *Whitney v. L&L Realty Corp.*, 500 S.W.2d 94, 96 (Tex. 1973). If the record shows that the procedure in Tex. Bus. Corp. Act art. 2.11(B) was strictly followed, all requirements have been met, even though the corporation did not actually receive the citation because of its failure to comply with the provisions of the Business Corporation Act and notify the secretary of state of its change of address. *See Tankard-Smith, Inc. General Contractors v. Thursby*, 663 S.W.2d 473, 475–76 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.). On the other hand, even if a defendant has actual notice of the suit, a default judgment cannot stand if service through the secretary of state does not meet statutory requirements. *See Bank of America, N.T.S.A. v. Love*, 770 S.W.2d 890, 892 (Tex. App.—San Antonio 1989, writ denied).

§ 20.24:3 Substituted Service

The original, unserved return on which subsequent alternate service was based must be in the record and must affirmatively show the officer's reasonable diligence in executing the citation or the cause of his failure to execute it. *David A. Carl Enterprises v. Crow-Shutt # 14*, 553 S.W.2d 118, 120 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ); Tex. R. Civ. P. 107(d). Under rule 103 citation may be served, and under rule 107 returned, by any person at least eighteen years old who is authorized by law or court order to serve citations. The return of service must be signed by such an authorized person and, if signed by someone other than a sheriff, constable, or clerk of the court, must either be verified or signed under penalty of perjury. Tex. R. Civ. P. 107(e). A return signed under penalty of perjury must include the statement prescribed in Tex. R. Civ. P. 107(e). In addition, rule 107(f) provides that if citation is executed by another method under rule 106, proof of service must be made in the manner ordered by the court. Any deviation from the express terms of the order authorizing substituted service will mandate reversal. *Becker v. Russell*, 765 S.W.2d 899, 901 (Tex. App.—Austin 1989, no writ). A typographical error in the forwarding address typed by the secretary of state is grounds to set aside a default judgment based on substituted service. *Royal Surplus Lines Insurance Co. v. Samaria Baptist Church*, 840 S.W.2d 382, 383 (Tex. 1992).

§ 20.24:4 Service by Publication

If the defendant does not answer or appear after being cited by publication, an attorney ad litem must be appointed to represent him. *Villegas v. Shane-Michael Optical Co.*, 443 S.W.2d 571, 572–73 (Tex. Civ. App.—El Paso 1969, no writ); Tex. R. Civ. P. 244.

§ 20.25 Damages and Record

§ 20.25:1 Liquidated Damages

Damages will be assessed by the court in a default judgment "if the claim is liquidated and proved by an instrument in writing." Tex. R. Civ. P. 241. Damages may not be assessed without presenting evidence unless the claim is liquidated—that is, if the amount due can with sufficient certainty be calculated by the court solely from the instrument sued on and the factual, as opposed to conclusory, allegations of the petition. *Fears v. Mechanical & Industrial Technicians*, 654 S.W.2d 524, 530 (Tex. App.—Tyler 1983, writ ref'd n.r.e.); *Burrows v. Bowden*, 564 S.W.2d 474, 475 (Tex. Civ. App.—Corpus Christi 1978, no writ); *see* Michael Pohl & David Hittner, *Judgments by Default in Texas*, 37 Sw. L.J. 421, 436 (1983).

§ 20.25:2 Unliquidated Damages

To support a default judgment, the court must hear sufficient evidence on all unliquidated damages. *Holt Atherton Industries v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992); Tex. R. Civ. P. 243. *See also Otis Elevator Co. v. Parmelee*, 850 S.W.2d 179, 181 (Tex. 1993) (trial court, on imposing case-determinative discovery sanctions, improperly awarded unliquidated damages without hearing evidence). Unliquidated damages include the following:

1. Any damages not proved by an instrument in writing. Tex. R. Civ. P. 243.
2. Attorney's fees "actually incurred." ("Attorney's fees are by their very nature unliquidated unless the exact amount is fixed by agreement.") *Freeman v. Leasing Associates*, 503 S.W.2d 406, 408 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ).
3. "Reasonable" attorney's fees. *Odom v. Pinkston*, 193 S.W.2d 888, 891 (Tex. Civ. App.—Austin 1946, writ ref'd n.r.e.).
4. "Collection expenses" (in addition to attorney's fees) if the written instrument does not fix the exact amount. *Odom*, 193 S.W.2d at 891.

Note that affidavits constitute probative evidence to support a default judgment on unliquidated damages. *Texas Commerce Bank, N.A. v. New*, 3 S.W.3d 515, 516–17 (Tex. 1999).

If a party is not present or represented by counsel when testimony is taken on damages following entry of a default judgment, the trial court must require the court reporter to make a record of the evidence. *Houston Pipe Coating Co. v. Houston Freightways*, 679 S.W.2d 42, 45 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). The plaintiff's attorney should request the reporter's presence if the court fails to do so. Otherwise, the defendant may seek a new trial on unliquidated damages on the ground that the testimony on which the judgment was based was not recorded, and consequently no statement of facts is available for review of the sufficiency of the evidence. *Houston Pipe Coating*, 679 S.W.2d at 45; *see also Rogers v. Rogers*, 561 S.W.2d 172, 173 (Tex. 1978); *Morgan Express, Inc. v. Elizabeth-Perkins, Inc.*, 525 S.W.2d 312 (Tex. Civ. App.—Dallas 1975, writ ref'd) (*Morgan Express*'s reliance on former provisions of statute governing court reporter's duty considered not of controlling significance in *Rogers*). The rule that, absent a statement of facts, the appellate court must presume that the evidence was sufficient does not apply on direct review of

a default judgment if no statement of facts is available. *Morgan Express*, 525 S.W.2d at 315; *see also* Michael Pohl & David Hittner, *Judgments by Default in Texas*, 37 Sw. L.J. 421 (1983).

§ 20.25:3 Pleadings

A default judgment must be in accord with the pleadings. It is impermissible in a default judgment to render judgment for damages in excess of the damages specifically pleaded. *Simon v. BancTexas Quorum, N.A.*, 754 S.W.2d 283, 286 (Tex. App.—Dallas 1988, writ denied).

§ 20.26 Judgment Nihil Dicit

Judgment nihil dicit, wherein no answer placing the merits in issue is on file, is a form of default judgment. *Stoner v. Thompson*, 578 S.W.2d 679, 683 (Tex. 1979). Although there is a difference between a no-answer default judgment and a judgment nihil dicit, they are so similar that the same rules generally apply to each with respect to the effect and validity of the judgment. In both instances the nonanswering party has admitted the facts properly pleaded and the justice of the opponent's claim, though a judgment nihil dicit carries a stronger confession than does a default judgment. *Stoner*, 578 S.W.2d at 682. *But see Roberts v. Mullen*, 446 S.W.2d 86, 89 (Tex. Civ. App.—Dallas 1969, writ ref'd n.r.e.) (such implied admission not always absolute and subject to rebuttal).

Judgment nihil dicit is usually limited to situations in which the defendant has entered some plea, usually dilatory, which has not placed the merits of the plaintiff's case in issue, or the defendant has placed the merits in issue by filing an answer, but the answer has been withdrawn. *Frymire Engineering Co. v. Grantham*, 524 S.W.2d 680, 681 (Tex. 1975).

A party who permits a judgment nihil dicit impliedly confesses judgment and waives all errors in pleading or proof that are not fundamental or jurisdictional, except those that the record shows were not intended to be waived. *O'Quinn v. Tate*, 187 S.W.2d 241, 245 (Tex. Civ. App.—Texarkana 1945, writ ref'd).

A judgment nihil dicit must accord with the pleadings so that the amount and terms of the judgment are ascertainable by reference to the petition. *Mullen v. Roberts*, 423 S.W.2d 576, 579 (Tex. 1968).

A judgment nihil dicit is at form 20-5 in this chapter.

TEXAS COLLECTIONS MANUAL

Fourth Edition

Volume 3

Austin 2011

The State Bar of Texas, through its TexasBarBooks Department, publishes practice books prepared and edited by knowledgeable authors to give practicing lawyers and judges as much assistance as possible. The competence of the authors ensures outstanding professional products, but, of course, neither the State Bar of Texas, the editors, nor the authors make either express or implied warranties in regard to the use or freedom from error of this publication. In the use or modification of these materials, each lawyer must depend on his or her own expertise and knowledge of the law.

IRS CIRCULAR 230 NOTICE: To ensure compliance with requirements imposed by the IRS, we inform you that (1) this written material was not intended or written by the author(s) to be used for the purpose of avoiding federal penalties that may be imposed on a taxpayer; (2) this written material cannot be used by a taxpayer for the purpose of avoiding penalties that may be imposed on the taxpayer; (3) this written material cannot be used in promoting, marketing, or recommending to another party any tax-related transaction or matter; and (4) a taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

The use of the masculine gender in parts of this manual is purely for literary convenience and should, of course, be understood to include the feminine gender as well.

International Standard Book Number: 978-1-892542-78-6
International Standard Book Number: 978-1-892542-93-9 (2012 Supplement)
Library of Congress Control Number: 2011920779

Printed in the United States of America

Fourth Edition, 2011

Chapter 27

Postjudgment Remedies

I. Judgment Lien and Abstract of Judgment

II. Execution

III. Property Subject to and Exempt from Execution

IV. Postjudgment Garnishment

V. Turnover

VI. Other Postjudgment Collection Devices

Forms

[Reserved]

§ 27.35:5 Homestead in Qualifying Trust

Tex. Prop. Code § 41.0021 discusses homesteads in qualifying trusts.

§ 27.36 Designation of Homestead

The statutory provisions for the voluntary designation of homestead are as follows:

1. The designation must be by an instrument "signed and acknowledged or proved in the manner required for the recording of other instruments." Tex. Prop. Code § 41.005(c).
2. The designation must be filed in the county in which all or part of the property is located. There are specific requirements for the instrument's contents. Tex. Prop. Code § 41.005(c).
3. Boundaries set forth in the voluntary designation may be changed by filing and recording an instrument in the manner provided for a voluntary designation. Tex. Prop. Code § 41.005(d).
4. If at the time a writ of execution is issued the defendant has not made a voluntary designation, then any designation must be made in accordance with Tex. Prop. Code §§ 41.021–.024, portions of which are discussed below in this section. Tex. Prop. Code § 41.005(f).
5. If a voluntary designation was made by instrument on file under prior law, it is considered a voluntary designation under Tex. Prop. Code § 41.005. Tex. Prop. Code § 41.005(g).
6. If a person has not made a designation as set out in items 1. through 5. above but receives a homestead exemption for tax purposes on the property in question, that property is considered to be designated as his homestead if it is listed as his residence homestead on the most recent tax appraisal roll. Tex. Prop. Code § 41.005(e).

If an execution is issued against a holder of an interest in land of which a homestead may be a part and the defendant has not made a voluntary designation as discussed above, the plaintiff may give the defendant notice to designate his homestead. Tex. Prop. Code § 41.021. The notice must state that if the defendant fails to make the designation within the time permitted by statute, the court will appoint a commissioner to do so at the defendant's expense. Tex. Prop. Code § 41.021. The defendant has until 10:00 A.M. on the first Monday after the expiration of twenty days from the date he is served with notice to file his written designation with the court. Tex. Prop. Code § 41.022.

If the defendant fails to designate, the plaintiff may, within ninety days after issuance of the writ of execution, move the court to appoint the commissioner to designate the homestead. Tex. Prop. Code § 41.023(a). On such a motion, the court must appoint a commissioner and may appoint a surveyor and others to assist the commissioner. The commissioner must designate the homestead in a written report, with a plat of the designated area, and file it with the court no more than sixty days after the appointment order is signed or within such time as the court may allow. Tex. Prop. Code § 41.023(a). Within ten days after the commissioner files his report, the defendant or the plaintiff may request a hearing to confirm, reject, or modify the report. Exceptions to all or part of the report must be filed before the hearing; otherwise, evidence may not be submitted to contradict the report. After the hearing, or if no hearing is requested, the court must designate the homestead and order sale of the excess. Tex. Prop. Code § 41.023(b).

A homestead claimant is not estopped from asserting homestead rights in residential property on the basis of contrary declarations if, at

the time of the declarations, the claimant was in actual use and possession of the property. *In re Niland*, 825 F.2d 801, 807 (5th Cir. 1987).

§ 27.37 Creation and Abandonment of Homestead

To create the homestead right, there must be both overt acts of homestead occupancy and the intent to dedicate the property to homestead usage. *Gregory v. Sunbelt Savings, F.S.B.*, 835 S.W.2d 155, 158 (Tex. App.—Dallas 1992, writ denied); *Lifemark Corp. v. Merritt*, 655 S.W.2d 310, 314 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.). No specific writing is necessary. *Dodd v. Harper*, 670 S.W.2d 646, 649 (Tex. App.—Houston [1st Dist.] 1983, no writ). *See also Farrington v. First National Bank*, 753 S.W.2d 248, 251 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (summary judgment affidavit stating appellant's intent to occupy rural property and stating certain actions short of actually building home was sufficient to create fact questions on intent to create homestead even though appellant lived on urban property claimed as homestead).

Once the homestead right vests, it is presumed to continue until there is affirmative proof of abandonment. The evidence relied on to establish abandonment must be undeniably clear that there has been a total abandonment with an intention not to return and claim the exemption before a homestead, once occupied as such, can be subjected to a forced sale. *McFarland v. Rousseau*, 667 S.W.2d 929, 931 (Tex. App.—Corpus Christi 1984, no writ) (citing *West v. Austin National Bank*, 427 S.W.2d 906, 912 (Tex. Civ. App.—San Antonio 1968, writ ref'd n.r.e.)). The burden of proof of abandonment is on the plaintiff. *Exocet, Inc. v. Cordes*, 815 S.W.2d 350, 355 (Tex. App.—Austin 1991, no writ), *abrogated on other grounds by Fairfield Financial Group, Inc. v. Synnott*, 300 S.W.3d 316, 320 (Tex. App.—Austin 2009, no pet.). If a homestead claimant is married, the homestead cannot be abandoned without consent of the claimant's spouse. Tex. Const. art. XVI, § 50(b); Tex. Prop. Code § 41.004.

§ 27.38 Effect of Death on Homestead Rights

Death of a party protected by homestead rights extinguishes those rights. Homestead rights cannot be inherited or transferred by will. The court, however, will set apart the homestead for the use and benefit of the surviving spouse and minor children if no affidavit is filed under Texas Probate Code section 271(b). Tex. Prob. Code § 271(a)(1). Exempt property of a decedent's estate other than the homestead will be set apart for the use and benefit of the surviving spouse, minor children, unmarried adult children remaining with the family, and any adult child who is incapacitated. Tex. Prob. Code § 271(a)(2); *National Union Fire Insurance Co. of Pittsburgh v. Olson*, 920 S.W.2d 458, 461 (Tex. App.—Austin 1996, no writ). See also section 29.10 in this manual regarding exempt property in probate.

§ 27.39 Sale and Leaseback of Homestead

See section 17.38 in this manual regarding the consequences of making a purchase of the debtor's homestead for less than fair market value, followed by a leaseback of the property.

§ 27.40 Fraudulent Transfer of Homestead

The homestead exemption may be lost only by death, abandonment, or alienation. A fraudulent transfer of the homestead by the debtor to his own holding company to avoid creditors will not result in forfeiture of the homestead exemption. Also, because creditors have no right of recovery against a debtor's homestead, such a con-

veyance of the homestead cannot be in fraud of their rights as creditors. *In re Moody*, 862 F.2d 1194 (5th Cir. 1989), *cert. denied*, 503 U.S. 960 (1992). See section 14.10 in this manual regarding fraudulent transfer generally.

§ 27.41 Exempt Personal Property

§ 27.41:1 List of Exemptions

Except for properly fixed encumbrances, personal property exempt from forced sale up to an aggregate fair market value of $60,000 for a family or $30,000 for a single adult person who is not a member of a family includes—

1. home furnishings, including family heirlooms;
2. provisions for consumption;
3. farming or ranching vehicles and implements;
4. tools, equipment, books, and apparatus, including boats and motor vehicles, used in a trade or profession;
5. wearing apparel;
6. jewelry, not to exceed 25 percent of the $60,000/$30,000 limit;
7. two firearms;
8. athletic and sporting equipment, including bicycles;
9. a two-wheeled, three-wheeled, or four-wheeled motor vehicle for each member of the family who holds a driver's license or who is not licensed but relies on another person to drive the vehicle for him;
10. the following animals and forage on hand for their consumption:
    a. two horses, mules, or donkeys, and a saddle, blanket, and bridle for each;
    b. twelve head of cattle;
    c. sixty head of other livestock;
    d. 120 fowl; and
11. household pets.

Tex. Prop. Code §§ 42.001, 42.002. Also exempt and not included in the aggregate limitations are current wages for personal services; professionally prescribed health aids; alimony, support, or separate maintenance; and certain religious books. Tex. Prop. Code § 42.001(b). Unpaid commissions for personal services not exceeding 25 percent of the aggregate limitation are also exempt. Tex. Prop. Code § 42.001(d). Qualified college savings plans are also exempt. Tex. Prop. Code § 42.0022.

§ 27.41:2 Tools of Trade

Texas courts have held that, in order to qualify as a tool of the debtor's trade or profession, a tool or apparatus must be peculiarly essential to the practice of that trade. *Segraves v. Weitzel*, 734 S.W.2d 773, 775–76 (Tex. App.—Fort Worth 1987, no writ) (citing *Simmang v. Pennsylvania Fire Insurance Co.*, 112 S.W. 1044 (Tex. 1908), and *McMillan v. Dean*, 174 S.W.2d 737 (Tex. Civ. App.—Austin 1943, writ ref'd w.o.m.)). Holdings of the Texas bankruptcy courts, however, have interpreted the statute differently, holding that the tool must merely be useful in the debtor's trade, not peculiarly adapted to it. *In re Erwin*, 199 B.R. 628 (Bankr. S.D. Tex. 1996); *In re Legg*, 164 B.R. 69 (Bankr. N.D. Tex. 1994).

§ 27.41:3 Certain Savings Plans and Social Security Benefits

There are additional personal property exemptions for several forms of assets in which the debtor holds a right to receive payments, whether the right is vested or not. These include—

1. rights under a stock bonus;
2. pension, annuity, deferred compensation, profit-sharing, or similar plans, including retirement plans for self-employed persons;
3. simplified employee pension plans;
4. individual retirement accounts or annuities, including inherited individual retirement accounts or annuities;
5. health savings accounts; and
6. annuities or similar contracts purchased with assets distributed from any of the above.

Tex. Prop. Code § 42.0021(a).

The savings plans listed in Texas Property Code section 42.0021(a) are exempt to the extent they are exempt from federal income tax or to the extent federal income tax on the person's interest is deferred until actual payment of benefits to the person under section 223, 401(a), 403(a), 403(b), 408(a), 408A, 457(b), or 501(a) of the Internal Revenue Code of 1986, including a government plan or church plan described by section 414(d) or (e) of the Internal Revenue Code of 1986. Tex. Prop. Code § 42.0021(a).

Contributions to an IRA, other than contributions to a Roth IRA described in section 408A of the Internal Revenue Code of 1986, or to an annuity that exceed the amount deductible under the Internal Revenue Code of 1986 and any accrued earnings on those contributions are not exempt unless otherwise exempt by law. Tex. Prop. Code § 42.0021(b).

Federally based retirement or pension benefits are also exempt under various federal statutes. These include—

1. Social Security benefits, 42 U.S.C. § 407(a);
2. veterans benefits, 38 U.S.C. § 5301; and
3. civil service retirement benefits, 5 U.S.C. § 8346.

In addition, a number of federally created pension or retirement benefits are also exempt, such as those for longshoremen and railroad workers.

§ 27.41:4 Insurance Benefits

The cash value and proceeds of an insurance policy or annuity contract issued by a life, health, or accident insurance company, including a mutual company or fraternal benefit society or an annuity or benefit plan used by an employer or individual, are exempt from execution, attachment, garnishment or other seizure. Tex. Ins. Code § 1108.051. The exemption is unlimited and is in addition to the exemptions listed in chapter 42 of the Property Code. Tex. Ins. Code § 1108.001. Exceptions to this exemption are for premium payments made in fraud of creditors, for debt secured by the policy or proceeds, or for child support liens under chapter 157 of the Family Code. Tex. Ins. Code § 1108.053.

§ 27.41:5 Designation of Exempt Property

If the number or amount of a type of personal property exceeds the exemption allowed by Tex. Prop. Code § 42.002 or if the aggregate value of a debtor's personal property exceeds the limitation set out at Tex. Prop. Code § 42.001(a), the defendant may, under certain circumstances, specify the property to be levied on. Under other circumstances, the levying officer or the court may make the designation. Tex. Prop. Code § 42.003.

§ 27.41:6 Property Subject to Security Interest or Mortgage

When the defendant points out property on which the officer is to levy, he cannot point out property that he has sold, mortgaged, or con-

veyed in trust or that is exempt from forced sale. Tex. R. Civ. P. 638. Property that has been pledged, assigned, or mortgaged as security for a debt or contract, however, can be levied on and sold under execution against the person making the pledge, assignment, or mortgage. Tex. R. Civ. P. 643. If the purchaser, mortgagee, or trustee of property that the defendant has sold, mortgaged, or conveyed in trust points out other property of the defendant in the county that is sufficient to satisfy the execution, the property sold, mortgaged, or conveyed in trust may not be seized in execution. Tex. Civ. Prac. & Rem. Code § 34.004. Only that interest owned by the defendant can be sold. *See* Tex. Civ. Prac. & Rem. Code § 34.045. Before the revision of chapter 9 of the Texas Business and Commerce Code that took effect in 2001, section 9.311 of the Code provided that the defendant's rights in the collateral could be sold under execution even if the security agreement prohibited transfer by the defendant. Mortgaged property could therefore be sold, but the buyer purchased it subject to the mortgage debt or security interest. *Liquid Carbonic Co. v. Logan*, 79 S.W.2d 632 (Tex. Civ. App.—Austin 1935, no writ). The secured party may try to stop the sale. The value of the defendant's equity, reduced by expenses of sale, may not be worth the trouble of a levy. The sales value will typically be reduced further when the buyer must consider satisfying or continuing to carry the security interest.

Although Tex. R. Civ. P. 643 provides for the execution sale of property subject to a security interest, and former section 9.311 provided for involuntary transfer of the defendant's property through levy, the court in *Grocers Supply v. Intercity Investment Properties, Inc.*, 795 S.W.2d 225 (Tex. App.—Houston [14th Dist.] 1990, no writ), nonetheless held that a prior perfected security interest holder who had a right to possession of the property had superior rights over a "mere" judgment creditor. The security agreement at issue provided that a judgment against the debtor or the levy, seizure, or attachment of the collateral would constitute a default, making the entire obligation immediately due and payable to the secured creditor. The court ordered possession for the secured party and recovery of all of its costs. *Grocers Supply*, 795 S.W.2d at 227. Revised chapter 9 of the Texas Business and Commerce Code, which took effect July 1, 2001, does not have a similar provision to former section 9.311, which provided that collateral could be sold under execution even if a security agreement prohibited transfer by the debtor. Instead, revised chapter 9 simply provides that "whether a debtor's rights in collateral may be voluntarily or involuntarily transferred is governed by law other than this chapter." Tex. Bus. & Com. Code § 9.401(a). The comments explain that—

> [d]ifficult problems may arise with respect to attachment, levy, and other judicial procedures under which a debtor's creditors may reach collateral subject to a security interest. For example, an obligation may be secured by collateral worth many times the amount of the obligation. If a lien creditor has caused all or a portion of the collateral to be seized under judicial process, it may be difficult to determine the amount of the debtor's "equity" in the collateral that has been seized. The section leaves resolution of this problem to the courts. The doctrine of marshaling may be appropriate.

Tex. Bus. & Com. Code § 9.401 cmt. 6. The comments appear to leave open the possibility of seizure of property subject to security interests, with resolution in the courts. Caution should therefore be exercised if seized property is subject to a prior perfected security interest and the secured party demands possession of the property.

§ 27.42 Fraudulent Conveyance to Avoid Judgment Lien or Execution

If the debtor has used nonexempt property to acquire, obtain any interest in, improve, or pay indebtedness on property that would be exempt under Property Code sections 42.001–.002 with the intent to defraud, delay, or hinder an interested person, the property or interest so acquired and the improvements so made will not be exempt from seizure for the satisfaction of liabilities. Tex. Prop. Code § 42.004(a). If any property, interest, or improvement is acquired by the discharge of an encumbrance held by another, any person who is defrauded, delayed, or hindered by the acquisition is subrogated to the rights of the prior encumbrancer. Tex. Prop. Code § 42.004(a). The plaintiff must assert this claim within two years after the transaction. A person with a claim that is unliquidated or contingent at the time of the transaction must assert a claim under this section within one year after the claim is reduced to judgment. Tex. Prop. Code § 42.004(b). It is a defense to a claim under Tex. Prop. Code § 42.004 that the transfer was made in the ordinary course of business by the person making the transfer. Tex. Prop. Code § 42.004(c).

See section 14.10 in this manual for a discussion of the Texas Uniform Fraudulent Transfer Act, Tex. Bus. & Com. Code §§ 24.001–.013.

[Sections 27.43 through 27.50 are reserved for expansion.]

IV. Postjudgment Garnishment

§ 27.51 Purpose and Use

Garnishment is a remedy allowing a judgment creditor (garnisher) either to recover property of the judgment debtor in the hands of a third party (garnishee) or to collect a debt owed by the garnishee to the debtor. *See* Tex. Civ. Prac. & Rem. Code §§ 63.001–.005; *Orange County v. Ware*, 819 S.W.2d 472, 474 (Tex. 1991).

The creditor should not use garnishment as a discovery device but should proceed in garnishment only if he cannot satisfy his judgment by execution and is confident that the garnishment action will return more than it will cost. If the creditor brings a garnishment action and the garnishee establishes that he neither has the judgment debtor's property nor is indebted to the judgment debtor, the costs of the proceeding, including a reasonable compensation to the garnishee, will be taxed against the creditor. Tex. R. Civ. P. 677. For a discussion of wrongful garnishment, see section 27.71 below.

§ 27.52 Applicable Statutes and Rules

Postjudgment garnishment is governed by Tex. Civ. Prac. & Rem. Code §§ 63.001–.008 and by Tex. R. Civ. P. 657–679. The attorney may find some of the material discussing prejudgment garnishment in sections 8.11 through 8.15 in this manual to be useful when considering postjudgment garnishment.

Caveat: Many of the cases cited in this part of this chapter were decided under former Texas Revised Civil Statutes articles 4076, 4084, 4096, and 4099, which have been codified at Tex. Civ. Prac. & Rem. Code §§ 63.001–.005.

§ 27.53 Strict Compliance Required

Garnishment is a harsh remedy, and strict compliance with all requirements is necessary. *El Periodico, Inc. v. Parks Oil Co.*, 917 S.W.2d 777, 779 (Tex. 1996); *Walnut Equipment Leasing Co. v. J-V Dirt & Loam*, 907 S.W.2d 912, 915 (Tex. App.—Austin 1995, writ denied). Clerical errors in the garnishment documents may be corrected and amended as the court directs. Tex. R. Civ. P. 679. Certain defects in the garnishment procedure that are neither fundamental nor jurisdictional are waived if the garnishee fails to answer the writ. Failure to substantially comply with the statutes and rules will, however, void the garnishment judgment. *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Allied Bank of Texas*, 704 S.W.2d 919, 920 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

§ 27.54 Availability of Postjudgment Garnishment

§ 27.54:1 Availability Generally

A writ of garnishment is available after judgment only in the following circumstances:

1. The plaintiff has a valid, final, and subsisting judgment against the defendant. Tex. Civ. Prac. & Rem. Code § 63.001(3). The garnisher must establish ownership of the underlying judgment. *See, e.g., Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Allied Bank of Texas*, 704 S.W.2d 919 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.). See section 27.54:2 below regarding when a judgment is final for garnishment purposes.
2. The defendant has not filed an approved supersedeas bond to suspend execution on the judgment. Tex. R. Civ. P. 657.
3. The plaintiff swears that, to his knowledge, the defendant does not possess in Texas sufficient property subject to execution to satisfy the judgment. Tex. Civ. Prac. & Rem. Code § 63.001(3). It is not necessary, however, for the plaintiff to prove that the defendant lacks sufficient property in the state to satisfy the judgment. *Black Coral Investments v. Bank of the Southwest*, 650 S.W.2d 135, 136 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.). See also section 8.12:4 in this manual for a discussion of the corresponding affidavit requirement for prejudgment garnishment. It is not necessary to have had a writ of execution returned *nulla bona* to use garnishment. *Cantwell v. Wilson*, 241 S.W.2d 366, 368 (Tex. Civ. App.—Austin 1951, no writ).

§ 27.54:2 Finality of Judgment

A judgment is final and subsisting for garnishment purposes from and after the date it is signed. Tex. R. Civ. P. 657. Therefore, a postjudgment action is available as soon as the underlying judgment is signed, if all other bases for the garnishment are met.

§ 27.55 Jurisdiction and Parties

Although garnishment is brought as a separate action, it is ancillary to the underlying suit and should be brought in the court that rendered the judgment to be enforced. *King & King v. Porter*, 252 S.W. 1022 (Tex. 1923). A garnishment action is brought against the garnishee as defendant. Tex. R. Civ. P. 659. In some counties the garnishment action will be numbered as an "a" case, such as "97-1010a," whereas in other counties it will be given a new number. The judgment debtor is not a party to the suit but must be served with notice along with a copy of

the writ of garnishment, the application and accompanying affidavits, and the orders of the court as soon as practicable after service of the writ on the garnishee. Tex. R. Civ. P. 663a.

The fact that the judgment debtor is not a party to the garnishment action is particularly relevant if the garnisher and garnishee enter into an agreed judgment. Because the debtor is not a party, his assent is not necessary to the enforceability of the agreed judgment.

§ 27.56 Property Subject to and Exempt from Garnishment

§ 27.56:1 Property and Debts Subject to Garnishment

Generally, all debts and all nonexempt personal property of the defendant held by the garnishee may be reached by the judgment plaintiff through postjudgment garnishment. Nonexempt property is discussed in part III. in this chapter. To be subject to garnishment, a debt must be absolute and not subject to any contingency. *Clapper v. Petrucci*, 497 S.W.2d 120, 122 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.). For a discussion of property subject to garnishment, see George Ann Miller, *The Garnishment Process*, *in* Student Symposium, *Creditor's Post-Judgment Remedies in Texas*, 5 St. Mary's L.J. 719, 722 (1974).

Some commonly sought debts subject to garnishment are as follows:

1. Bank account. A bank account is the most commonly garnished debt. Bank deposits can be reached regardless of the account name if the funds are owed to the judgment debtor. *Frankfurt's Texas Investment Corp. v. Trinity Savings & Loan Ass'n*, 414 S.W.2d 190, 195 (Tex. Civ. App.—Dallas 1967, writ ref'd n.r.e.). Community funds can also be reached. *Tatum State Bank v. Gibson*, 24 S.W.2d 506, 507 (Tex. Civ. App.—Texarkana 1930, no writ); *Brooks v. Sherry Lane National Bank*, 788 S.W.2d 874, 876 (Tex. App.—Dallas 1990, no writ).

2. Safe-deposit box. A bank can be sued in garnishment to reach the contents of a safe-deposit box holding the judgment debtor's property, even if the bank does not know what the box contains. *Blanks v. Radford*, 188 S.W.2d 879, 886 (Tex. Civ. App.—Eastland 1945, writ ref'd w.o.m.).

3. Stock. Stock is expressly subject to garnishment under Tex. R. Civ. P. 669.

4. Promissory note. A past-due note can be garnished. *Thompson v. Gainesville National Bank*, 18 S.W. 350 (Tex. 1886); *Davis v. First National Bank*, 135 S.W.2d 259, 261 (Tex. Civ. App.—Waco 1939, no writ). A nonnegotiable note can also be garnished. *Saenger v. Proske*, 232 S.W.2d 106 (Tex. Civ. App.—Austin 1950, writ ref'd). A negotiable instrument cannot be garnished before its maturity. *Iglehart v. Moore*, 21 Tex. 501 (1858).

5. Trust fund in which debtor is beneficiary. Assets in and revenue from trusts other than spendthrift trusts can be garnished. *Nunn v. Titche-Goettinger Co.*, 245 S.W. 421, 422–23 (Tex. Comm'n App. 1922, judgm't adopted); *Bank of Dallas v. Republic National Bank of Dallas*, 540 S.W.2d 499, 501–02 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.).

6. Judgments. Judgments can be garnished. *Industrial Indemnity Co. v. Texas American Bank—Riverside*, 784 S.W.2d 114, 119–120 (Tex. App.—Fort Worth 1990, no writ).

§ 27.56:2 Property Exempt from Garnishment

Exempt property is discussed generally in part III. in this chapter. Some of the more important exemptions are as follows:

1. Real property. Only effects of the debtor are subject to garnishment; "effects" do not include real property. *See Fitzgerald v. Brown, Smith & Marsh Bros.*, 283 S.W. 576, 578 (Tex. Civ. App.—Texarkana 1926, writ dism'd). Also, the proceeds of a sale of a homestead are exempt from seizure for six months. Tex. Prop. Code § 41.001(c).

2. Wages. Current wages are exempt, except for the enforcement of court-ordered child support payments. Tex. Const. art. XVI, § 28; Tex. Civ. Prac. & Rem. Code § 63.004; Tex. Prop. Code § 42.001(b)(1); *see also* 42 U.S.C. § 659 (garnishment of wages due from or payable by United States, including wages of military, for child support obligations).

3. Worker's compensation benefits. Death and personal injury benefits paid under workers' compensation laws are exempt. Tex. Lab. Code § 408.201.

4. Government employees' retirement benefits. Pensions, annuities, and retirement benefits of government employees are usually exempt; check the applicable statute. *See, e.g.*, 5 U.S.C. § 8346; Tex. Gov't Code § 811.005 (retirement annuities and certain other benefits of state employees), § 821.005 (payments by Teacher Retirement System). *But see Perkins v. Perkins*, 690 S.W.2d 706, 708 (Tex. App.—El Paso 1985, writ ref'd n.r.e.) (military and civil service retirement benefits not exempt in some circumstances).

5. Welfare and Social Security benefits. Most state welfare benefits paid or payable are exempt. *See, e.g.*, Tex. Hum. Res. Code § 31.040 (aid to families with dependent children), § 32.036(b) (medical assistance). Federal Social Security benefits are likewise exempt. 42 U.S.C. § 407(a).

6. Trust or other funds in debtor's name belonging to third party. Neither trust funds nor funds of another deposited in a defendant's name are subject to garnishment by the defendant's creditors. Failure of the garnishee to raise this defense may subject the garnishee to liability to the defendant. *Southwest Bank & Trust Co. v. Calmark Asset Management*, 694 S.W.2d 199, 200–01 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

7. Insurance benefits. Certain life, health, and accident insurance benefits are exempt. Tex. Ins. Code §§ 1108.051–.053.

8. Pensions, profit-sharing, retirement, and similar plans. With some exceptions, property designated under Tex. Prop. Code § 42.0021 is exempt from attachment, execution, and seizure for the satisfaction of debts. Property exempt under this statute is discussed at section 27.41:3 above.

9. Unliquidated demands. Unliquidated demands are exempt from garnishment. *Houston Drywall, Inc. v. Construction Systems, Inc.*, 541 S.W.2d 220, 222 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

10. Property held by state. Property held by the state is exempt from garnishment as a matter of public policy and

under the doctrine of sovereign immunity. *Morris v. Texas Department of Corrections*, 762 S.W.2d 667, 669–70 (Tex. App.—Tyler 1988, no writ) (sovereign immunity); *Addison v. Addison*, 530 S.W.2d 920, 921 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ) (public policy); *but see* Tex. Civ. Prac. & Rem. Code § 63.007 (waiving sovereign immunity for inmate trust funds). Sovereign immunity should be determined on a case-by-case basis.

11. Property held *in custodia legis*. Property held *in custodia legis* may not be garnished. However, when the court enters a decree of distribution or when nothing more remains for the custodian to do but make delivery of the property or payment of the money, the reason for *custodia legis* is satisfied, and the property becomes subject to levy. *Gonzales v. Daniel*, 854 S.W.2d 253, 256–57 (Tex. App.—Corpus Christi 1993, no writ).

12. Money due original contractors and subcontractors. Creditors of original contractors may not garnish money due the original contractor or the contractor's surety; also, a creditor of a subcontractor may not garnish money due the subcontractor, to the prejudice of the subcontractors, mechanics, laborers, materialmen, or their sureties. Tex. Prop. Code § 53.151.

§ 27.56:3 Alter Ego

A garnishment proceeding may be used to reach the defendant's property when it is found in the possession of another entity that is the alter ego of the defendant. *Valley Mechanical Contractors v. Gonzales*, 894 S.W.2d 832, 834–35 (Tex. App.—Corpus Christi 1995, no writ).

§ 27.56:4 Fraudulent Transfer

If the plaintiff specifically pleads and proves a fraudulent transfer, he can garnish property found to have been transferred improperly from the defendant to the garnishee. *Englert v. Englert*, 881 S.W.2d 517, 519–20 (Tex. App.—Amarillo 1994, no writ); *see* Tex. Bus. & Com. Code § 24.005(a)(1). See section 14.10 in this manual regarding fraudulent transfer.

§ 27.56:5 Debtor's Property Held by Third Party

If the plaintiff wants to challenge title to property held by a third party (for example, if the defendant's funds have been placed in a bank account held by a nominal owner on behalf of the defendant), the plaintiff should seek a writ of garnishment naming the nominal owner, not the true owner. *Bank One Texas, N.A. v. Sunbelt Savings, F.S.B.*, 824 S.W.2d 557, 558 (Tex. 1992). The court did not make it clear how to "name" the third party. If the applicant for the writ of garnishment alleges that the defendant's funds are in a third party's account, the garnishee typically will freeze the account and interplead. *See also Newsome v. Charter Bank Colonial*, 940 S.W.2d 157 (Tex. App.—Houston [14th Dist.] 1996, writ denied); *Overton Bank & Trust, N.A. v. PaineWebber, Inc.*, 922 S.W.2d 311 (Tex. App.—Fort Worth 1996, no writ).

§ 27.57 Application for Writ of Garnishment

Form 27-11 in this chapter is an application for writ of garnishment after judgment. Form 27-12 is the affidavit in support of the application. No hearing is required on a postjudgment application. The clerk will issue a writ when the application is filed. Tex. R. Civ. P. 658.

§ 27.58 No Bond for Postjudgment Garnishment

Unlike prejudgment garnishment, no bond is required for postjudgment garnishment. *See* Tex. R. Civ. P. 658–658a.

§ 27.59 Service of Writ of Garnishment

§ 27.59:1 Service on Garnishee

The writ of garnishment is to be served on the garnishee. Tex. R. Civ. P. 659. Service must be by a sheriff or constable, not by a private process server. *Lawyers Civil Process, Inc. v. State*, 690 S.W.2d 939, 942–43 (Tex. App.—Dallas 1985, no writ).

§ 27.59:2 Service on Financial Institutions

Service of a writ of garnishment on a financial institution is governed by section 59.008 of the Texas Finance Code. Tex. Civ. Prac. & Rem. Code § 63.008. A claim against a customer—defined in Finance Code section 59.001(2) to include writs of garnishment and notices of receivership, among other actions—must be delivered to the address designated as the address of the registered agent of the financial institution in its registration statement filed with the secretary of state pursuant to section 201.102 or 201.103 of the Finance Code. Tex. Fin. Code § 59.008(a). Out-of-state financial institutions must file an application for registration with the secretary of state by complying with the laws of Texas for foreign corporations doing business in Texas, that is, designating an agent for process. Tex. Fin. Code § 201.102. Texas financial institutions may file a statement with the secretary of state appointing an agent for process. Tex. Fin. Code § 201.103. The Texas secretary of state's office may be called at 512-463-5555 to ascertain the name of the agent for process. This information may also be available online through SOSDirect, the secretary of state's Web access system, at **www.sos.state.tx.us/corp/sosda/index.shtml**.

If a financial institution complies with section 201.102 or 201.103, a claim against a customer of the financial institution (for example, a writ of garnishment) is not effective if served or delivered to an address other than the address designated. Tex. Fin. Code § 59.008(b). The financial institution's customer bears the burden of preventing or limiting a financial institution's compliance with or response to a claim subject to section 59.008. Tex. Fin. Code § 59.008(c). It appears then that a financial institution complying with the provisions regarding designation of a registered agent can elect to declare the claim against its customer ineffective if the claimant fails to properly serve the financial institution. Further, if the financial institution inadvertently honors a claim against its customer that is incorrectly served, it appears to have no exposure to its customer, who has the burden to prevent or suspend the financial institution's response to the claim.

If the financial institution does not comply with section 201.102 or 201.103, the financial institution is subject to service of claims against its customers as otherwise provided by law. Tex. Fin. Code § 59.008(d).

In an action against a financial institution (as defined in section 201.101 of the Texas Finance Code), citation may be served by serving the registered agent of the financial institution or, if there is no registered agent, serving the president or a branch manager at any office located in Texas. Tex. Civ. Prac. & Rem. Code § 17.028(a), (b). If citation has not been properly served, a financial institution may maintain an action to set aside the default judgment or any sanctions entered against it. Tex. Civ. Prac. & Rem. Code § 17.028(d).

For credit unions, citation may be served by serving the registered agent of the credit union or, if the credit union does not have a registered agent, serving the president or vice president. Tex. Civ. Prac. & Rem. Code § 17.028(c). However, a citation served on a credit union that is located in a place of worship may not be served during a worship service. Tex. Civ. Prac. & Rem. Code § 17.028(e).

Most financial institutions will tell who their designated agent for service of process is, especially if it is explained that the institution is being sued only as garnishee.

§ 27.59:3 Service on Defendant

The judgment defendant must be served with copies of the writ of garnishment, the application, the accompanying affidavits, and the orders of the court as soon as practical after service of the writ on the garnishee. This service can be in any manner prescribed for service of citation or as provided in Tex. R. Civ. P. 21a. Tex. R. Civ. P. 663a. It is recommended that, instead of serving the defendant personally, his copy of the application and affidavit be served by certified mail, return receipt requested, and by regular mail. The copy of the writ served on the defendant must include, in ten-point type and in a manner calculated to advise a reasonably attentive person of its contents, the following statement:

> To _____, Defendant:
>
> You are hereby notified that certain properties alleged to be owned by you have been garnished. If you claim any rights in such property, you are advised:
>
> YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT.

Tex. R. Civ. P. 663a. Some court clerks provide additional copies of the writs with the notice language. Others do not; in that case, it is necessary to photocopy the writ and type the notice language on the face of the copy before serving it on the defendant.

Failure of the garnisher to properly serve the defendant is fatal to the plaintiff's garnishment action, even though the defendant may have actual notice of the garnishment action. *Walnut Equipment Leasing Co. v. J-V Dirt & Loam*, 907 S.W.2d 912, 915 (Tex. App.—Austin 1995, writ denied); *Hering v. Norbanco Austin I, Ltd.*, 735 S.W.2d 638, 641–42 (Tex. App.—Austin 1987, writ denied); *Small Business Investment Co. of Houston v. Champion International Corp.*, 619 S.W.2d 28, 30 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ); *but see Del-Phi Engineering Associates v. Texas Commerce Bank-Conroe, N.A.*, 771 S.W.2d 589, 591 (Tex. App.—Beaumont 1989, no writ) (defendant waived lack of service by setting agreed hearing).

Although the defendant must be served with notice of the garnishment proceedings, the garnishee does not have standing to sue or appeal based on failure to serve the defendant. *Sherry Lane National Bank v. Bank of Evergreen*, 715 S.W.2d 148, 151–52 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); *see also* Tex. R. Civ. P. 663a.

The forms of the writ and notice are prescribed in Tex. R. Civ. P. 661, 663a. For a writ to be served on the garnishee, see form 8-5 in this manual; for a notice to the defendant, see form 27-13 in this chapter. The notice at form 27-13 is to be used as a cover sheet only and not as a substitute for the writ with notice language included on it. The writ of garnishment is usually prepared by the clerk of the court.

§ 27.60 Officer's Return

The officer who executes a writ of garnishment must make his return as with any other citation. Tex. R. Civ. P. 663. Texas Civil Practices and Remedies Code section 17.030 requires the Supreme Court of Texas to adopt rules of civil procedure requiring a person who serves process to complete a return of service. *See* Tex. Civ. Prac. & Rem. Code § 17.030(a). The officer or authorized person executing the citation must complete a return of service, and the return may be endorsed on or attached to the citation. Tex. R. Civ. P. 107(a). The return, along with any document to which it is attached, must be filed with the court. Tex. R. Civ. P. 107(g).

The attorney should inspect the return before obtaining a garnishment judgment, especially a default judgment. Returns in garnishment proceedings are governed by the rules for citations generally. *Curry Motor Freight v. Ralston Purina Co.*, 565 S.W.2d 105, 106 (Tex. Civ. App.—Amarillo 1978, no writ). Returns have been held fatally defective for failing to show the manner of service on a corporate garnishee and for failing to show the place of service. *See Jacksboro National Bank v. Signal Oil & Gas Co.*, 482 S.W.2d 339, 341–42 (Tex. Civ. App.—Tyler 1972, no writ). *But see Hudler-Tye Construction, Inc. v. Pettijohn & Pettijohn Plumbing, Inc.*, 632 S.W.2d 219, 221 (Tex. App.—Fort Worth 1982, no writ) (return that does not show place of service presumed served in county in which officer is authorized to act "until the contrary appears"). For a discussion of service of process, see chapter 16 in this manual, especially section 16.8 (list for officer's return). See form 27-14 in this chapter for the officer's return.

§ 27.61 Garnishee's Answer

§ 27.61:1 Form of Garnishee's Answer

The garnishee's answer must be under oath, in writing, and signed by him. Tex. R. Civ. P. 665.

§ 27.61:2 Garnishee Indebted to Defendant or Possesses Defendant's Property

If the garnishee answers that he is now indebted to the judgment debtor (or was so indebted when served) or now has effects of the debtor (or had the debtor's effects when served), the court will enter a judgment for the plaintiff in the amount so admitted. Tex. R. Civ. P. 668, 669. For a discussion of the steps the plaintiff can take if dissatisfied with the garnishee's answer, see section 27.63 below.

§ 27.61:3 Garnishee Not Indebted to Defendant

If the garnishee answers that (1) he is not now indebted to the debtor and was not when served (or, as applicable, does not have any of the debtor's effects and did not have them when served) and (2) does not know of anyone who does have the debtor's effects, and the plaintiff does not dispute these allegations, the garnishee will be discharged. Tex. R. Civ. P. 666. The plaintiff may controvert the garnishee's answer; see section 27.63 below.

§ 27.61:4 No Answer

If the garnishee does not file an answer to the writ of garnishment by the answer date stated in the writ, the court can render a default judgment for the plaintiff against the garnishee. For garnishees that are not financial institutions, the default judgment is for the full amount of the judgment in the original cause plus all interest and costs in both the original cause and the garnishment action. Tex. R. Civ. P. 667. Before obtaining the default judgment, the attorney should make certain that the officer's return will support a default judgment if later attacked. *See United National Bank v. Travel Music of San Antonio*, 737 S.W.2d 30 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.); see also section 27.60 above.

A default judgment against a financial institution can be rendered "solely as to the existence of liability and not as to the amount of damages." Tex. Fin. Code § 276.002(a). The garnisher has the burden to prove "the amount of actual damages proximately caused by the financial institution's default." Tex. Fin. Code § 276.002(c). For good cause shown, the garnisher can also recover reasonable attorney's fees incurred in establishing damages. Tex. Fin. Code § 276.002(d).

§ 27.62 Funds Trapped by Writ

The writ, once served on the garnishee, impounds or "traps" funds owed or held by the garnishee on the date of service, as well as funds owed or held from the time the garnishee is served through the date of answer. *Newsome v. Charter Bank Colonial*, 940 S.W.2d 157, 162–63 (Tex. App.—Houston [14th Dist.] 1996, writ denied); *First National Bank in Dallas v. Banco Longoria, S.A.*, 356 S.W.2d 192, 195–96 (Tex. Civ. App.—San Antonio 1962, writ ref'd n.r.e.); *Cooper v. Cocke*, 145 S.W.2d 275, 279 (Tex. Civ. App.—Amarillo 1940, no writ); *Consolidated Gasoline Co. v. Jarecki Manufacturing Co.*, 72 S.W.2d 351, 352 (Tex. Civ. App.—Eastland 1934), *aff'd*, 105 S.W.2d 663 (Tex. 1937). The garnishee pays trapped monies to the debtor at his peril. *Westridge Villa Apartments v. Lakewood Bank & Trust Co.*, 438 S.W.2d 891, 894 (Tex. Civ. App.—Fort Worth 1969, writ ref'd n.r.e.).

The garnishee may file an answer before answer day, but the garnisher may controvert the garnishee's answer, requesting that the court require the garnishee to disclose what funds were held or owed on answer day. *Banco Longoria*, 356 S.W.2d at 196. If the garnishee files an answer after answer day but before the garnisher obtains a default judgment, the garnishee need only disclose what monies were held or owed from date of service through answer day; the writ does not trap funds held or owed after that day. *Jarecki Manufacturing Co.*, 72 S.W.2d at 353.

§ 27.63 Plaintiff's Controverting Plea to Garnishee's Answer

A plaintiff or defendant who is dissatisfied with the garnishee's answer can file an affidavit stating why he believes for good reason that the answer is incorrect. Tex. R. Civ. P. 673. The issues raised will be tried as in other cases. Tex. Civ. Prac. & Rem. Code § 63.005(a); Tex. R. Civ. P. 674, 676. If the plaintiff controverts the answer of a garnishee who does not reside in the county in which the garnishment action is pending, jurisdiction is removed from the court in which the action is pending, and that court cannot proceed further except to transfer the garnishment proceeding to the county of the garnishee's residence. *First National Bank v. Steves Sash & Door Co.*, 468 S.W.2d 133, 138 (Tex. Civ. App.—San Antonio 1971, writ ref'd n.r.e.); *see* Tex. Civ. Prac. & Rem. Code § 63.005.

If the garnishee's answer raises doubt about the ownership of the funds, the garnisher must then affirmatively establish that the debtor owns the funds. Any other person claiming ownership of or an interest in the funds must intervene and overcome the presumption that the funds belong to the debtor. The fact that a garnisher may have failed to establish that the debtor is the owner of the funds will not benefit the intervening party. It will simply show that ownership of the funds is in doubt. The intervenor must himself affirmatively prove his ownership of the funds in order to recover. *Putman & Putman, Inc. v. Capitol Warehouse, Inc.*, 775 S.W.2d 460, 463 (Tex. App.—Austin 1989, writ denied). See also section 27.70 below regarding the garnishee's right of offset.

§ 27.64 Defendant's Right to Replevy

A defendant may replevy garnished property if it has not yet been sold. If it has been sold, he may replevy the proceeds of the sale. The defendant will be required to post bond in order to replevy. Tex. R. Civ. P. 664.

§ 27.65 Dissolution or Modification of Writ of Garnishment

A defendant may also seek dissolution or modification of the writ of garnishment. Tex. R. Civ. P. 664a. At the hearing on a motion to dissolve or modify, the plaintiff must prove the grounds relied on for the writ's issuance. These grounds are set forth in Tex. Civ. Prac. & Rem. Code § 63.001(3) and are discussed at section 27.54:1 above. Otherwise, the party seeking to modify or dissolve the writ bears the burden of proof. *Walnut Equipment Leasing Co. v. J-V Dirt & Loam*, 907 S.W.2d 912, 915 (Tex. App.—Austin 1995, writ denied). The plaintiff need not prove that the garnishee is indebted to the defendant. *Swiderski v. Victoria Bank & Trust Co.*, 706 S.W.2d 676, 678 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

§ 27.66 Costs and Attorney's Fees

If the garnishee's answer is not controverted and the plaintiff obtains a garnishment judgment against him, costs will be taxed against the judgment debtor and included in the execution in garnishment. Tex. R. Civ. P. 677. The garnishee's costs will be taken from the amount the garnishee owes the defendant, and the remainder will be applied to the plaintiff's judgment. *Pan American National Bank v. Ridgway*, 475 S.W.2d 808 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.). If the answer is contested, "the costs shall abide the issue." Tex. R. Civ. P. 677. If the garnishee is discharged on his answer, costs of the garnishment proceeding, including a reasonable compensation to the garnishee, will be taxed against the plaintiff. Tex. R. Civ. P. 677.

The successful plaintiff is not entitled to recover attorney's fees for prosecuting a postjudgment garnishment action. *Henry v. Insurance Co. of North America*, 879 S.W.2d 366, 368–69 (Tex. App.—Houston [14th Dist.] 1994, no writ). The garnishee, however, can recover costs, which include attorney's fees. If the garnishee answers that he is indebted to the judgment debtor, the garnishee's costs, including attorney's fees, will be deducted from the amount paid the garnisher and charged to the defendant. *Pan American National Bank*, 475 S.W.2d at 809. If the garnishee is discharged on his answer, his costs will be taxed against the plaintiff. Tex. R. Civ. P. 677. Those costs include attorney's fees. *J.C. Hadsell & Co. v. Allstate Insurance Co.*, 516 S.W.2d 211, 213 (Tex. Civ. App.—Texarkana 1974, writ dism'd).

§ 27.67 Garnishment Judgment

If the garnishee answers that he is indebted to the defendant in any amount or was so indebted when the writ of garnishment was served on him, or if the court so finds, the garnishment judgment will be for the amount the garnishee admits he owes the defendant or the amount found by the court to be due the defendant from the garnishee. The garnishment judgment may not, however, exceed the amount of the plaintiff's judgment in the original suit against the defendant with interest and costs in both the original suit and in the garnishment proceedings. Tex. R. Civ. P. 668. If the answer or verdict was that the garnishee has in his possession, or had when the writ was served, any of the defendant's effects liable to execution, the decree will order the sale of the effects under execution to satisfy the plaintiff's original judgment and will direct the garnishee to deliver to the officer for sale as much of the effects as necessary to satisfy the judgment. Tex. R. Civ. P. 669. The garnishee will probably want the garnishment judgment to

order his debt to the defendant discharged. See form 27-15 in this chapter for a garnishment judgment.

The officer making a sale of personal property must execute a transfer of the property to the purchaser, with a brief recital of the judgment of the court under which the property was sold. Tex. R. Civ. P. 672.

§ 27.68 Enforcement of Garnishment Judgment

The garnishee adjudged to be indebted to the defendant will usually pay the garnishment judgment on request. If the garnishee will not pay the judgment, execution can be used as in the case of other judgments. Tex. R. Civ. P. 668. If the garnishee has any of the defendant's effects, the judgment should order them sold under execution and should order the garnishee to deliver the appropriate amount of effects to the officer to be sold in satisfaction of the judgment. Tex. R. Civ. P. 669, 672. If the garnishee does not deliver the effects to the officer on demand, the garnishee can be cited to show cause why he should not be attached for contempt of court and, failing to show cause, can be fined for contempt and imprisoned until he delivers the property. Tex. R. Civ. P. 670.

Because this default situation rarely occurs, forms for contempt proceedings in a garnishment action are not included in this chapter. For a general discussion of contempt of court, see section 26.7 in this manual.

§ 27.69 Garnishee as Stakeholder

If the garnishee is served with a writ and is unsure whether the funds sought are owned by the defendant or a third party, he can file a bill of interpleader and place the funds into the registry of the court. If this action is justified, the garnishee avoids liability to the garnisher for releasing the funds and avoids liability to the account holder for wrongfully freezing the funds. *See Thompson v. Fulton Bag & Cotton Mills*, 286 S.W.2d 411, 414 (Tex. 1956) (scope of inquiry in writ of garnishment is broad enough to impound funds of defendant held by garnishee even though title thereto stands in name of third party); *First Realty Bank v. Ehrle*, 521 S.W.2d 295, 298–99 (Tex. Civ. App.—Dallas 1975, no writ) (bank's fear of exposure to multiple liability was reasonable and bank was entitled to protect itself by interpleader). If the garnishee's answer puts into doubt the defendant's ownership of the funds, the garnisher then has the burden of proof to show that the defendant owns the funds. *Putman & Putman, Inc. v. Capitol Warehouse, Inc.*, 775 S.W.2d 460, 463 (Tex. App.—Austin 1989, writ denied).

§ 27.70 Garnishee's Offset Rights

Locating a defendant's account for garnishment may be only half the plaintiff's battle. In addition to the timing of withdrawals by the defendant, the plaintiff is faced with the prospect of offset by the defendant's bank if the defendant is indebted to his bank, both before and in some instances after service of the writ of garnishment.

Accounts can be offset after service of a writ of garnishment if the debt is matured or the debtor is insolvent. But what if the debt has not been matured at the time of service? *See* Susan Soussan & Jane Cooper-Hill, *A Bank's Right to Offset after Service of Writ of Garnishment*, 48 Tex. B.J. 638 (1985), discussing *San Felipe National Bank v. Caton*, 668 S.W.2d 804 (Tex. Civ. App.—Houston [14th Dist.] 1984, no writ). In *Caton* the court approved an offset after garnishment when the obligation was not in default, based on a contractual provision giving the bank a lien on the depositor's account. *Contra* Andrew Messer, *A Bank's Right to Offset after Service of Writ of Garnishment—A Reconcilia-*

tion of San Felipe National Bank v. Caton, 54 Tex. B.J. 368 (1991).

If the bank has a right to mature the indebtedness at the time the writ is served, it may take steps to accelerate and offset after service of the writ. This right may be due to a default in the installment payment, events of default defined in the note separate from nonpayment (for example, attachment of the account), or even an insecurity clause. The attorney should use discovery before garnishment to learn whether the debtor is indebted to the garnishee and, if indebted, the terms of the indebtedness. *See also Holt's Sporting Goods Co. of Lubbock v. American National Bank*, 400 S.W.2d 943 (Tex. Civ. App.—Amarillo 1966, writ dism'd); *Home National Bank v. Barnes-Piazzek Co.*, 278 S.W. 299 (Tex. Civ. App.—Fort Worth 1925, writ ref'd).

§ 27.71 Liability for Wrongful Postjudgment Garnishment

The plaintiff can be liable for wrongful garnishment if in his affidavit he makes an untrue allegation of a statutory ground for garnishment, possibly even though he had probable cause to believe the ground was true and he did not act maliciously. *Peerless Oil & Gas Co. v. Teas*, 138 S.W.2d 637, 640 (Tex. Civ. App.—San Antonio 1940), *aff'd*, 158 S.W.2d 758 (Tex. 1942). If the plaintiff knows that the defendant actually has property within the state subject to execution sufficient to satisfy the debt, wrongful garnishment can occur if the plaintiff alleges otherwise in his affidavit. *See King v. Tom*, 352 S.W.2d 910, 913 (Tex. Civ. App.—El Paso 1961, no writ); *Griffin v. Cawthon*, 77 S.W.2d 700, 702 (Tex. Civ. App.—Fort Worth 1934, writ ref'd). The plaintiff has a duty to make a reasonable inquiry whether any such property exists. *Massachusetts v. Davis*, 160 S.W.2d 543, 554 (Tex. Civ. App.—Austin), *aff'd in part and rev'd in part on other grounds*, 168 S.W.2d 216 (Tex. 1942), *cert. denied*, 320 U.S. 210 (1943).

A valid, subsisting judgment that is not suspended supports a garnishment. The fact that it is later set aside does not in itself support an action for wrongful garnishment. *Biering v. First National Bank*, 7 S.W. 90 (Tex. 1888); *Hobson & Associates v. First Print, Inc.*, 798 S.W.2d 617 (Tex. App.—Amarillo 1990, no writ). Failure of the plaintiff to state in his application that he was not aware of property owned by the defendant subject to execution sufficient to satisfy the judgment did not support a wrongful garnishment action. *Canyon Lake Bank v. Townsend*, 649 S.W.2d 809, 810–11 (Tex. App.—Austin 1983, writ ref'd n.r.e.). *See generally* Glenn Jarvis, Comment, *Creditor's Liability in Texas for Wrongful Attachment, Garnishment, or Execution*, 41 Texas L. Rev. 692, 704–07, 711–16 (1963).

§ 27.72 Locating Bank Accounts

Bank account location services should be utilized with extreme caution. If the information has been gained by false pretenses, criminal penalties apply pursuant to subchapter II of the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6821–6827. See generally chapter 3 in this manual for further information on locating a debtor's assets.

[Sections 27.73 through 27.80 are reserved for expansion.]

V. Turnover

§ 27.81 Origin of Turnover Statutes

The Texas turnover statutes are found at Tex. Civ. Prac. & Rem. Code §§ 31.002–.0025, 31.010. These statutes, with the postjudgment discovery devices under Tex. R. Civ. P. 621a, give creditors the statutory equivalent of what was previously known in equity as a creditor's bill. *Ex parte Johnson*, 654 S.W.2d 415, 417 (Tex. 1983).

§ 27.82 Purpose, Function, and Effect of Turnover

The purpose of the turnover statutes is to aid the diligent judgment creditor in reaching the judgment debtor's property. *Cross, Kieschnick & Co. v. Johnston*, 892 S.W.2d 435, 438 (Tex. App.—San Antonio 1994, no writ). Turnover aids the plaintiff if the defendant owns property that cannot readily be attached or levied on by ordinary legal process. *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 224 (Tex. 1991); *Hennigan v. Hennigan*, 666 S.W.2d 322, 323 (Tex. App.—Houston [14th Dist.]), *writ ref'd n.r.e. per curiam*, 677 S.W.2d 495 (Tex. 1984). See section 27.90 below regarding property subject to and exempt from turnover.

The turnover statutes place the burden on the defendant to produce documents or property used to satisfy a judgment. They are deliberately open-ended to aid the diligent plaintiff. *See* House Comm. on Judicial Affairs, Bill Analysis, Tex. S.B. 965, 66th Leg., R.S. (1979).

§ 27.83 When to Seek Turnover Relief

Seeking turnover relief is appropriate if the judgment debtor owns nonexempt property or property rights that cannot readily be attached or levied on by ordinary legal process. Tex. Civ. Prac. & Rem. Code § 31.002(a). *See Hennigan v. Hennigan*, 666 S.W.2d 322, 323 (Tex. App.—Houston [14th Dist.]), *writ ref'd n.r.e. per curiam*, 677 S.W.2d 495 (Tex. 1984) (attorney's income from retainers and hourly fee billing; defendant stated he would not pay voluntarily); *Arndt v. National Supply Co.*, 650 S.W.2d 547, 549 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.) (accounts receivable, stocks). The court may order the judgment debtor to turn over realty located outside the State of Texas. *Reeves v. Federal Savings & Loan Insurance Corp.*, 732 S.W.2d 380 (Tex. App.—Dallas 1987, no writ). By extension, personal property outside the state may also be subject to turnover.

There is no requirement that a judgment creditor first exhaust other legal remedies, such as attachment, execution, or garnishment, before seeking turnover relief. *Hennigan*, 666 S.W.2d at 323. Turnover is cumulative of other lawful remedies available to a judgment creditor for collection of a judgment. *Matrix, Inc. v. Provident American Insurance Co.*, 658 S.W.2d 665, 668 (Tex. App.—Dallas 1983, no writ). Some courts nonetheless require a creditor to obtain a writ of execution and have it returned *nulla bona* before considering an application for turnover relief.

A waiting period of thirty days after entry of judgment or overruling of a motion for new trial is not required, as it is before levy and execution. *Childre v. Great Southwest Life Insurance Co.*, 700 S.W.2d 284, 286–87 (Tex. App.—Dallas 1985, no writ). Also, the court can consider a turnover application even if the judgment is on appeal, as long as a supersedeas bond has not been filed. *Anderson v. Lykes*, 761 S.W.2d 831, 833–34 (Tex. App.—Dallas 1988, no writ).

§ 27.84 Jurisdiction and Choice of Forum

A judgment creditor may bring a turnover action either in the same suit in which the judgment against the debtor is rendered or in a new and independent suit. Tex. Civ. Prac. & Rem. Code § 31.002(d). If the creditor moves for turnover relief in the same suit in which the judgment is rendered, the trial court must conduct a hearing on the application, even if an appeal is pending. *Anderson v. Lykes*, 761 S.W.2d 831 (Tex. App.—Dallas 1988, no writ). See section 27.95 below for a discussion of the trial court's discretion to grant or deny turnover relief.

An independent suit may be brought in any court having jurisdiction over the subject matter and the defendant. A creditor may, therefore, choose a court of competent jurisdiction that is best able to handle the particular relief sought, such as the appointment of a receiver or the issuance of an injunction. If turnover is sought in a new and independent action, venue requirements should be considered. David Hittner, *Texas Post-Judgment Turnover and Receivership Statutes*, 45 Tex. B.J. 417, 419 (1982). For more extensive discussions of jurisdiction and venue in collection cases, see chapter 15 in this manual.

§ 27.85 Pleadings

§ 27.85:1 Creditor's Pleadings

The application should generally—

1. recite that the judgment remains unsatisfied;
2. identify the present or future rights to property or types of property owned by the judgment debtor that the judgment creditor seeks to have turned over;
3. allege that the property cannot be readily attached or levied on by ordinary process;
4. state that the property is not exempt;
5. if injunctive relief is requested, follow the requirements for obtaining an injunction or temporary restraining order (pleadings such as no adequate remedy at law, and verifying petition);
6. request that the property, along with related documents and records, be turned over to the sheriff or constable for execution or to a receiver or provide that it otherwise be applied to the satisfaction of the judgment; and
7. request attorney's fees.

Tex. Civ. Prac. & Rem. Code § 31.002.

The plaintiff's failure to plead that the defendant's property could not be readily attached or levied on is not fatal to the turnover application. The defendant's response is to file a special exception. *Pace v. McEwen*, 617 S.W.2d 816, 819 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ). See form 27-16 in this chapter for an application for turnover relief.

§ 27.85:2 Debtor's Pleadings

The defendant may challenge an order for turnover by motion to modify. *See Ex parte Johnson*, 654 S.W.2d 415, 418 (Tex. 1983). An affirmative defense such as payment must be pleaded and proved by the defendant. If the defendant has neither answered a suit for turnover nor pleaded payment as an affirmative defense, he is precluded on appeal from contending that the plaintiff failed to prove that the judgment was unsatisfied. *Ross v. 3D Tower Ltd.*, 824 S.W.2d 270, 273 (Tex. App.—Houston [14th Dist.] 1992, writ denied); *Matrix, Inc. v. Provident American Insurance Co.*, 658 S.W.2d 665, 667 (Tex. App.—Dallas 1983, no writ); Tex. R. Civ. P. 94.

§ 27.86 Notice and Hearing

§ 27.86:1 Notice

Notice to the defendant and opportunity to be heard are not required by the turnover statute. *Ross v. 3D Tower Ltd.*, 824 S.W.2d 270 (Tex. App.—Houston [14th Dist.] 1992, writ denied). Courts routinely grant ex parte orders for turnover but, in the court's discretion, may first require that notice be given to the defendant. Whether the judgment debtor is likely to dispose of the property if notice of a hearing is given may be one factor.

§ 27.86:2 Hearing

A judgment creditor is entitled to a hearing for turnover relief. *Anderson v. Lykes*, 761 S.W.2d 831, 834 (Tex. App.—Dallas 1988, no writ). The statute requires a factual showing that the judgment debtor has nonexempt property that is not readily subject to ordinary execution. *Schultz v. Fifth Judicial District Court of Appeals at Dallas*, 810 S.W.2d 738, 740 (Tex. 1991) (orig. proceeding), *abrogated on other grounds by In re Sheshtawy*, 154 S.W.3d 114 (Tex. 2004). It is reversible error for a court to grant turnover relief without the showing required by the statute. *Tanner v. McCarthy*, 274 S.W.3d 311 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *Clayton v. Wisener*, 169 S.W.3d 682, 683–84 (Tex. App.—Tyler 2005, no pet.); *Sivley v. Sivley*, 972 S.W.2d 850 (Tex. App.—Tyler 1998, no pet.). A record of the hearing should be made to preserve issues if an appeal is taken. *Tanner*, 274 S.W.3d 311.

The defendant has the burden to prove that particular property is exempt. *Jacobs v. Adams*, 874 S.W.2d 166, 167–68 (Tex. App.—Houston [14th Dist.] 1994, no writ); *Rucker v. Rucker*, 810 S.W.2d 793, 795–96 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

§ 27.87 Constitutionality of Turnover Statutes

The Texas turnover statutes do not violate constitutional due-process requirements. *Thomas v. Thomas*, 917 S.W.2d 425, 433–34 (Tex. App.—Waco 1996, no writ). An ex parte turnover order does not unfairly surprise a judgment debtor, because the judgment puts the debtor on notice that postjudgment collection proceedings will follow. *Ex parte Johnson*, 654 S.W.2d 415, 418 n.1 (Tex. 1983) (dicta); *Thomas*, 917 S.W.2d at 433–34. A good review of the constitutional issues is found in *Sivley v. Sivley*, 972 S.W.2d 850 (Tex. App.—Tyler, 1998, no pet.).

§ 27.88 Turnover Orders Generally

Texas Civil Practice and Remedies Code section 31.002(b) provides for the three types of turnover orders available under the statute. While the provision for appointment of a receiver is often used, the practitioner should not overlook the provisions for turnover of property to a sheriff or constable or for otherwise applying the property to the satisfaction of the judgment.

A turnover proceeding can and should be used to determine whether the defendant's particular property is subject to turnover. *See, e.g., Owen v. Porter*, 796 S.W.2d 265 (Tex. App.—San Antonio 1990, no writ) (whether community property was joint management or sole management); *Sloan v. Douglass*, 713 S.W.2d 436 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.); *Pace v. McEwen*, 617 S.W.2d 816, 819 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ) (homestead); *but see Republic Insurance Co. v. Millard*, 825 S.W.2d 780 (Tex. App.—Houston [14th Dist.] 1992, no writ); *Steenland v. Texas Commerce Bank, N.A.*, 648 S.W.2d 387 (Tex. App.—Tyler 1983, writ ref'd n.r.e.) (court could not determine excess nonexempt value of homestead; creditor must seek separate trial and finding).

A turnover order should not provide for delivery of the debtor's property directly into the hands of the judgment creditor or his attorney. *Ex parte Johnson*, 654 S.W.2d 415, 418 (Tex. 1983). The Code allows a court to enter or enforce an order without identifying specifically the property subject to turnover. *See* Tex. Civ. Prac. & Rem. Code § 31.001(h). This keeps the attorney from having to give the defendant notice of which assets to hide, and it allows the attorney to avoid the problem of having to identify specific assets to be turned over to the receiver. The property to be turned over may be stated in the form of a category, for example, "all accounts receivable."

The court may appoint a receiver to "take possession of" nonexempt property belonging to the judgment debtor, "sell it and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment." Tex. Civ. Prac. & Rem. Code § 31.002(b)(3).

See form 27-17 in this chapter for an order for tunover relief.

§ 27.89 Receiverships in Turnover Actions

§ 27.89:1 Authority of Receiver under Turnover Statutes

The court may appoint a receiver of the judgment debtor's property with the authority to take possession of and sell the nonexempt property and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment. Tex. Civ. Prac. & Rem. Code § 31.002(b)(3). Code chapter 64 does not apply to a receivership under section 31.002.

§ 27.89:2 Appointment of Receiver

Traditional requirements for the appointment of a receiver are inapplicable in postjudgment turnover proceedings. *Schultz v. Cadle Co.*, 825 S.W.2d 151, 154–55 (Tex. App.—Dallas 1992), *writ denied per curiam*, 852 S.W.2d 499 (Tex. 1993); *Childre v. Great Southwest Life Insurance Co.*, 700 S.W.2d 284, 288 (Tex. App.—Dallas 1985, no writ). The decision to appoint a receiver is within the discretion of the court. *Schultz*, 825 S.W.2d at 155. The court is not required to appoint a receiver. *Ross v. 3D Tower Ltd.*, 824 S.W.2d 270, 272 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

§ 27.89:3 Qualifications of Receiver

Although neither the turnover statute nor the case law interpreting the statute establishes requirements for who can serve as a receiver, it is suggested that the receiver (1) be a citizen and qualified voter of the State of Texas at the time of appointment; (2) maintain actual residence in the state during the receivership; and (3) not be a party, attorney, or other person interested in the action for appointment of a receiver. *See Swate v. Johnston*, 981 S.W.2d 923 n.1 (Tex. App.—Houston [1st Dist.] 1998, no pet.). Earning fees payable from the estate of the receivership does not disqualify the receiver as an interested person. If the applicant seeks to give the receiver the powers of a master, the person to be appointed should also not be related to any party. Tex. R. Civ. P. 171.

§ 27.89:4 Application of Appointment of Receiver

In addition to requesting that a receiver be appointed as discussed herein, the attorney should make sure the application is pleaded in accordance with section 31.002(a) of the Texas Civil Practices and Remedies Code. The court may appoint a receiver only if the judgment creditor meets the requirements of section 31.002(a) of the Code. For a discussion of what the pleadings should contain, see section 27.85:1 above. See form 27-18 in this chapter for a motion for postjudgment receivership.

§ 27.89:5 Receivership Provision in Turnover Order

The receiver's powers are limited by the turnover statute. Tex. Civ. Prac. & Rem. Code § 31.002(b)(3). The order appointing a receiver determines what powers are available to a receiver. *Ex parte Hodges*, 625 S.W.2d 304, 306 (Tex. 1981). The order should be "definite, clear and concise in order to give the person to whom it is directed sufficient information as to his duties and should not be such as would call on him for interpretations, inferences or conclusions." *Thomas v. Thomas*, 917 S.W.2d 425, 434 (Tex. App.—Waco 1996, no writ). Great care should be taken in drafting the order appointing the receiver to ensure that all the powers necessary for the receiver to perform his duties are included.

The attorney should make sure to include language that not only turns over property belonging to the judgment debtor to the receiver but also empowers the receiver to take possession of the property and sell it for the benefit of the judgment debtor. The order should be specific enough to support a contempt action against the judgment debtor in case the debtor fails to comply with the order.

The order appointing a receiver should tax the receiver's fee against the judgment debtor as a cost. Furthermore, the court must approve payment of a receiver's fee by separate written order. Texas Supreme Court, *Second Amended Order Regarding Mandatory Reports of Judicial Appointments and Fees*, Misc. Docket No. 07-9188 (Oct. 30, 2007); *Moyer v. Moyer*, 183 S.W.3d 48 (Tex. App.—Austin 2005, no pet.).

See form 27-19 in this chapter for an order appointing a receiver.

§ 27.89:6 Master in Chancery

The attorney may consider adding to the order powers of a master in chancery under rule 171 of the Texas Rules of Civil Procedure. If the receiver also wants to serve as a master in chancery, the receiver should (1) be a citizen of the state of Texas, (2) not be an attorney for either party to the action, and (3) not be related to any party. Tex. R. Civ. P. 171. The master in chancery has all the powers of a court of equity. Powers of a master in chancery include requiring the production of evidence, ruling on the admissibility of evidence, and placing a witness under oath for the purposes of examination by the master or a party. The order may limit or specify the master's powers. Tex. R. Civ. P. 171. *But see Academy of Model Aeronautics, Inc. v. Packer*, 860 S.W.2d 419 (Tex. 1993) (pretrial appointment of master for pending and future discovery matters was abuse of discretion); *Simpson v. Canales*, 806 S.W.2d 802 (Tex. 1991) (appointment of master only in exceptional case, for good cause); *Sheikh v. Sheikh*, 248 S.W.3d 381 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (good cause/exceptional circumstances and whether a conflict arises); *Roebuck v. Horn*, 74 S.W.3d 160, 163–64 (Tex. App.—Beaumont 2002, no pet.) (conflict may arise where master and receiver are same person).

The order provisions granting a person the powers of a master are interlocutory. The proper challenge is by writ of mandamus. *Sheikh*, 248 S.W.3d 381; *Tanner v. McCarthy*, 274 S.W.3d 311 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *Moyer v. Moyer*, 183 S.W.3d 48, 58 (Tex. App.—Austin 2005, no pet.).

§ 27.89:7 Bond and Oath for Appointment of Receiver

Although Tex. R. Civ. P. 695a provides that a bond must be filed before a receiver can be appointed, courts have held that no receiver's bond is required in a turnover receivership.

Schultz v. Cadle Co., 825 S.W.2d 151 (Tex. App.—Dallas 1992), *writ denied per curiam*, 852 S.W.2d 499 (Tex. 1993) (bond requirements of rule 695a do not apply to postjudgment receiver appointed under turnover statute, and decision whether to require bond is in court's discretion); *In re Estate of Herring*, 983 S.W.2d 61, 64 (Tex. App.—Corpus Christi 1998, no pet.); *Childre v. Great Southwest Life Insurance Co.*, 700 S.W.2d 284, 285 (Tex. App.—Dallas 1985, no writ). "Any bond which may be required should be carefully framed so as not to indemnify the judgment debtor in the traditional sense, as the righteousness of the appointment should have been fully litigated in any hearing pursuant to the new statutes." *Childre*, 700 S.W.2d at 289 (citing David Hittner, *Texas Post-Judgment Turnover and Receivership Statutes*, 45 Tex. B.J. 417 (1982)). The judgment debtor bears the burden of showing any extraordinary circumstances requiring the bond to be increased. *Childre*, 700 S.W.2d at 289. If the application for turnover seeks both a receiver and an injunction, one bond may serve both purposes. *Childre*, 700 S.W.2d at 288–89. See form 27-20 for a bond.

The turnover statute does not provide that an oath be taken or filed by a receiver. However, practice has evolved to include the taking of an oath. See form 27-21 for an oath.

§ 27.89:8 Effect of Order Appointing Receiver on Prior Existing Liens

Subject to a prior perfected security interest, the judgment debtor's nonexempt property is held in custodia legis by the receiver as of the date the order placing the judgment debtor into receivership is signed. *First Southern Properties, Inc. v. Vallone*, 533 S.W.2d 339, 341 (Tex. 1976) (citing *Ellis v. Vernon Ice, Light & Water Co.*, 23 S.W. 858 (Tex. 1893), and *Texas Trunk Railway Co. v. Lewis*, 16 S.W. 647 (Tex. 1891)).

§ 27.89:9 Receiver's Fees and Expenses

The matters of compensation and expenses and how they are treated are within the discretion of the trial court and its action will not be reversed unless there was a clear abuse of discretion. *Archer v. Ross*, 262 S.W.2d 213, 217 (Tex. App.—Dallas 1953, no writ). Generally, a receiver's fees are taxed against the judgment debtor and expenses are taxed as costs against the judgment debtor to be paid with property and funds in the hands of the receiver. *Archer*, 262 S.W.2d at 217.

The court must approve payment of a receiver's fee by separate written order. Texas Supreme Court, *Second Amended Order Regarding Mandatory Reports of Judicial Appointments and Fees*, Misc. Docket No. 07-9188 (Oct. 30, 2007).

A problem occurs when the receivership estate does not possess any assets or has insufficient assets to satisfy a judgment or the receiver's fees and expenses. In such cases, a conflict may occur between the receiver and the judgment creditor. The attorney should make it very clear to the judgment creditor that if the receiver is unable to locate any assets or sufficient assets to satisfy the judgment, the judgment creditor may be responsible for the receiver's fees and expenses. The practitioner is encouraged to reach an agreement with the proposed receiver before the receiver is appointed. If the order is silent about fees and expenses, the court may be petitioned to make a ruling through the use of an application.

See form 27-22 in this chapter for an order approving the receiver's fees.

§ 27.89:10 Immunity of Receiver

As long as the receiver exercises the authority granted in the order appointing him as the receiver, the receiver is entitled to the same

immunity as the judge of the appointing court. *Davis v. Bayless*, 70 F.3d 367, 373 (5th Cir. 1995); *Davis v. West*, 317 S.W.3d 301 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

§ 27.90 Property Subject to and Exempt from Turnover

§ 27.90:1 Property Generally

The turnover statutes apply to nonexempt property owned by the judgment debtor, including present or future rights to property that cannot be readily attached or levied on by ordinary legal process. Tex. Civ. Prac. & Rem. Code § 31.002(a); *see Hennigan v. Hennigan*, 666 S.W.2d 322, 323 (Tex. App.—Houston [14th Dist.]), *writ ref'd n.r.e. per curiam*, 677 S.W.2d 495 (Tex. 1984); *Matrix, Inc. v. Provident American Insurance Co.*, 658 S.W.2d 665, 668 (Tex. App.—Dallas 1983, no writ). Whether property is exempt can be decided in a turnover proceeding. *Moyer v. Moyer*, 183 S.W.3d 48 (Tex. App.—Austin 2005, no pet.); *Pace v. McEwen*, 617 S.W.2d 816, 819 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

Proceeds of exempt property are exempt under the turnover statute, except when collecting child support. Tex. Civ. Prac. & Rem. Code § 31.002(f). *But see Schultz v. Cadle Co.*, 825 S.W.2d 151, 153–54 (Tex. App.—Dallas 1992), *writ denied per curiam*, 852 S.W.2d 499 (Tex. 1993) (wages were no longer exempt when paid to company owned by debtor).

The defendant has the burden to prove that particular property is exempt. *Jacobs v. Adams*, 874 S.W.2d 166, 167–68 (Tex. App.—Houston [14th Dist.] 1994, no writ); *Rucker v. Rucker*, 810 S.W.2d 793, 795–96 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

For a discussion of property subject to and exempt from execution, see part III. in this chapter.

§ 27.90:2 Property Subject to Turnover

The following list of property subject to turnover is illustrative, not exclusive. The court may also order that all documents or records related to the property be delivered. Tex. Civ. Prac. & Rem. Code § 31.002(b)(1).

1. Income from business. Nonexempt income from the judgment debtor's business (for example, income from a sole proprietorship or funds due an independent contractor) is subject to turnover. *Thomas v. Thomas*, 917 S.W.2d 425, 434–35 (Tex. App.—Waco 1996, no writ); *DeVore v. Central Bank & Trust*, 908 S.W.2d 605, 609–10 (Tex. App.—Fort Worth 1995, no writ); *Brink v. Ayre*, 855 S.W.2d 44, 45 (Tex. App.—Houston [14th Dist.] 1993, no writ); *Ross v. 3D Tower Ltd.*, 824 S.W.2d 270, 273 (Tex. App.—Houston [14th Dist.] 1992, writ denied).
2. Commissions earned by an independent contractor. *Campbell v. Stucki*, 220 S.W.3d 562 (Tex. App.—Tyler 2007, no pet.).
3. Property located outside Texas. *Reeves v. FSLIC*, 732 S.W.2d 380, 381–82 (Tex. App.—Dallas 1987, no writ).
4. Causes of action. *Renger Memorial Hospital v. State*, 674 S.W.2d 828, 830 (Tex. App.—Austin 1984, no writ); but see section 27.90:3 below.
5. Promissory notes. *Matrix, Inc. v. Provident American Insurance Co.*, 658 S.W.2d 665, 668 (Tex. App.—Dallas 1983, no writ).
6. Nonexempt property held by a third party, but subject to the debtor's control. Tex. Civ. Prac. & Rem. Code § 31.002(b)(1); *Beaumont Bank, N.A.*

v. Buller, 806 S.W.2d 223, 227 (Tex. 1991); *Norsul Oil & Mining Ltd. v. Commercial Equipment Leasing Co.*, 703 S.W.2d 345, 349 (Tex. App.—San Antonio 1985, no writ). See section 27.92 below.

7. Accounts receivable. *Ross*, 824 S.W.2d at 272; *Arndt v. National Supply Co.*, 650 S.W.2d 547 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.).

8. Shares of stock. *Newman v. Toy*, 926 S.W.2d 629 (Tex. App.—Austin 1996, writ denied); *Childre v. Great Southwest Life Insurance Co.*, 700 S.W.2d 284, 289 (Tex. App.—Dallas 1985, no writ).

§ 27.90:3 Property Not Subject to Turnover

The following property is not subject to turnover.

1. Current wages. Tex. Civ. Prac. & Rem. Code § 31.0025; *see also Caulley v. Caulley*, 806 S.W.2d 795, 797–98 (Tex. 1991). *Caveat:* A number of cases decided before *Caulley* discussed, and some approved, turnover of paychecks or proceeds of them, reasoning that the funds were no longer "current wages" once received by the debtor. *See, e.g., Barlow v. Lane*, 745 S.W.2d 451, 453 (Tex. App.—Waco 1988, writ denied); *Salem v. American Bank of Commerce*, 717 S.W.2d 948 (Tex. App.—El Paso 1986, no writ).

2. Homestead. *Pace v. McEwen*, 617 S.W.2d 816 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

3. Retirement plan funds, unless they do not qualify under applicable provisions of the Internal Revenue Code. The defendant has the burden to prove that they qualify. *Rucker v. Rucker*, 810 S.W.2d 793, 795–96 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

4. Periodic payments unless there is a finding that payments are from a nonexempt source, such as business income. *Ex parte Prado*, 911 S.W.2d 849, 850 (Tex. App.—Austin 1995, no writ) (defendant ordered to turn over $500 per month, without court's first identifying specific source of nonexempt property or right); *see Ross v. 3D Tower Ltd.*, 824 S.W.2d 270, 272–73 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (turnover order mandating monthly payments upheld).

5. Cause of action of judgment debtor against plaintiff. *Associated Ready Mix, Inc. v. Douglas*, 843 S.W.2d 758, 762 (Tex. App.—Waco 1992, no writ); *Criswell v. Ginsberg & Foreman*, 843 S.W.2d 304, 306–07 (Tex. App.—Dallas 1992, no writ); *Commerce Savings Ass'n v. Welch*, 783 S.W.2d 668, 669–71 (Tex. App.—San Antonio 1989, no writ).

6. Unasserted denied causes of action for legal malpractice for failure to settle under the *Stowers* doctrine. *Charles v. Tamez*, 878 S.W.2d 201, 208 (Tex. App.—Corpus Christi 1994, writ denied).

7. Proceeds of exempt property. Tex. Civ. Prac. & Rem. Code § 31.002(f).

§ 27.90:4 Property Held by Financial Institution

With respect to turnover of property held by a financial institution in the name of or on behalf of the judgment debtor as a customer of the financial institution, the rights of a receiver

appointed under Texas Civil Practice and Remedies Code section 31.002(b)(3) do not attach until the financial institution receives service of a certified copy of the order of receivership in the manner specified by Texas Finance Code section 59.008. *See* Tex. Civ. Prac. & Rem. Code § 31.002(g). The service provisions of section 59.008 also apply to service of writs of garnishment, discussed at section 27.59:2 above.

A financial institution that receives a request to turn over assets or financial information of a judgment debtor to a judgment creditor or a receiver under a turnover order or receivership under section 31.002 shall be provided and may rely on a certified copy of the order or injunction of the court. Tex. Civ. Prac. & Rem. Code § 31.010(a)(1).

§ 27.91 Disposition of Property

If no receiver has been appointed, the court may order the defendant's property and related documents and records to be turned over to a designated sheriff or constable for sale by execution or may otherwise apply the property to the satisfaction of the judgment. Tex. Civ. Prac. & Rem. Code § 31.002(b)(1), (2).

In addition, the court may apply the property to the satisfaction of the judgment by turning it over to the registry of the court. *Brecheisen v. Johnson*, 665 S.W.2d 191, 192 (Tex. App.—Dallas 1984, writ ref'd n.r.e.); *Arndt v. National Supply Co.*, 650 S.W.2d 547, 549 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.). The court, however, may not order turnover directly to a judgment creditor. *Ex parte Johnson*, 654 S.W.2d 415, 418–19 (Tex. 1983).

If a receiver has been appointed, the receiver can sell the nonexempt property and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment. Tex. Civ. Prac. & Rem. Code § 31.002(b)(3). Citing preturnover case law, the court in *Salaymeh* held that the sale of property by a receiver is generally not effective until the sale is reported by the receiver and confirmed by the court after notice to the parties. *Salaymeh v. Plaza Centro, LLC*, 258 S.W.3d 236, 240 (Tex. App.—Houston [1st Dist.] 2008, no pet.). The turnover statute itself, however, does not contain specific procedures for the sale of property by the receiver.

§ 27.92 Who May Be Ordered to Turn Over Property

The statute appears to limit the court's remedies to ordering the judgment debtor to turn over property to a sheriff or constable, otherwise applying the property to satisfaction of the judgment, or appointing a receiver. *See* Tex. Civ. Prac. & Rem. Code § 31.002(b)(1)–(3). The court can order third parties who possess the judgment debtor's property to turn it over, if the property is subject to the debtor's control. *Schultz v. Fifth Judicial District Court of Appeals at Dallas*, 810 S.W.2d 738, 740 (Tex. 1991) (orig. proceeding), *abrogated on other grounds by In re Sheshtawy*, 154 S.W.3d 114 (Tex. 2004); *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 227 (Tex. 1991). Third parties who have been ordered to turn over property include—

1. corporations holding the debtor's stock, *Norsul Oil & Mining Ltd. v. Commercial Equipment Leasing Co.*, 703 S.W.2d 345, 348–49 (Tex. App.—San Antonio 1985, no writ);
2. representatives of the debtor's estate, *Buller*, 806 S.W.2d at 227; *First City National Bank of Beaumont v. Phelan*, 718 S.W.2d 402 (Tex. App.—Beaumont 1986, writ ref'd n.r.e.); and
3. sureties on the debtor's supersedeas bond, *Schliemann v. Garcia*, 685 S.W.2d 690 (Tex. App.—San Antonio 1984, no writ).

The reach of the turnover statutes against third parties is limited to recovering the debtor's property. The statute is procedural in nature and cannot be used to adjudicate the substantive rights of a third party. If the third party claims an interest in the property, turnover should not be used. *See, e.g., Plaza Court, Ltd. v. West*, 879 S.W.2d 271 (Tex. App.—Houston [14th Dist.] 1994 no writ) (turnover order placed third parties into receivership); *Republic Insurance Co. v. Millard*, 825 S.W.2d 780 (Tex. App.—Houston [14th Dist.] 1992, no writ) (third party may not be included as party defendant for first time in postjudgment turnover petition); *Cravens, Dargan & Co. v. Peyton L. Travers Co.*, 770 S.W.2d 573 (Tex. App.—Houston [1st Dist.] 1989, writ denied) (defendant's bond held by State Board of Insurance); *United Bank Metro v. Plains Overseas Group, Inc.*, 670 S.W.2d 281 (Tex. App.—Houston [1st Dist.] 1983, no writ) (creditor sought to establish that corporation wholly owned by defendant was defendant's alter ego).

Other creative but unsuccessful attempts to reach property in the hands of third parties include *Detox Industries, Inc. v. Gullett*, 770 S.W.2d 954 (Tex. App.—Houston [1st Dist.] 1989, no writ) (creditor sought order compelling corporation to cancel defendant's stock certificates and reissue stock in creditor's name); *Cross, Kieschnick & Co. v. Johnston*, 892 S.W.2d 435 (Tex. App.—San Antonio 1994, no writ) (creditor obtained judgment against misnamed party, then sought turnover order against correctly named party); and *Burns v. Miller, Hiersche, Martens & Hayward, P.C.*, 948 S.W.2d 317 (Tex. App.—Dallas 1997, writ denied) (debtor ordered to turn over distributions from spendthrift trust paid by the trustee to third parties).

If turnover relief is sought against a third party, jurisdiction over the third party should be obtained by proper service of citation. *See generally Ex parte Swate*, 922 S.W.2d 122, 125 (Tex. 1996) (noting potential due-process problems in ordering third parties to turn over assets without notice and hearing to them).

§ 27.93 Costs and Attorney's Fees

A judgment creditor is entitled to recover reasonable costs, including attorney's fees, in a turnover proceeding. Tex. Civ. Prac. & Rem. Code § 31.002(e). The court may refuse to grant attorney's fees to an unsuccessful turnover applicant. *See Great Global Assurance Co. v. Keltex Properties, Inc.*, 904 S.W.2d 771, 776 (Tex. App.—Corpus Christi 1995, no writ); *Boudreaux Civic Ass'n v. Cox*, 882 S.W.2d 543 (Tex. App.—Houston [14th Dist.] 1994, no writ); *Dallas Power & Light Co. v. Loomis*, 672 S.W.2d 309, 312 (Tex. App.—Dallas 1984, writ ref'd n.r.e.); *see also* Tex. R. Civ. P. 131, 141.

While a judgment creditor's failure to make sufficient attempts to collect a judgment through other legal process can be considered in determining the reasonableness of the amount of attorney's fees and costs, it is not a basis to deny such a request under section 31.002. *Great Global Assurance Co.*, 904 S.W.2d at 776.

Because turnover proceedings may not be resolved for months, the creditor's attorney may want to reserve the court's ruling on the amount to be awarded until the turnover action is nearly concluded.

§ 27.94 Enforcement of Turnover Order

The court may enforce its orders under the turnover statutes by contempt or by other means in case of refusal or disobedience. Tex. Civ. Prac. & Rem. Code § 31.002(c); *Ex parte Buller*, 834 S.W.2d 622, 626–27 (Tex. App.—Beaumont 1992, no writ) (contemner may be imprisoned to coerce compliance with turnover order if she possesses means to satisfy judgment). A motion for contempt brought during an appeal may be

filed in either the trial court or the court of appeals. *In re Sheshtawy*, 154 S.W.3d 114 (Tex. 2004) (abrogating *Schultz v. Fifth Judicial District Court of Appeals at Dallas*, 810 S.W.2d 738 (Tex. 1991) (orig. proceeding)). For a general discussion of contempt of court, see section 26.7 in this manual. When using the discovery contempt forms as a starting point for holding a judgment debtor in contempt for violating a turnover order, the practitioner should take care to change the grounds paragraph to refer to Texas Civil Practice and Remedies Code section 31.002 and not Texas Rule of Civil Procedure 215.

§ 27.95 Court's Discretion

The standard of review of a turnover order is whether the trial court abused its discretion. *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991). It is unclear, however, if the trial court's discretion applies to the determination of whether to grant relief under the entire turnover statute or merely applies to the determination of the manner of the turnover. *Compare Buttles v. Navarro*, 766 S.W.2d 893, 894 (Tex. App.—San Antonio 1989, no writ), *and Barlow v. Lane*, 745 S.W.2d 451, 453–54 (Tex. App.—Waco 1988, writ denied) (statute's use of "may" gives court discretion to grant or deny turnover relief), *with Anderson v. Lykes*, 761 S.W.2d 831, 834 (Tex. App.—Dallas 1988, no writ) (statute's use of "entitled" gives creditor right to hearing on application for turnover relief that court has no discretion to deny). *See also Charles v. Tamez*, 878 S.W.2d 201, 205 (Tex. App.—Corpus Christi 1994, no writ).

§ 27.96 Appeal of Turnover Order

A turnover order is in the nature of a mandatory injunction. Therefore, an appeal can be taken from a final turnover order. *Schultz v. Fifth Judicial District Court of Appeals at Dallas*, 810 S.W.2d 738 (Tex. 1991) (orig. proceeding), *abrogated on other grounds by In re Sheshtawy*, 154 S.W.3d 114 (Tex. 2004)); *Burns v. Miller, Hiersche, Martens & Hayward, P.C.*, 909 S.W.2d 505, 506 (Tex. 1995). If, however, certain requests for relief are left undecided by the order, such as an award or denial of attorney's fees, or the turnover order requires further orders of the court, the order may be merely interlocutory and therefore nonappealable. *See Brecheisen v. Johnson*, 665 S.W.2d 191, 192 (Tex. App.—Dallas 1984, writ ref'd n.r.e.) (defendant ordered to turn over property to registry of court; further order releasing funds to creditor required). A turnover order that is contrary to statute or contains errors is only voidable, not void. It must be attacked directly. *In re Wiese*, 1 S.W.3d 246 (Tex. App.—Corpus Christi 1999) (orig. proceeding). The appellate timetable for a final judgment applies. *Burns*, 909 S.W.2d 505.

A motion for contempt brought during an appeal may be filed in either the trial court or the court of appeals. *In re Sheshtawy*, 154 S.W.3d 114.

If the turnover order requires further orders of the court, the order is interlocutory and not appealable. The remedy is mandamus. *See In re Brecheisen*, 665 S.W.2d at 192. Otherwise, the order is a final order subject to appeal. *See International Paper Co. v. Garza*, 872 S.W.2d 18, 19 (Tex. App.—Corpus Christi 1994, no writ).

[Sections 27.97 through 27.100 are reserved for expansion.]

VI. Other Postjudgment Collection Devices

§ 27.101 Partnership Charging Order

§ 27.101:1 Purpose and Effect of Charging Order

A charging order allows a judgment creditor to reach a debtor's interest in a partnership to satisfy the judgment. In this situation, the judgment creditor has the right only to receive any distribution to which the debtor would otherwise have been entitled in the partnership interest. A charging order constitutes a lien on the debtor's partnership interest and is the exclusive remedy by which a judgment creditor of a partner or any other owner of a partnership interest may satisfy a judgment out of the debtor's partnership interest. Tex. Bus. Orgs. Code §§ 152.308(a)–(d), 153.256(a)–(d). Note that sections 152.308 and 153.256 of the Texas Business Organizations Code do not deprive a partner or other owner of a partnership interest of a right under exemption laws with respect to the judgment debtor's partnership interest. Tex. Bus. Orgs. Code §§ 152.308(e), 153.256(e). Also, a creditor of a partner or of any other owner of a partnership interest does not have the right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the partnership. Tex. Bus. Orgs. Code §§ 152.308(f), 153.256(f).

The court's grant of a charging order is discretionary. *Commerce Savings Ass'n v. Welch*, 783 S.W.2d 668, 671 (Tex. App.—San Antonio 1989, no writ).

§ 27.101:2 Procedure

The attorney should file the application for a charging order in the court that rendered the underlying judgment unless jurisdictional or venue considerations force filing in another court.

It is the better practice to serve the partnership with citation, although there is no express requirement to do so. If the application is filed in a court other than the one rendering the underlying judgment, the attorney should serve citation on the judgment debtor as well. Service of citation brings the party served within the court's jurisdiction, allowing a judgment ordering the partnership to obey the charging order. Tex. R. Civ. P. 124.

For an application and charging order, see forms 27-23 and 27-24 in this chapter.

§ 27.102 Temporary Restraining Orders and Injunctions

A judgment creditor may use injunctions or other means to reach property to satisfy a judgment. Tex. Civ. Prac. & Rem. Code § 31.002(a). Injunctive relief is appropriately used as part of a turnover action to preserve the status quo pending final action. For example, the judgment debtor could be enjoined from disposing of or secreting the property in question pending final orders. See sections 8.33 through 8.40 in this manual for further discussion of injunctions.

If the judgment creditor seeks any form of injunctive relief, care should be taken to comply with all applicable requirements including equitable pleading, verification, bond, filing, citation, and writ requirements. *See* David Hittner, *Texas Post-Judgment Turnover and Receivership Statutes*, 45 Tex. B.J. 417, 418 (1982). *But see Roosth v. Roosth*, 889 S.W.2d 445, 460 (Tex. App.—Houston [14th Dist.] 1994, writ denied); *Childre v. Great Southwest Life Insurance Co.*, 700 S.W.2d 284, 288 (Tex. App.—Dallas 1985, no writ) (traditional requirements for appointing receiver or granting injunction do not apply when relief is granted under turnover statute).

If the application for turnover seeks both a receiver and an injunction, one bond may serve both purposes. *See Childre*, 700 S.W.2d at 288–89.

§ 27.103 Receivership under Texas Deceptive Trade Practices–Consumer Protection Act

The Texas Deceptive Trade Practices–Consumer Protection Act (DTPA) authorizes the appointment of a receiver if a money judgment entered under the Act remains unsatisfied thirty days after it becomes final. The DTPA creates a set of presumptions entitling the judgment creditor to the appointment of a receiver over the defendant's business unless the defendant proves that all the presumptions do not apply. Tex. Bus. & Com. Code § 17.59. If the conditions for the appointment are met, the court must appoint a receiver. *Dudley v. E.W. Hable & Sons*, 683 S.W.2d 102, 103–04 (Tex. App.—Tyler 1984, no writ).

§ 27.104 Investment Securities

A creditor whose debtor is the owner of an investment security may obtain aid from the courts, by injunction or otherwise, in reaching the security. Tex. Bus. & Com. Code § 8.112(e).

§ 27.105 Assignment of Judgment

The judgment creditor may sell its interest in a judgment in lieu of collecting the judgment. The formal requirements for transfers of judgments (or transfers of a cause of action) are found in Tex. Prop. Code § 12.014. The assignment must be in writing, acknowledged or sworn to in the form and manner required by law for acknowledgment or swearing of deeds, and filed among the papers of the suit. Tex. Prop. Code § 12.014(a), (b). Additionally, the assignment may be filed in the real property records where the abstract of judgment is filed so that the real property records reflect the owner of the judgment and any liens related thereto. *See* Tex. Prop. Code § 12.014(c). See form 27-25 in this chapter.

Form 27-14

The officer receiving the writ "shall make return thereof as of other citations." Tex. R. Civ. P. 663. Texas Civil Practices and Remedies Code section 17.030 and Tex. R. Civ. P 107 generally discuss the requirements for a return of service. The return and any document to which it is attached must be filed with the court and may be filed electronically or by facsimile, if available. Tex. R. Civ. P. 107(g). See the discussions of the officer's return at sections 16.8 and 27.60 in this manual.

For a writ of garnishment before judgment to be served on the garnishee, see form 7-10. For a notice of garnishment to be served on the defendant, see form 27-13.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for writ of garnishment at form 27-11.

Officer's Return for Postjudgment Writ of Garnishment

CAME TO HAND at _____ __.M. on the _____ day of _____ and executed at _____ __.M. on the _____ day of _____ at _____, _____ County, Texas, by delivering to [**name of person or entity**], at [**address, city, state**], [**describe manner of service or attempted service**], a true copy of this Writ of Garnishment.

The distance actually traveled by me in execution of this process was _____ miles, and my fees are $_____.

_____

[**Name**]

SHERIFF OR CONSTABLE

[Reserved]

Chapter 28

Landlord-Tenant Law

§ 28.1 Scope of Chapter

Landlord-tenant law has been around since antiquity. More and more, courts are applying principles of contract law, not real property law, in landlord-tenant cases. Landlords must be careful to use properly drafted leases.

This chapter focuses on the rights of the landlord regarding commercial real property leases. Residential leases are discussed as appropriate. This chapter does not cover commercial personal property leases.

§ 28.2 Typical Fact Situation

The following is a typical fact situation in a landlord-tenant relationship that is spiraling toward default and subsequent litigation. The tenant is a closely held, thinly capitalized corporation. The landlord has hired a third-party property management company to manage its commercial rental property. The lease is guaranteed by one or more of the tenant's principals. The tenant is in the service industry, and there are few hard assets located on the leased premises other than office furnishings and five-year-old computers. The landlord has subordinated its security interest to the tenant's lender. Halfway into a five-year lease, the tenant defaults in rent payment.

Two scenarios are therefore possible: (1) the tenant does not abandon the leased premises and must be removed or (2) the tenant abandons the leased premises on its own.

§ 28.3 Eviction Procedure

When the tenant stops paying rent but does not voluntarily abandon or vacate the leased premises, the tenant must be evicted.

§ 28.3:1 Forcible Entry and Detainer

Forcible entry and detainer is dealt with in chapter 24 of the Texas Property Code and in rules 738 through 755 of the Texas Rules of Civil Procedure. The purpose of the statutes and rules for forcible entry and detainer is to provide a summary, speedy, simple, and inexpensive remedy for determining who is entitled to possession of property. *Home Savings Ass'n v. Ramirez*, 600 S.W.2d 911, 913 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).

§ 28.3:2 Eviction "For Cause" and "Without Cause"

Eviction for Nonpayment of Rent: Before filing an eviction suit, the practitioner must determine if the grounds are nonpayment of rent or that the owner wants possession. These are the sole grounds recognized for eviction. A tenant's nonpayment of rent when due under a lease is adequate grounds for eviction. *Caro v. Housing Authority of City of Austin*, 794 S.W.2d 901, 903 (Tex. App.—Austin 1990, writ denied).

Eviction for Causes Other Than Nonpayment of Rent: Specific statutory grounds for eviction are provided for a holdover tenant, a tenant at will, and a tenant at sufferance. Tex. Prop. Code § 24.002. Absent a legally enforceable lease, someone other than the owner who is the occupier of the premises is at best a tenant at sufferance and at worst a trespasser. *Fandey v.*

Lee, 880 S.W.2d 164, 169 (Tex. App.—El Paso 1994, writ denied).

Notice to Vacate: The first step in eviction is to serve a notice to vacate. The landlord must give the tenant at least three days' written notice to vacate the premises before filing a forcible detainer suit. The Texas Property Code provides:

> (f) The notice to vacate shall be given in person or by mail at the premises in question. Notice in person may be by personal delivery to the tenant or any person residing at the premises who is 16 years of age or older or personal delivery to the premises and affixing the notice to the inside of the main entry door. Notice by mail may be by regular mail, by registered mail, or by certified mail, return receipt requested, to the premises in question. If the dwelling has no mailbox and has a keyless bolting device, alarm system, or dangerous animal that prevents the landlord from entering the premises to leave the notice to vacate on the inside of the main entry door, the landlord may securely affix the notice on the outside of the main entry door.
>
> . . . .
>
> (i) If before the notice to vacate is given as required by this section the landlord has given a written notice or reminder to the tenant that rent is due and unpaid, the landlord may include in the notice to vacate required by this section a demand that the tenant pay the delinquent rent or vacate the premises by the date and time stated in the notice.

Tex. Prop. Code § 24.005(f), (i). The notice period is calculated from the day on which the notice is delivered. Tex. Prop. Code § 24.005(g). If the lease does not require prior notice and demand for payment, the landlord is not required to make demand for payment before serving a notice to vacate. *Santos v. City of Eagle Pass*, 727 S.W.2d 126, 128–29 (Tex. App.—San Antonio 1987, no writ). However, a letter advising the tenant that if a default in rent payment is not cured within ten days the landlord will file a forcible entry and detainer suit does not suffice as a notice to vacate when the suit is never filed. *Schecter v. Folsom*, 417 S.W.2d 180, 182–83 (Tex. Civ. App.—Dallas 1967, no writ).

§ 28.3:3 Self-Help Eviction: Tenant Lockout

Lockout of Tenant—Commercial Lease: Both the commercial landlord's right to lock out the tenant and the commercial tenant's right of reentry after an unlawful lockout are set forth in Texas Property Code sections 93.002 and 93.003. The provisions for preventing entry, interruption of utilities, and forcible entry or removal of furniture are identical to those for residential leases. *See* Tex. Prop. Code § 93.002(a), (c). Absent a lease provision to the contrary, the law permits the immediate lockout of a commercial tenant for failure to pay rent. Tex. Prop. Code § 93.002(c)(3). Once the locks have been changed, the landlord must place a written notice on the tenant's front door stating the name and address or telephone number of the individual from whom a new key may be obtained. Tex. Prop. Code § 93.002(f). The new key is required to be provided only during the tenant's regular business hours and only if the tenant pays the delinquent rent. Tex. Prop. Code § 93.002(f). If, however, the landlord violates the lockout provisions, the tenant has the choice to either recover possession of the premises or terminate the lease. Tex. Prop. Code § 93.002(g)(1). The tenant's damages are equal to its actual damages plus one month's rent or $500, whichever is greater, plus attorney's fees and court costs, less any delinquent rents the

tenant is then liable for. Tex. Prop. Code § 93.002(g)(2). If there is a conflict between a commercial lease and the provisions of section 93.002, the lease supersedes the statute. Tex. Prop. Code § 93.002(h).

If the tenant has been locked out of the leased premises illegally, he may recover possession of the premises. *See* Tex. Prop. Code § 93.003. To regain possession, the tenant must file a sworn complaint seeking reentry with the justice court in the precinct in which the premises are located. The complaint must specify the facts of the unlawful lockout, and the tenant or its representative must also state orally under oath to the justice the facts of the unlawful lockout. Tex. Prop. Code § 93.003(b). If the tenant has complied with subsection (b) of section 93.003, and the court believes the tenant, the court may issue, ex parte, a writ of reentry that entitles the tenant to immediate and temporary possession of the premises. Tex. Prop. Code § 93.003(c). The writ of reentry must be served on the landlord or the landlord's management company. Tex. Prop. Code § 93.003(d). The landlord is entitled to a hearing, and the writ of reentry must notify the landlord of its right to a hearing. The hearing is required to be held between the first and not later than the seventh day after the landlord requests a hearing. Tex. Prop. Code § 93.003(e). To avoid a judgment for costs against the landlord, the landlord must request a hearing before the eighth day after service of the writ of reentry. Tex. Prop. Code § 93.003(f). Any party may appeal from the court's judgment in the same manner as an appeal in a forcible detainer suit. Tex. Prop. Code § 93.003(g). If the court rules that possession should remain with the tenant, a writ of possession is issued superseding the writ of reentry. Tex. Prop. Code § 93.003(h). If the landlord fails to comply with the writ of reentry, the landlord may be held in contempt of court. Tex. Prop. Code § 93.003(i). Upon the landlord's disobedience of the writ, the tenant may file an affidavit stating the name of the person who is disobedient and describing the act or omission. Upon receipt of the affidavit, the court shall issue a show-cause order. If the court finds disobedience to the writ, it may commit the person to jail without bail until the person purges himself of the contempt in a manner and form as the court may direct. If the landlord obeys the writ before a show-cause order is served, the court may nevertheless still find the person in contempt and assess further punishment. Tex. Prop. Code § 93.003(i).

The tenant can suffer the same penalties as the landlord if it swears out a bad-faith complaint. In such a case the landlord may, in a separate cause of action, recover from the tenant its actual damages plus one month's rent or $500, whichever is greater, plus attorney's fees and costs of court, less any amounts for which the landlord is liable to the tenant. Tex. Prop. Code § 93.003(k).

Lockout of Tenant—Residential Lease: A landlord may not intentionally prevent a residential tenant from entering leased premises except by judicial process unless the exclusion results from—

1. bona fide repairs, construction, or an emergency;
2. removing the contents of premises abandoned by a tenant; or
3. changing the door locks on the door to the individual unit of a tenant who is delinquent in paying at least part of the rent.

Tex. Prop. Code § 92.0081(b).

Although a landlord may change the door locks of the apartment of a tenant who is delinquent in rent, this tactic merely gives the landlord a means to confront the tenant, because the landlord or the landlord's agent must place a written notice on the tenant's front door stating (1) an on-site location where the tenant may go twenty-four hours a day to obtain the new key or

a telephone number that is answered twenty-four hours a day that the tenant may call to have a key delivered within two hours after calling the number; (2) the fact that the landlord must provide the new key to the tenant at any hour, regardless of whether or not the tenant pays any of the delinquent rent; and (3) the amount of rent and other charges for which the tenant is delinquent. Tex. Prop. Code § 92.0081(c). A landlord who changes the locks or otherwise prevents a tenant from entering the tenant's individual rental unit may not change the locks or otherwise prevent a tenant from entering a common area of residential rental property. Tex. Prop. Code § 92.0081(e–1). Also, a landlord may not change the locks more than once in a rental payment period or when the tenant or any other legal occupant is in the dwelling. Tex. Prop. Code § 92.0081(k).

A tenant's remedies for a landlord's violation of the lockout provision include (1) recovery of the premises or termination of the lease and (2) actual damages, a penalty of one month's rent plus $1,000, reasonable attorney's fees, and court costs, reduced by any amounts owed to the landlord by the tenant, including delinquent rent. Tex. Prop. Code § 92.0081(h). If the landlord fails to provide a new key, the tenant may recover an additional penalty of one month's rent. Tex. Prop. Code § 92.0081(i). A tenant who has been locked out in violation of the above provisions may recover possession of the premises through court action. Tex. Prop. Code § 92.009.

The statute also limits the landlord's ability to interrupt a tenant's utility service for which the tenant pays the utility company directly. A landlord may interrupt or cause the interruption of the utilities only in the case of bona fide repairs, construction, or an emergency. Tex. Prop. Code § 92.008(a). Furthermore, a landlord may not remove a door, window, or attic hatchway cover or a lock, latch, hinge, hinge pin, doorknob, or other mechanism connected to a door, window, or attic hatchway cover from premises leased to a tenant unless the removal is for bona fide repair or replacement. A landlord also may not remove furniture, fixtures, or appliances from premises leased to a tenant unless the removal is for bona fide repair or replacement. In either case the repair or replacement must be promptly performed. Tex. Prop. Code § 92.0081(a).

The statutory provisions pertaining to residential leases may not be waived under a lease; such a lease provision is void. Tex. Prop. Code § 92.0081(j).

§ 28.4 Judicial Procedure

§ 28.4:1 Jurisdiction

Section 24.004 of the Texas Property Code provides that a justice court in the precinct in which the real property is located has jurisdiction in eviction suits, but the justice court does not have jurisdiction to determine title to the land. A suit to determine title and ownership of real property must be brought in a district court or county court. If the question of title is so integrally linked to the issue of possession that possession may not be determined without first determining title, the justice court lacks jurisdiction to grant an eviction. *Falcon v. Ensignia*, 976 S.W.2d 336, 338 (Tex. App.—Corpus Christi 1998, no pet.). However, the fact that title is disputed does not necessarily deprive the justice court of jurisdiction. Where the holder of a mortgage foreclosed and sought to evict the former owner, the owner's contention that the foreclosure and sale were not properly exercised did not deprive the justice court of jurisdiction to grant an eviction. *Dormady v. Dinero Land & Cattle Co., L.C.*, 61 S.W.3d 555, 558–59 (Tex. App.—San Antonio 2001, pet. dism'd w.o.j.); *see also Falcon*, 976 S.W.2d at 338 ("Justice courts may adjudicate possession even where issues related to the title of real property are tangentially or collaterally related to possession.").

A judgment in a proceeding for forcible detainer does not have res judicata effect with respect to other issues related to the lease other than the right to immediate possession of the property. *McGlothlin v. Kliebert*, 672 SW.2d 231, 233 (Tex. 1984); *Buttery v. Bush*, 575 S.W.2d 144, 146 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.); *see also Aguilar v. Weber*, 72 S.W.3d 729, 732 (Tex App.—Waco 2002, no pet.); *Dormady*, 61 S.W.3d at 558.

§ 28.4:2 Summons and Complaint

After at least three days have passed since giving the tenant written notice to vacate, the landlord may file suit by filing a written sworn complaint with the justice court seeking judgment against the tenant for possession of the premises. *See* Tex. Prop. Code §§ 24.005, 24.0051. The court will then immediately issue a citation directed to the defendant, commanding him to appear before the court at a time and place named in the citation not more than ten days nor less than six days from the date of service of the citation. The citation must inform the parties that the case will be heard by a jury upon the timely request and payment of a jury fee no later than five days after the defendant is served. Tex. R. Civ. P. 739. The citation required by rule 739 must include the following notice to the defendant on the first page in conspicuous bold print in English and Spanish:

SUIT TO EVICT

THIS SUIT TO EVICT INVOLVES IMMEDIATE DEADLINES. A TENANT WHO IS SERVING ON ACTIVE MILITARY DUTY MAY HAVE SPECIAL RIGHTS OR RELIEF RELATED TO THIS SUIT UNDER FEDERAL LAW, INCLUDING THE SERVICEMEMBERS CIVIL RELIEF ACT (50 U.S.C. APP. SECTION 501 ET SEQ.), OR STATE LAW, INCLUDING SECTION 92.017, TEXAS PROPERTY CODE. CALL THE STATE BAR OF TEXAS TOLL-FREE AT 1-877-9TEXBAR IF YOU NEED HELP LOCATING AN ATTORNEY. IF YOU CANNOT AFFORD TO HIRE AN ATTORNEY, YOU MAY BE ELIGIBLE FOR FREE OR LOW-COST LEGAL ASSISTANCE.

Tex. Prop. Code § 24.0051(d).

The sworn complaint must describe the lands, tenements, or premises of which possession is claimed with sufficient certainty to identify them, and it must also state the facts entitling the complainant to possession and authorizing the action under chapter 24 of the Texas Property Code. Tex. R. Civ. P. 741.

§ 28.4:3 Service of Citation

The justice court will issue a citation and deliver it to the constable, who will serve the citation by delivering a copy of it to the defendant or by leaving a copy with a person over the age of sixteen at the defendant's usual place of abode at least six days before the return day on the citation. The constable must complete and file a return of service in accordance with rule 536a with the court that issued the citation on or before the day assigned for the trial. Tex. R. Civ. P. 742.

If the complaint lists all home and work addresses of the defendant that are known to the plaintiff, and if it states that the plaintiff knows of no other home or work address of the defendant in the county in which the premises are located, service of the citation may be made by delivery to the premises in question under the following procedure. If the officer is unsuccessful in serving the citation under rule 742, the officer must, no later than five days after receiving the citation, execute a sworn statement that he has made diligent efforts to serve the citation on at least two occasions at all addresses of the defendant in the county in which the premises are located as may be shown on the sworn complaint and stating the times and places of

attempted service. Tex. R. Civ. P. 742a. The officer's sworn statement is filed with the court. The court may then authorize service by the officer by placing the citation inside the premises by placing it through a door mail slot or by slipping it under the front door, or if neither method is possible or practical, by securely affixing the citation to the front door or main entry to the premises. Tex. R. Civ. P. 742a(a). The officer must, that same day or the next day, deposit in the mail a true copy of the citation with a copy of the sworn complaint attached, addressed to the defendant at the premises in question and sent by first-class mail. Tex. R. Civ. P. 742a(b). The delivery and mailing to the premises must occur at least six days before the return day on the citation, and the officer must complete and file a return of service in accordance with rule 536a with the court that issued the citation on or before the day assigned for trial. Tex. R. Civ. P. 742a(d). The officer must note the date of delivery and date of mailing on the return of citation. Tex. R. Civ. P. 742a(c). Service under rule 742a is procedurally sufficient to support a default judgment for possession of the premises and for unpaid rent. Tex. Prop. Code § 24.0051(a).

§ 28.4:4 Default Judgment

If the defendant fails to appear at the time and place for trial, the allegations of the complaint may be taken as admitted and judgment entered by default. Tex. R. Civ. P. 743.

§ 28.4:5 Eviction Trial

If the defendant appears before the justice court at the time and place set for trial, a trial is conducted as in any other lawsuit. At the request of either party and for good cause shown, supported by affidavit, the trial may be postponed for a period not exceeding six days. Tex. R. Civ. P. 745.

Either party may demand a trial by jury by making a request to the court on or before five days from the date the defendant was served with citation and by paying a jury fee of $5. Tex. R. Civ. P. 744. If no jury is demanded by either party, the court tries the case. If a jury is timely demanded by either party, a jury is empaneled and sworn and the case is submitted to the jury on one issue: whether the plaintiff or the defendant is entitled to possession of the property. Tex. R. Civ. P. 747. *See also* Tex. R. Civ. P. 746. All issues of fact and law are submitted to the jury, and the court does not instruct the jury on the law.

§ 28.4:6 Defenses Available to Tenant

Because the only issue to be decided is whether the landlord or the tenant is entitled to have possession of the premises, questions of legal title to the property, fraud, negligence, deceptive trade practices, and other theories of law not relating to the question of possession are not properly asserted in an eviction proceeding. *See* Tex. R. Civ. P. 746.

The defendant in one eviction proceeding offered as a defense proof of the following facts: the property owners had entered into an oral contract to sell the property to the occupants, the occupants had entered into possession of the property and made valuable improvements to it, the owners were attempting to perpetrate a fraud on the occupants through a forcible detainer suit, and the owners had filed the suit in retaliation for the occupants having brought a disciplinary proceeding against the owners' son, who was an attorney. The court of appeals held that these questions had no relevancy to the question in the forcible detainer suit of which party had the right to immediate possession of the premises, and evidence pertaining to those affirmative defenses was inadmissible in that suit. *Fandey v. Lee*, 880 S.W.2d 164, 169–70 (Tex. App.—El Paso 1994, writ denied).

Usury: Though often attempted as a defense by tenants, usury does not apply to real property

leases because the lease is not for the retention or forbearance of money. *Apparel Manufacturing Co., Inc. v. Vantage Properties, Inc.*, 597 S.W.2d 447, 449 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.). The court held that a lease transaction is not a lending transaction and therefore does not meet the definition of usury. In *River Oaks Shopping Center v. Pagan*, 712 S.W.2d 190, 192 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.), the court found that all rent due under the lease was incurred at the time of the execution of the lease and the subsequent rental payments were merely the time in which the tenant had to repay it.

Deceptive Trade Practices: There are two implied warranties relating to the leasing of real estate: (1) an implied warranty that residential rentals are habitable and fit for living (*Kamarath v. Bennett*, 568 S.W.2d 658, 660–61 (Tex. 1978); *see also Johnson v. Highland Hill Drive Apartments*, 568 S.W.2d 661 (Tex. 1978)), and (2) an implied warranty that commercial rentals are suitable for their intended commercial purposes (*Davidow v. Inwood North Professional Group—Phase I*, 747 S.W.2d 373, 377 (Tex. 1988)). In the commercial lease situation, the *Davidow* court held that the tenant's obligation to pay rent and the landlord's implied warranty of suitability are mutually dependent. That is, a breach of the warranty authorizes an abatement of rent. *Davidow*, 747 S.W.2d at 377.

Covenant of Quiet Enjoyment: Most leases provide an express covenant of quiet enjoyment of the premises. If the lease does not provide it, the law implies such a covenant. The covenant, then, is best defined as one in which the tenant shall not be evicted or disturbed by the lessor. In *Goldman v. Alkek*, 850 S.W.2d 568, 570–72 (Tex. App.—Corpus Christi 1993, no writ), the court held that the landlord breached the covenant of quiet enjoyment when the landlord made demands for additional amounts of money not required by the lease, the tenant paid the additional amounts, and the landlord attempted to terminate the lease, because such an action would sufficiently show that actions of the landlord hindered the tenant and its occupation in the enjoyment of the leased premises.

Texas Property Code section 93.002 governs the interruption of utilities, removal of property, and exclusion of commercial tenants. A landlord may not interrupt utilities paid directly by the tenant except for bona fide repairs, construction, or emergency. Doors, windows, hatchways, latches, locks, doorknobs, and other mechanisms may not be removed except for bona fide repairs. A landlord may not intentionally prevent a tenant from entering the premises (except for by judicial process) except for lockouts, as discussed at section 28.3:3 above. These acts, therefore, give the tenant a statutory cause of action and also a common-law cause of action under breach of quiet enjoyment.

By virtue of the covenant of quiet enjoyment, a legal duty has been found on the part of the landlord to protect the tenant from disturbance that may be created by the acts of tenants of an adjoining portion of the building. *Maple Terrace Apartment Co. v. Simpson*, 22 S.W.2d 698, 700 (Tex. Civ. App.—Texarkana 1929, no writ).

Constructive Eviction: Constructive eviction is an intentional act or omission of the landlord permanently depriving a tenant, without his consent, of the use and beneficial enjoyment of the premises or any substantial part thereof so that the tenant abandons the premises. *Hoover v. Wukasch*, 274 S.W.2d 458, 460 (Tex. Civ. App.—Austin 1955, writ ref'd n.r.e.). Constructive eviction has been defined as having four distinct elements: (1) intent on the landlord's part that the tenant no longer enjoy the premises, (2) a material act by the landlord substantially interfering with the use and enjoyment of the premises for the purpose for which they were let, (3) an act that permanently deprives the tenant of the use and enjoyment of the premises, and (4) an abandonment of the premises by the

tenant within a reasonable time of the commission of the act. *Briargrove Shopping Center v. Vilar Joint Venture, Inc.*, 647 S.W.2d 329, 334 (Tex. App.—Houston [1st Dist.] 1982, no writ).

The proper measure of general damages for wrongful eviction of a tenant by a landlord is the difference between the market rental value of the leasehold for the unexpired term of the lease and stipulated rentals. It is the object and purpose of the law to compensate a tenant who has been wrongfully evicted from the premises for the actual loss sustained. This does not include special damages, such as lost profits. *Briargrove Shopping Center*, 647 S.W.2d at 336.

Texas law relieves tenants of contractual liability for any remaining rentals due under the lease if they can establish constructive eviction by the landlord. *Downtown Realty v. 509 Tremont Building, Inc.*, 748 S.W.2d 309, 312 (Tex. App.—Houston [14th Dist.] 1988, no writ). A landlord's acts or omissions can form the basis of a constructive eviction. *See Steinberg v. Medical Equipment Rental Services, Inc.*, 505 S.W.2d 692, 677 (Tex. Civ. App.—Dallas 1974, no writ).

Persistent requests for past-due rent in the presence of customers does not meet the legal requirements of constructive eviction. *Stillman v. Youmans*, 266 S.W.2d 913, 916 (Tex. Civ. App.—Galveston 1954, no writ). Intention on the part of the landlord that the tenant no longer enjoy the premises can be presumed from the surrounding circumstances. *Richker v. Georgandis*, 323 S.W.2d 90, 98 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.). Leasing to a competitor of the tenant is not constructive eviction. *Sherrer v. Sparks*, 78 S.W.2d 1035 (Tex. Civ. App.—San Antonio 1935, no writ). Removing trade fixtures can be a constructive eviction. *Stephens v. Anderson*, 275 S.W.2d 869, 871 (Tex. Civ. App.—Austin 1955, writ ref'd n.r.e.). Sending a default letter demanding payment of rent is not constructive eviction. *Weissberger v. Brown-Bellows-Smith, Inc.*, 289 S.W.2d 813, 817 (Tex. App.—Galveston 1956, writ ref'd n.r.e.). If the lease calls for written notice to the landlord before the landlord has the duty to make repairs, and the tenant fails to give written notice, the tenant cannot rely on the landlord's failure to make the repairs as constructive eviction. *Hoover*, 274 S.W.2d at 460. An eviction is not established where it appears that the tenant vacated the premises voluntarily or left for reasons other than the conduct of the landlord. *Nabors v. Johnson*, 51 S.W.2d 1081, 1082 (Tex. Civ. App.—Waco 1932, no writ); *Ogus, Rabinovich & Ogus Co. v. Foley Bros. Dry Goods Co.*, 252 S.W. 1048, 1052 (Tex. Comm'n App. 1923).

Termination: If the landlord elects to terminate a lease because of some default by the tenant, the landlord may not recover future rentals from the lease. *Glasscock v. Console Drive Joint Venture*, 675 S.W.2d 590, 592 (Tex. App.—San Antonio 1984, writ ref d n.r.e.). This case is interesting in that it was submitted on an agreed statement of facts. The landlord stipulated in open court that the exhibits were true and correct copies of the instruments and to the truth of the matters contained in them. One of the exhibits was the landlord's verified petition for forcible detainer, which contained a statement consistent with the lease agreement that the landlord may exercise the option to terminate the lease. The landlord lost its future rentals claim.

A tenant cannot unilaterally terminate a lease absent a breach of the landlord. Abandonment by the tenant does not terminate a contract. *Stubbs v. Stuart*, 469 S.W.2d 311, 312–13 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ). In *Crawford v. Haywood*, 392 S.W.2d 387, 389 (Tex. Civ. App.—Corpus Christi 1965, no writ), the court held that mere abandonment and declaration of intention not to pay rent does not abrogate the landlord's rights under the lease. Suing under the lease for rents is an affirmation of the lease. *Meehan v. Pickett*, 463 S.W.2d 481, 484

(Tex. Civ. App.—Beaumont 1971, writ ref'd n.r.e.).

A tenant vacating the leased premises has a duty to notify the landlord of its departure. Until notification is effective and terminates the tenancy, the tenant remains in legal possession of the premises and is responsible for damages to the leasehold. *Flores v. Rizik*, 683 S.W.2d 112, 116 (Tex. App.—San Antonio 1984, no writ).

Surrender of a lease held by the tenant and acceptance of possession by the landlord ordinarily releases the tenant from liability for rents that would thereafter accrue. Whether there has been an acceptance by the landlord that releases the tenant from further obligations under the lease involves determining the intent of the parties. *Southmark Management Corp. v. Vick*, 692 S.W.2d 157, 159 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.). A landlord, of course, can agree to release a tenant from liability under a lease. *Franchise Stores Realty Corp. v. Dakri*, 721 S.W.2d 397, 398 (Tex. App.—Houston [1st Dist.] 1986, no writ); *but see Schecter v. Folsom*, 417 S.W.2d 180, 182–83 (Tex. Civ. App.—Dallas 1967, no writ) (letter advising tenant that if tenant did not cure default and payment of rent within ten days landlord would file forcible entry and detainer suit did not constitute notice by landlord that lease was forfeited where suit was never filed.).

Election of Remedies: Generally, the filing of a forcible detainer suit or the removal of a tenant is not an election of remedies. *See McHaney v. Hackleman*, 347 S.W.2d 822, 826–27 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e) ("[T]he law is well settled that the mere institution of suit, which is not prosecuted to judgment, or the application for a remedy, does not constitute an election of remedies, unless the litigant has received some benefit or his opponent has suffered some loss or detriment."); *but see Carter v. Long*, 455 S.W.2d 812 (Tex. Civ. App.—Texarkana 1970, writ ref'd n.r.e.) (landlord's action of filing forcible detainer suit had effect of evicting tenant from premises, and by landlord's action of eviction, he terminated lease by retaking possession of premises; those acts constituted an election of remedies in that landlord elected to terminate agreement and retake exclusive possession rather than seek remedies under agreement).

Waiver: Most standard commercial leases contain a covenant waiver paragraph. In such cases the contract controls, and any acts of the landlord should not constitute a waiver of any other covenants the tenant is required to perform. Absent such a paragraph, a landlord should be aware that only slight acts on his part may waive his right to enforce the lease. *See G.C. Murphy Co. v. Lack*, 404 S.W.2d 853 (Tex. Civ. App.—Corpus Christi 1966, writ ref'd n.r.e.). If the landlord has notice of a breach of the lease, any recognition by the landlord of the continued tenancy of the tenant will have the effect of a waiver of the landlord's right to terminate the lease. The refusal of the landlord to accept timely tender of rent may constitute a waiver of the landlord's right to declare the lease in default unless there is a new breach. *Harris v. Ware*, 93 S.W.2d 598, 599–600 (Tex. Civ. App.—Waco 1936, writ ref'd). The landlord who accepts rent from a tenant after full notice of a breach of a covenant or condition in the lease for which a forfeiture might have been demanded waives his right to declare a forfeiture for the breach until a new breach occurs. *Theophilakos v. Costello*, 54 S.W.2d 203, 205 (Tex. Civ. App.—Waco 1932, no writ). The right to terminate a lease for failure to make payments when due is waived by assurances from the landlord that the tenant need not worry about timely payments. *Ada Oil Co. v. Logan*, 447 S.W.2d 205, 209 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ). The landlord's acceptance of partial payment of rent does not necessarily preclude his right to terminate the lease. *Jowell v. Pearsall*, 331 S.W.2d 514, 515 (Tex. Civ. App.—Texarkana 1959, no writ).

Acceptance of rent for the premises after taking proper legal steps to terminate the lease for cause is not a waiver of the landlord's right to repossess the premises unless the facts show an intent to waive. *Crawford v. Texas Improvement Co.*, 196 S.W. 195, 197 (Tex. Civ. App.—El Paso 1917, writ dism'd). A landlord who has been very indulgent in allowing rents to become overdue cannot be precluded from terminating the lease. *McCray v. Kelly*, 130 S.W.2d 458, 462 (Tex. Civ. App.—Galveston 1939, writ dism'd).

Disposal of Property or Conversion: Texas Property Code section 93.002(e) gives the landlord the right to remove and store any abandoned property of the tenant that remains on the premises. In addition to the landlord's other rights, the landlord may dispose of the property sixty days after the date the property is stored. To do this, the landlord must deliver, by certified mail to the tenant at the tenant's last known address, a notice stating that the landlord may dispose of the tenant's property if the tenant does not claim the property within sixty days of the date the property is stored. Tex. Prop. Code § 93.002(e).

In *Wilson v. Moore*, 122 S.W. 577, 579 (Tex. Civ. App. 1909, no writ), the court held that conversion of the tenant's property was not found because the tenant was requested to take the property. The tenant voluntarily left the property and the landlord did not make any claim on or assume any ownership over it. In *Alsbury v. Linville*, 214 S.W. 492, 495 (Tex. Civ. App.—San Antonio 1919, writ dism'd w.o.j.), the court held that landlords are authorized to take possession of the premises upon abandonment by tenants.

Landlords taking possession of abandoned premises are required to safely care for the property left at the premises by the tenant. When a landlord, upon abandonment of the premises, retook possession to remove personal belongings of the tenant without intent to appropriate the belongings and so held the property subject to the tenant's order, he was not guilty of conversion of the belongings. *See American Cotton Co-op Ass'n v. Plainview Compress & Warehouse Co.*, 114 S.W.2d 689 (Tex. Civ. App.—Amarillo 1938, writ dism'd). The court held that one who is rightfully in possession of property, although the legal title thereto may be in another, is not guilty of conversion. To establish allegations of conversion it must be shown that the person charged unlawfully exercised dominion and control over the property of another to the exclusion of the exercise of the right of possession by the owner or some other person entitled to its possession. *American Cotton Co-op Ass'n*, 114 S.W.2d at 692–94. Assuming a valid initial taking of the property by the landlord, it is well settled that there is a corresponding obligation on the part of the landlord to safely care for such property and keep it for the benefit of the owner until the demanded rent has been paid. *Johnson v. Lane*, 524 S.W.2d 361, 364 (Tex. Civ. App.—Dallas 1975, no writ). In *Prewitt v. Branham*, 643 S.W.2d 122, 123 (Tex. 1982), the supreme court held that where there was a forged signature on a lease agreement for realty, there could be a conversion of the document in which the rights were conferred.

In forcible detainer suits the landlord, in removing a tenant's property after a successful suit, has no duty to protect or store the property of the tenant. When the tenant was served with process and notice to vacate the premises, the notice required that the tenant remove the person and the personal property. When the tenant failed to remove property as required under a forcible detainer suit, the tenant placed its property at risk. *Conroy v. Manos*, 679 S.W.2d 124, 126 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

Time of the Essence: Generally in contracts, and specifically in real estate transactions, time is not of the essence unless the express agreement of the parties makes it so. When time is not of the essence a contract need not necessarily be performed precisely at the agreed time. A party

has a reasonable time in which to perform the contract. *Montgomery v. Montgomery*, 99 S.W. 1145, 1147 (Tex. Civ. App.—Dallas), *aff'd*, 105 S.W. 38 (Tex. 1907). When time is of the essence in a contract, a party must perform or tender performance in literal compliance with the provisions about time to avoid a forfeiture or to entitle him to enforce a contract in a suit for specific performance. *Heffington v. Gillespie*, 176 S.W.2d 205, 211–12 (Tex. Civ. App.—Fort Worth 1943, no writ); *see also Maxwell v. Lake*, 674 S.W.2d 795 (Tex. App.—Dallas 1984, no writ). Language clearly showing an intention that time be of the essence is required to be in the contract. *See Nicholason v. Whyte*, 236 S.W. 770, 773 (Tex. Civ. App.—Dallas 1921, no writ). However, where time is of the essence as expressly shown in the contract, such performance may be extended by the parties' waiver of strict compliance. *Hage v. Westgate Square Commercial*, 598 S.W.2d 709, 711 (Tex. Civ. App.—Waco 1980, writ ref'd n.r.e.). The waiver may be shown by parol evidence or course of dealing. *Hage*, 598 S.W.2d at 712. Most lease contracts contain time-is-of-the-essence clauses.

Failure of Consideration: In conjunction with a breach of the covenant of quiet enjoyment or a breach of warranty of suitability, tenants can plead a failure of consideration. Failure of consideration occurs when, because of some supervening cause after an agreement is reached, the promised performance fails. *Suttles v. Thomas Bearden Co.*, 152 S.W.3d 607 (Tex. App.—Houston [1st Dist.] 2004, no pet.). Failure of consideration may result as a consequence of fraud, mutual mistake, or failure of one party to perform its obligation under an agreement that the purported property is not what it was represented by the buyer. 14 Tex. Jur. 3d *Contracts* § 107. However, breach of a covenant in a contract for the sale of land will not necessarily amount to a failure of consideration. *Lozano v. Meyers*, 8 S.W.2d 785, 787 (Tex. Civ. App.—San Antonio 1928), *aff'd*, 18 S.W.2d 588 (Tex. Comm'n App. 1929).

§ 28.4:7 Judgment and Writ of Possession; Appeal

If the judgment or verdict is in favor of the plaintiff, the justice court must render judgment for the plaintiff for possession of the premises, costs, and damages, which may be unpaid rent and attorney's fees, and shall award a writ of possession. If the judgment or verdict is in favor of the defendant, the court must render judgment for the defendant against the plaintiff for costs and any damages the defendant has proved within the court's jurisdictional limits. No writ of possession shall issue until the expiration of five days from the time the judgment is signed. Tex. R. Civ. P. 748.

Writ of Possession: A landlord who prevails in an eviction suit is entitled to a judgment for possession of the premises and a writ of possession, which may not be issued before the sixth day after the date on which the judgment for possession is rendered. Tex. Prop. Code § 24.0061(a), (b). The court must notify a tenant in writing of a default judgment for possession by sending a copy of the judgment to the premises by first-class mail not later than forty-eight hours after the entry of the judgment. Tex. Prop. Code § 24.0061(c).

The writ of possession must order the officer executing the writ to—

(1) Post a written warning of at least 8-1/2 by 11 inches on the exterior of the front door of the rental unit notifying the tenant that the writ has been issued and that the writ will be executed on or after a specific date and time stated in the warning not sooner than 24 hours after the warning is posted; and

(2) when the writ is executed:

(A) deliver possession of the premises to the landlord;

(B) instruct the tenant and all persons claiming under the tenant to leave the premises immediately, and, if the persons fail to comply, physically remove them;

(C) instruct the tenant to remove or to allow the landlord, the landlord's representatives, or other persons acting under the officer's supervision to remove all personal property from the rental unit other than personal property claimed to be owned by the landlord; and

(D) place, or have an authorized person place, the removed personal property outside the rental unit at a nearby location, but not blocking a public sidewalk, passageway, or street and not while it is raining, sleeting or snowing.

Tex. Prop. Code § 24.0061(d).

The writ of possession must also authorize the officer to hire a bonded or insured warehouseman to remove and store part or all of the property at no cost to the landlord or the officer executing the writ. Tex. Prop. Code § 24.0061(e). The officer, however, may not require the landlord to store the property. Tex. Prop. Code § 24.0061(f).

The writ of possession must also contain notice to the officer that he is not liable for damages resulting from the execution of the writ if he executes it in good faith and with reasonable diligence. Tex. Prop. Code § 24.0061(g). The Code also allows a sheriff or constable to use reasonable force in executing a writ. *See* Tex. Prop. Code § 24.0061(h).

Warehouseman's Lien: Texas Property Code section 24.0062 discusses warehouseman's liens. If the property is stored by the sheriff or constable in a bonded or insured public warehouse, the warehouseman has a lien on the property for his reasonable moving and storage charges. The lien does not attach to any property until the property has been stored by the warehouseman. Tex. Prop. Code § 24.0062(a). The officer must send a written notice to the tenant of the address and telephone number of the warehouse and the tenant's right to redeem the property by paying the warehouseman's charges. See Tex. Prop. Code § 24.0062(b), (c) for notice requirements. If the tenant does not redeem the property within thirty days, the warehouseman may sell the property to satisfy his charges. Tex. Prop. Code § 24.0062(b)(5).

Appeal to County Court for Trial De Novo: No motion for new trial is allowed. Tex. R. Civ. P. 749. Either party may appeal from a final judgment to the county court of the county in which the judgment is rendered by filing with the justice court, within five days after the judgment is signed, a bond to be approved by the justice, payable to the adverse party, conditioned that he will prosecute his appeal with effect or pay all costs and damages that may be adjudged against him. Tex. R. Civ. P. 749.

Appeal Bond: Tex. R. Civ. P. 752 allows either party to plead and prove and recover damages, if any, suffered for withholding or defending possession of the premises during the pendency of an appeal, and if such amounts are found by the justice court, the appeal bond must be in an amount which covers these damages also. Within five days following the filing of the appeal bond, the party appealing must give notice by certified mail of the filing of the bond to the adverse party, and no judgment can be

entered by default in the county court until after this notice has been given. Tex. R. Civ. P. 749.

Pauper's Affidavit: Tex. R. Civ. P. 749a permits a party appealing from a judgment in a forcible detainer proceeding to file a pauper's affidavit in lieu of an appeal bond. The opposing party has five days within which to file an objection, and if an objection is timely filed, the justice court must hold a hearing and rule on the matter within five days.

Stay Pending Appeal: An appeal is perfected by filing with the justice court either an appeal bond or a pauper's affidavit. Tex. R. Civ. P. 749c. When an appeal has been perfected, further proceedings in the justice court are stayed, and the justice must make a transcript of the entries on his docket and transmit and file them together with the original papers and any money in his registry to the clerk of the county court. The clerk of the county court dockets the case and the case proceeds de novo. Tex. R. Civ. P. 751.

Pleadings in County Court: The case then proceeds under the rules applicable to proceedings in county courts. If the defendant did not file a written answer in the justice court and fails to file a written answer with the county court within eight days after the transcript is filed, the plaintiff may have judgment by default. Tex. R. Civ. P. 753. However, the pauper's affidavit, by itself, is a sufficient appearance to prevent the landlord from obtaining a judgment by default if the tenant fails to file a written answer with the county court. *Hughes v. Habitat Apartments*, 860 S.W.2d 872 (Tex. 1993).

Preferential Trial Setting: The trial and all hearings and motions are entitled to precedence in the county court. Tex. R. Civ. P. 751.

§ 28.5 Landlord's Liens and Distress Warrants

§ 28.5:1 Commercial Landlord's Liens

The success in the enforcement of a distress warrant presupposes a valid landlord's lien. A landlord may acquire a lien on the tenant's property by either statute, contract, or security agreement. *See* Tex. Prop. Code §§ 54.021–.025. The landlord of a building leased for nonresidential purposes has a lien on a tenant's property for rent that becomes due during the twelve-month period succeeding the date of the beginning of the rental agreement or the anniversary of the date. Tex. Prop. Code § 54.021. By way of priority, unless a landlord perfects its security interest on an annual basis, beginning on the date the lease commences, an intervening security interest of another creditor will have priority over the landlord's lien. *See* Tex. Bus. & Com. Code § 9.203; *Bank of North America v. Kruger*, 551 S.W.2d 63, 66 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.). For example, the building landlord's lien loses priority to the security interest of another creditor if the lease covers the period between January 1, 2011, and December 31, 2011, and the security interest is perfected after December 31, 2011. Property Code section 54.021, therefore, effectively divides a lease into contract years for purposes of determining whether a perfected secured creditor's security interest will supersede a statutory landlord's lien. Each year of the contract is viewed separately. At the beginning of each contract year, if the secured creditor's UCC financing statement has been filed during the previous year, its lien will be superior to the landlord's lien. *FDIC v. Sears, Roebuck & Co.*, 743 S.W.2d 772, 773 (Tex. App.—El Paso 1988, no writ). The lien does not attach to property exempted by statute from forced sale. Tex. Prop. Code § 54.023.

To perfect its lien, the landlord should file an affidavit lien statement with the county clerk. *See* Tex. Prop. Code § 54.022. The lien is unenforceable for rent on commercial buildings if the rent is more than six months past due unless the landlord files a lien statement with the county clerk in the county in which the building is located. Tex. Prop. Code § 54.022(a). Filing the statement presumably makes the lien enforceable against the tenant regardless of when it is filed, but the time of filing can be crucial in protecting the lien's priority against intervening liens. For this reason the statement should be filed no later than six months after rent for any given month becomes due. *See Industrial State Bank v. Oldham*, 221 S.W.2d 912, 914 (Tex. 1949). The landlord or the landlord's agent or attorney must verify the statement, which must contain information specified in Tex. Prop. Code § 54.022(b). The lien exists while the tenant occupies the building and until one month after the day the tenant abandons it. Tex. Prop. Code § 54.024. For an affidavit and lien statement, see form 28-2 in this chapter.

Most standard leases provide some boilerplate language for the imposition of a landlord's lien. This contractual lien, as opposed to the statutory lien provided by the Property Code, gives the landlord much more latitude. Perfection under UCC article 9 may cut off any subsequent creditor's security interest. Once that security interest is filed, subsequent annual filings are unnecessary. The landlord's lien is not satisfied until the landlord's claim for rent advances and furnishings has been paid. *Green v. Scales*, 219 S.W. 274, 275 (Tex. Civ. App.—Fort Worth 1919, no writ). A tenant cannot free himself or the products of the leased premises unless this is done by contract with the landlord for payment of rent. *Forrest v. Durnell*, 26 S.W. 481, 482 (Tex. 1894); *Granville v. Rauch*, 335 S.W.2d 799, 803 (Tex. Civ. App.—Austin 1960, no writ). The landlord's lien is not affected by subletting or assignment of the lease. *Forrest*, 26 S.W. at 482–83; *Mauritz v. Markloff*, 268 S.W. 230, 231 (Tex. Civ. App.—Galveston 1925, no writ); *Green*, 219 S.W. at 275; *Edwards v. Anderson*, 82 S.W. 659, 659–60 (Tex. Civ. App.—Austin 1904, no writ). One who has seized property from the leased premises may be held liable by the landlord for the full value thereof or for the amount of debt owed by the tenant and for exemplary damages if he acted with knowledge of the circumstances. *Guaranty Bond State Bank of Timpson v. Redding*, 24 S.W.2d 457, 461 (Tex. Civ. App.—Beaumont 1929, no writ); *Ward v. Gibbs*, 30 S.W. 1125, 1128 (Tex. Civ. App.—Galveston 1895, no writ). To give effect to the landlord's lien, the landlord is afforded the remedy of foreclosure. To be entitled to the benefit of this lien, the landlord must assert its right to it in its pleadings in a suit involving the property and pray that the lien be foreclosed. *Anderson v. Owen*, 269 S.W. 454, 455 (Tex. Civ. App.—Galveston 1924, no writ). The lien, however, does not attach to property belonging to others that is located on the leased premises. *West Development Co. v. Crown Bottling Co.*, 90 S.W.2d 887, 890 (Tex. Civ. App.—Waco 1936, writ dism'd).

The tenant may replevy the property by filing a bond in double the amount of the landlord's debt. A landlord who wrongfully obtains a distress warrant may be liable for wrongful restraint. *McKee v. Sims*, 45 S.W. 564 (Tex. 1898); *McAfee v. Chandler*, 7 S.W.2d 623, 624 (Tex. Civ. App.—Amarillo 1928, no writ). Liability for wrongful restraint may arise from levying a distress warrant on property in excess of the amount sued, making false allegations in the landlord's affidavit about the amount of rent due, or levying on property not subject to the landlord's lien. In *McVea v. Verkins*, 587 S.W.2d 526, 531 (Tex. Civ. App.—Corpus Christi 1979, no writ) (citing *Schwulst v. Neely*, 50 S.W. 608 (Tex. Civ. App. 1899, no writ)), the court held that to enforce a contractual landlord's lien and to obtain possession of the property subject to the lien absent consent by the tenant, the landlord must foreclose the lien by judicial proceed-

ings and in no other way. In *Kruger*, 551 S.W.2d at 65, the court held that contractual landlord's liens are subject to provisions of the Uniform Commercial Code but that statutory landlord's liens are not.

See section 28.5:4 below regarding distress warrants, form 28-1 in this chapter for a petition to foreclose the lien, and forms 28-3 through 28-11 for forms applicable to distress warrants. Sequestration may also be appropriate if the landlord fears the tenant may dispose of property subject to the lien. See sections 8.16 through 8.24 in this manual regarding sequestration.

§ 28.5:2 Agricultural Landlord's Lien

An agricultural landlord acquires a lien on a tenant's property for rent due and for "the money and the value of property that the landlord furnishes or causes to be furnished to the tenant to grow a crop on the leased premises and to gather, store, and prepare the crop for marketing." Tex. Prop. Code § 54.001.

This lien attaches to property on the leased premises that the landlord directly or indirectly furnishes to a tenant on which to grow crops, and it attaches to those crops grown in the year that the rent accrues or the property is furnished. However, if the landlord provides everything except labor, the lien attaches only to the crops grown in the year that the property is furnished. The lien does not attach to the goods of a merchant, trader, or mechanic if the tenant sells and delivers the goods in good faith in the regular course of business. Agricultural products, animals, and tools subject to a statutory agricultural lien may not be exempted from forced sale by other statutes. Tex. Prop. Code § 54.002. The lien does not arise if the rent charged by the landlord exceeds certain percentages of the value of grain or cotton crops grown on the premises. Tex. Prop. Code § 54.003.

The lien is effective against a purchaser of the tenant's crops regardless of actual notice or lack of notice to the purchaser, and the landlord may enforce the lien by foreclosing on the crops or by suing the purchaser for conversion. *Dill v. Graham*, 530 S.W.2d 157, 160 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.).

In addition to filing suit to foreclose the lien, the landlord may secure a distress warrant. See section 28.5:4 below regarding distress warrants, form 28-1 in this chapter for a petition to foreclose the lien, and forms 28-3 through 28-11 for forms applicable to distress warrants. Sequestration may also be appropriate if the landlord fears the tenant may dispose of property subject to the lien. See sections 8.16 through 8.24 in this manual regarding sequestration.

§ 28.5:3 Residential Landlord's Lien

The landlord of residential property has a lien for unpaid rent, which attaches to the tenant's nonexempt property in the residence or in a storage room. Property exempted from the lien by statute generally includes possessions essential to daily life, including, among other things, clothing, food, medicine, a car, a truck, a couch, two living room chairs, a dining table and chairs, beds, kitchen furnishings, tools of a trade, and agricultural implements. Also exempt are goods that the landlord or the landlord's agent knows to be subject to a recorded chattel mortgage or financing agreement. Tex. Prop. Code §§ 54.041–.042.

A residential landlord's lien can be (and usually is) contractual. Tex. Prop. Code § 54.041 provides for a lien independent of contract, but the nonjudicial remedies described below are available only under a contractual lien.

The procedure for enforcing a contractual landlord's lien by nonjudicial seizure and sale is described at Tex. Prop. Code §§ 54.044–.045; a

detailed description is beyond the scope of this manual.

The landlord may never seize exempt property and may seize nonexempt property only if seizure is authorized by a written lease and can be accomplished without a breach of the peace. Tex. Prop. Code § 54.044(a). A contractual landlord's lien is enforceable only if printed conspicuously in the lease agreement, and even then it may not diminish the tenant's statutory rights, liabilities, or exemptions. Tex. Prop. Code § 54.043.

If a residential tenant abandons the premises, the landlord or the landlord's agent may remove the contents. Tex. Prop. Code § 54.044(d).

Unless the residential lien is contractual, a landlord may not seize a tenant's personal property to satisfy claims for unpaid rent without notice and a hearing. Tex. Prop. Code § 54.044(a); *Hall v. Garson*, 468 F.2d 845, 847 (5th Cir. 1972). The lien may be foreclosed only by judicial procedure. If there is a contractual landlord's lien authorizing sale or disposition, however, judicial procedure may not be necessary. In foreclosing such a contractual lien, however, the landlord is required to conduct a sale of the lien property within a commercially reasonable time; failure to do so subjects the landlord to liability for conversion. *Myers v. Ginsburg*, 735 S.W.2d 600, 604–05 (Tex. App.—Dallas 1987, no writ).

At any time before judgment in a suit for unpaid rent, the tenant may replevy any of the property that has been seized, if the property has not been claimed or sold, by posting a bond in an amount approved by the court, payable to the landlord, and conditioned that if the landlord prevails in the suit, the amount of the judgment rendered and any costs assessed against the tenant shall be first satisfied, to the extent possible, out of the bond. Tex. Prop. Code § 54.048.

If the landlord or landlord's agent willfully violates any statutes controlling the residential landlord's lien, the tenant is entitled to reasonable attorney's fees, actual damages, and other monetary awards. Tex. Prop. Code § 54.046.

§ 28.5:4 Distress Warrants

Generally: Distress warrants, covered in Tex. R. Civ. P. 610–620 and section 54.025 of the Texas Property Code, provide the means for enforcement of an agricultural or commercial landlord's lien, but not a residential landlord's lien. The landlord may seek a distress warrant directing a sheriff or constable to attach and hold specified property. The person to whom rent or an advance is payable or the person's agent, attorney, assign, or other legal representative may apply to an appropriate justice court for a distress warrant under any of three circumstances: if the tenant owes any rent or, for an agricultural lien, any advance; if the tenant is about to abandon the premises; or if the tenant is about to remove the tenant's property from the premises. Tex. Prop. Code §§ 54.006, 54.025. Enforcing a landlord's lien by having property seized before final judgment is also called "distraint." In place of a distress warrant, a landlord may seek a writ of prejudgment attachment or sequestration as its remedy.

Generally, the application for a distress warrant must be filed with an appropriate justice court at the commencement of a suit or at any time during its progress. Texas Rule of Civil Procedure 610 outlines the requirements for the application and affidavits. If the warrant is to issue before final judgment, the court must hold a hearing, which may be ex parte, and require a bond of the landlord. *See* Tex. R. Civ. P. 610, 611.

If the suit is based on an agricultural landlord's lien, the application must be filed with a justice court in the precinct in which the leasehold is located or in which the property subject to the lien is located or with the justice court that has jurisdiction of the cause of action. Tex. Prop. Code § 54.006. If the suit is based on a building

landlord's lien, the application must be filed with a justice court in the precinct in which the building is located. Tex. Prop. Code § 54.025.

Availability: A distress warrant may be requested either at the beginning of the suit or at any time during its progress. Tex. R. Civ. P. 610.

Application: The application may be supported by affidavits of the plaintiff, his agent, his attorney, or other persons having knowledge of the relevant facts, but must include a statement that the amount sued for is rent or advances described by statute or must produce a writing signed by the tenant to that effect and must further swear that the distress warrant is not sued out for the purpose of vexing or harassing the defendant. The application must meet all statutory requirements and must state grounds for issuing the warrant and specific facts relied on by the plaintiff to warrant the required findings by the justice of the peace. Two or more grounds for the warrant may be stated conjunctively or disjunctively. Tex. R. Civ. P. 610.

"The application and any affidavits shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence provided that facts may be stated based upon information and belief if the grounds of such belief are specifically stated." Tex. R. Civ. P. 610. Attorneys generally should not execute affidavits on their clients' behalf. See section 1.32:5 in this manual. See form 28-3 in this chapter for an application for a distress warrant and form 28-4 for an affidavit.

Hearing: No warrant may issue before final judgment except on written order of the justice of the peace after a hearing, which may be ex parte. Tex. R. Civ. P. 610.

Order: Rule 610 specifies the required elements of the order granting the application for the distress warrant, which include findings of fact supporting the statutory grounds, the maximum value of the property to be seized, the amount of bond required of the plaintiff, the amount of bond required of the debtor to replevy, and a commandment that the property be kept safe and preserved subject to further orders of the court having jurisdiction. See form 28-5 for an order for issuance of distress warrant.

Plaintiff's Bond: No distress warrant can issue before final judgment until the plaintiff has filed a bond with the justice of the peace in an amount to adequately compensate the defendant if the plaintiff fails to prosecute his suit to effect and pay all damages and costs as may be adjudged against him for wrongfully suing out the warrant. Tex. R. Civ. P. 610, 611.

Requisites of Warrant: The warrant must be directed to the sheriff or any constable within the state, commanding him to attach and hold as much of the defendant's property, not exempt by statute, of reasonable value in approximately the amount fixed by the justice of the peace, as is found within the county. Tex. R. Civ. P. 612.

On the face of the warrant, "in 10-point type and in a manner calculated to advise a reasonably attentive person of its contents," the following notice must be displayed:

> To _____, Defendant:
>
> You are hereby notified that certain properties alleged to be owned by you have been seized. If you claim any rights in such property, you are advised:
>
> YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WARRANT.

Tex. R. Civ. P. 613. See form 28-7 for a distress warrant.

Service and Return of Warrant: The defendant must be served with a copy of the distress warrant, the application, accompanying affidavits, and orders of the justice of the peace in any manner prescribed for service of citation or as provided in rule 21a. Tex. R. Civ. P. 613. If the value of the property subject to the warrant falls within the jurisdictional limits of the justice court, the warrant will be returned to that court; otherwise the warrant is made returnable to the district court with jurisdiction over the action. Tex. R. Civ. P. 619. See form 28-8 for an officer's return.

Defendant's Right to Replevy: If the seized property has not been claimed or sold, the defendant may replevy all or part of the property at any time before judgment. If the property has been sold by court order, the defendant can replevy the proceeds of the sale. Tex. R. Civ. P. 614.

Dissolution or Modification of Distress Warrant: After issuance of the warrant, the defendant or any intervening party who claims an interest in the seized property may seek to vacate, dissolve, or modify the seizure by sworn written motion. Tex. R. Civ. P. 614a.

Emergency Sale of Perishable Property: If property seized under a distress warrant is "in danger of serious and immediate waste or decay" or if keeping it until trial will greatly reduce its value, the court may order an emergency sale. Tex. R. Civ. P. 615. Procedures for determining whether the property is perishable and for selling it are prescribed in Tex. R. Civ. P. 616–618. For an application for emergency sale, see form 28-9; for an affidavit for emergency sale, see form 28-10; and for an order for emergency sale, see form 28-11.

§ 28.5:5 Attorney's Fees

Leases usually provide for reasonable attorney's fees for enforcing a lien or collecting delinquent rent. Also, Tex. Civ. Prac. & Rem. Code § 38.001 allows for recovery of attorney's fees in suits based on contract. For a discussion of attorney's fees, see part III. in chapter 1 of this manual.

§ 28.6 Landlord's Remedies and Damages after Tenant Abandons Premises

§ 28.6:1 Common-Law Remedies

The case of *Speedee Mart Inc. v. Stovall*, 664 S.W.2d 174, 177 (Tex. Civ. App.—Amarillo 1983, no writ), outlines the four common-law remedies available to a landlord when a tenant breaches a lease:

1. *Decline to repossess property.* The landlord may decline to repossess the property, electing instead to maintain the lease in full force and effect. Under this option, he can sue on the contract for the rent as it comes due. This option, however, is now somewhat suspect with the supreme court's indication of a requirement to mitigate damages. See section 28.6:2 below regarding mitigation.
2. *Anticipatory breach/own purposes.* The landlord may treat the tenant's conduct as an anticipatory breach of contract and repossess and retain the property for his own purposes. Under this option, he recovers the present value of the rentals that accrue under the lease contract reduced by the reasonable cash market value of the lease for the unexpired term.
3. *Anticipatory breach/relet.* The landlord may treat the tenant's conduct as an anticipatory breach of contract, repossess the property, and lease it to another tenant. Under this option, he can recover the actual rental reduced

by the amount to be received from the new tenant.

4. *Forfeiture.* The landlord may declare the lease forfeited. Under that option, he relieves the tenant of liability for future rental payments.

See Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc., 948 S.W.2d 293 (Tex. 1997); *Lakeside Leasing Corp. v. Kirkwood Atrium Office Park Phase 3*, 750 S.W.2d 847, 851 (Tex. App.—Houston [14th Dist.] 1998, no writ); *Look v. Werlin*, 590 S.W.2d 526, 528 (Tex. App.—Houston [1st Dist.] 1979, no writ).

The common-law remedies are available unless the parties contract otherwise. *Speedee Mart*, 664 S.W.2d at 177 n.1. In *Speedee Mart*, the court of appeals reversed the trial court's judgment because at the time of trial the damages model was based on future rent calculated from the time of trial, not the future rent calculated from the time of breach. The court held that the proper calculation should be future rent from the time of breach to the end of the lease reduced to its present value, then further reduced by the reasonable cash market value of the lease for the unexpired term. *See Speedee Mart*, 664 S.W.2d at 178.

In *Look*, 590 S.W.2d at 527, the court held that, based on the testimony given at trial, the leased premises had a market value only in the event of reletting. Therefore, since the space had not been relet, the market value was zero.

§ 28.6:2 Mitigation and Damages

Monetary damages under a commercial lease contract are not easily calculated. The question of mitigation further complicates this analysis. Texas has both a judicial and legislative approach to mitigation.

The concurring opinion in *Brown v. Republic-Bank First National Midland*, 766 S.W.2d 203, 204–05 (Tex. 1988), notes that on the question of whether a landlord should mitigate its damages, there is a pronounced disagreement among the states springing from the fact of the dual nature of a lease as both a contract and a conveyance of an interest in land. While the *Brown* court did not decide the issue of whether there should be an implied duty to mitigate placed on a landlord, in *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293 (Tex. 1997), the court explicitly held that a landlord has a duty to mitigate. The duty to mitigate is not absolute but requires the landlord to use reasonable efforts to fill the premises or the landlord is barred from recovery from the breaching tenant to the extent the landlord could have reasonably avoided damages. *Austin Hill Country Realty, Inc.*, 948 S.W.2d at 299.

When the tenant contends that the landlord has failed to mitigate damages, the tenant must plead the landlord's failure to mitigate as an affirmative defense; otherwise, the tenant may not offer evidence of the landlord's failure to mitigate. *Austin Hill Country Realty, Inc.*, 948 S.W.2d at 299–300. The tenant has the burden of proof to demonstrate whether or not the landlord has mitigated. *Austin Hill Country Realty, Inc.*, 948 S.W.2d at 299–300.

In 1997, the legislature added a mitigation rule, which provides that (1) a landlord has a duty to mitigate damages if a tenant abandons the leased premises in violation of the lease and (2) a provision of a lease that purports to waive this right or to exempt a landlord from liability under it is void. Tex. Prop. Code § 91.006. By its terms, Code section 91.006 is applicable only to leases that were entered into on or after September 1, 1997, and where the tenant abandoned the leased premises. The statute uses the term *abandon* and therefore should not be applicable to situations in which (1) the tenant's right to possession of the leased premises has been terminated for default (before the tenant abandons) or (2) the tenant has been removed from the leased premises via lockout or court order. If there is no

termination of the tenant's right to possession of the leased premises, lockout, or court order, abandonment likely occurred. Abandonment is a fact issue, but see Code section 93.002(d), which defines abandonment in the context of a commercial lease as follows: "a tenant is presumed to have abandoned the premises if goods, equipment or other property, in an amount substantial enough to indicate a probable intent to abandon the premises, is being or has been removed from the premises and the removal is not within the normal course of the tenant's business." If section 91.006 is not applicable, *Austin Hill Country Realty, Inc.*, provides the Texas law.

Since *Austin Hill Country Realty, Inc.*, several courts of appeals have handed down relevant opinions. Two significant opinions are *Cash America International, Inc. v. Hampton Place, Inc.*, 955 S.W.2d 459 (Tex. App.—Fort Worth 1997, pet. denied), and *Stucki v. Noble*, 963 S.W.2d 776 (Tex. App.—San Antonio 1998, pet. denied).

In *Cash America*, the commercial landlord brought an action against the tenant for anticipatory breach of lease. The court stated that the mitigation instructions sanctioned by the supreme court ask the jury to reduce damages not only for the reasonable cash market value of the unexpired term but also by the amount of damages that could have been avoided had the landlord used reasonable care in attempting to relet the leased premises.

In *Stucki*, the commercial landlord brought an action against the tenant to recover amounts due under a lease. The tenant argued that the summary judgment granted at the trial court level should be set aside on the grounds that the landlord failed to mitigate damages and because fact issues remained regarding mitigation. The lease specifically provided that the landlord had no obligation to "relet or attempt to relet the premises" in the event of the tenant's default. The court of appeals upheld the contractual waiver, citing *Austin Hill Country Realty, Inc.*: "[A] landlord's duty to mitigate his damages arises only when the landlord and the tenant have not contracted otherwise." *Stucki*, 963 S.W.2d at 781. The court also noted that the burden of proving failure to mitigate was on the tenant and that it had been waived it in this case because the tenant had offered no evidence to support his allegations of failure to mitigate. *Stucki*, 963 S.W.2d at 781.

The two major differences between the judicial and legislative approaches are that (1) the statutory provision, which applies only if the tenant abandons the premises, may not be waived by agreement of the landlord and tenant, and (2) the statutory provision does not qualify the landlord's duty to mitigate on whether or not the landlord has a contractual right to reenter without forfeiting the lease.

Chapter 29

Probate and Guardianship

I. Probate Generally

II. Claims Procedure Generally

III. Dependent Administration

IV. Independent Administration

V. Guardianship

VI. Nonprobate Assets

VII. Special Situations

Forms

Chapter 29

Probate and Guardianship

I. Probate Generally

Note: Certain provisions of the Texas Probate Code will be recodified under the Texas Estates Code effective January 1, 2014. *See* Act of June 19, 2009, 81st Leg., R.S., ch. 680, §§ 1–9 (H.B. 2502), eff. Jan. 1, 2014. Citations to the Probate Code in this chapter (and elsewhere in this manual) do not yet reflect the recodification.

§ 29.1 Decedent's Estate in Probate

When a person dies, his estate remains subject to payment of his debts unless the property is exempted by law and provided that procedural guidelines are satisfied. Tex. Prob. Code § 37. Claims against the estate will be paid in whole or on a pro rata basis to the extent the estate's assets will allow. Tex. Prob. Code §§ 320, 321. Estate administration is the process of determining the relative rights of creditors and beneficiaries.

Some assets of the deceased can pass outside probate through methods such as rights of survivorship and trusts. See part VI. in this chapter.

§ 29.2 Passage of Title through Probate

§ 29.2:1 Property Passed by Will

A mentally competent person having testamentary capacity may pass his estate and all his rights to property by will. Tex. Prob. Code § 58(a). When a person dies leaving a lawful will, he is said to have died "testate," and title and beneficial ownership of all his property devised or bequeathed by the will immediately vests in the respective devisees or legatees. The right of any beneficiary of the estate is subject to the payment of all claims against the estate and other limitations provided by law. Tex. Prob. Code § 37.

§ 29.2:2 Intestate Succession

If a decedent owns or has a right to property in Texas and that property is not passed by a will, it vests immediately in his heirs as determined by the laws of intestate succession. *See* Tex. Prob. Code § 37. Passage of title through intestate succession is governed by Code section 38. Title and inheritance rights of real property situated in another state are governed by the law of that state. *See Pellow v. Cade*, 990 S.W.2d 307, 313 (Tex. App.—Texarkana 1999, no pet.); *see also Restatement (Second) of Conflict of Laws* § 223 (1971).

§ 29.2:3 Heirship Proceeding

If a decedent's property passes by intestate succession, either the personal representative, a party seeking the appointment of an independent administrator under Probate Code section 145, the trustee of a trust holding assets for the benefit of the decedent, a person claiming to be a secured creditor, or the owner of part of the decedent's estate may apply for a determination of who the decedent's heirs are and what interests the heirs have in the decedent's property. Tex. Prob. Code §§ 48(a), 49(a). This proceed-

ing must be brought in the appropriate court of the county in which venue would be proper under section 6C of the Probate Code. Tex. Prob. Code § 48(a).

§ 29.2:4 Affidavit of Heirship

Any affidavit or other sworn or acknowledged document concerning heirship recorded for five years or longer in the deed records of a county in which a decedent's property is located is prima facie evidence of the facts it states when introduced in an heirship proceeding. Tex. Prob. Code § 52(a). Otherwise, such affidavits carry no significance, although third parties have traditionally relied on them. An affidavit of heirship should not be confused with a small estate affidavit; the latter is a statutory method of probating qualifying estates. See section 29.6:5 below.

§ 29.3 Administration of Estates

§ 29.3:1 Who May Apply for Administration

An executor named in the will or any interested person may apply for the appointment of a personal representative. Tex. Prob. Code § 76. "Interested persons" include heirs, devisees, spouses, creditors, or any others having a property right in or claim against the estate. Tex. Prob. Code § 3(r). The application must be filed within four years of the decedent's death, unless administration is necessary to receive or recover funds or other property due the estate. Tex. Prob. Code § 74.

§ 29.3:2 When Administration Necessary

Administration is deemed necessary if two or more debts exist against an estate, if partition of the estate among the distributees is sought, or if the administration is necessary to receive or recover funds or other property due the estate, but the court may authorize administration for other reasons. Tex. Prob. Code § 178(b). See part VI. in this chapter for a discussion of assets that pass outside of probate at death.

An estate may be administered with or without court supervision. The principal difference is that the rights of a creditor in independent administrations are less clearly defined, and thus it is more likely that creditors will not be paid in their order of priority if the estate is independently administered.

§ 29.4 Personal Representative

§ 29.4:1 Personal Representative Generally

In this chapter, "personal representative" is used as a generic term including independent executor, independent administrator, dependent administrator, administrator with will annexed, and guardian. *See* Tex. Prob. Code § 3(aa). These are the individuals with whom a creditor will most likely have contact during the claims process.

§ 29.4:2 Duties of Personal Representative

A personal representative has a duty to handle property of the estate as a prudent person would take care of his own property. Tex. Prob. Code § 230. The representative has a fiduciary duty to the heirs or devisees. *Humane Society v. Austin National Bank*, 531 S.W.2d 574, 580 (Tex. 1975), *cert. denied*, 425 U.S. 976 (1976).

After receiving letters testamentary or letters of administration, the personal representative must collect and take into possession the personal property, record books, title papers, and other business papers of the estate and must deliver these items to the persons entitled to receive

them when administration is complete. Tex. Prob. Code § 232.

§ 29.4:3 Duties and Obligations of Personal Representative to Creditors

It has been held that a personal representative stands in a fiduciary relationship to creditors. *Cochran's Administrators v. Thompson*, 18 Tex. 652 (1857); *Ex parte Buller*, 834 S.W.2d 622, 626 (Tex. App.—Beaumont 1992, no writ); *contra FCLT Loans, L.P. v. Estate of Bracher*, 93 S.W.3d 469, 481–82 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (holding that appointment as an independent executor does not necessarily give rise to a fiduciary duty to creditors). There are specific statutory duties for independent personal representatives; see section 29.52:2 below.

§ 29.4:4 Bond

Unless a decedent's will expressly dispenses with the need for a bond or a corporate fiduciary is named as personal representative, a personal representative must post bond. Tex. Prob. Code §§ 194, 195. Any interested person, including a creditor, may petition the court to raise the bond if it appears inadequate. Tex. Prob. Code § 204. On a showing of just cause, bond may be required of the personal representative if the representative has not otherwise been required to post bond, particularly in adversarial proceedings in which malfeasance is at issue.

§ 29.5 Ascertaining Debtor's Death and Status of Probate

If no one associated with a debtor informs the creditor of the debtor's death, the creditor will have to ascertain the fact of death and the opening of probate administration, if any, by other means. All deaths in Texas are reported to the vital statistics unit; the time between the date of death and when it is reported varies from two weeks to several months. For a fee the unit will search its records for a death record. A request may be sent by mail to Texas Vital Statistics, Department of State Health Services, 1100 West 49th Street, Austin, TX 78756-3101, by fax to 512-458-7711, or online at **www.texasonline.state.tx.us/tolapp/ovra**. A schedule of fees and an explanation of the application process is available on the Department of State Health Services Web site at **www.dshs.state.tx.us**. The unit also sells microfilmed death records to private research databases such as LEXIS-NEXIS. See section 3.8 in this manual regarding using private research sources for finding debtors generally.

To ascertain whether an administration has been opened on a decedent's estate, the attorney should start by asking the clerk of the court having probate jurisdiction in the county in which the decedent last lived. For a county with a large population whose probate court may be unable or unwilling to search for this information on request, the attorney should contact the customer service department of a title company. If a probate proceeding has been opened, the title company should be able to find the cause number of the proceeding.

§ 29.6 Special Administrations

§ 29.6:1 Temporary Administrator

The court may, by written order, immediately appoint a temporary administrator with limited powers. Tex. Prob. Code § 131A(a). The purpose of temporary administration is to preserve the estate until it can pass into the hands of a person fully authorized to administer it. The court can do this on application of any person. A temporary administration cannot exceed 180 days, but the court may make the temporary administrator a permanent one. Tex. Prob. Code § 131A(a). A temporary administration is somewhat like a temporary injunction, preserving the status quo while the situation is assessed.

As a practical matter, a creditor should apply for the appointment of a temporary administrator only if no estate has been opened and it appears that assets are being disposed of or are in danger of being depleted by third parties. See section 29.8 below regarding the responsibilities of a creditor acting as personal representative. A better option may be a fraudulent transfer action coupled with a request for injunctive relief to stop the transfer or wastage. See section 14.10 in this manual regarding fraudulent transfer and sections through 8.33 through 8.40 regarding injunctions.

The court may also appoint a temporary administrator with limited powers pending the contest of a will or administration. Tex. Prob. Code § 132. This appointment can continue until the termination of the contest and the appointment of an administrator or executor with full powers. Tex. Prob. Code § 132(a). At any time during the pendency of the contest, the court may confer on the temporary administrator all the power and authority of a permanent administrator, but the temporary administrator must give sufficient bond. *See* Tex. Prob. Code § 132(b).

A temporary administrator has only those rights and powers conferred by the court, and the court may require an additional bond at any time it deems necessary. Any acts not expressly authorized are void. Tex. Prob. Code § 133; *see also Bandy v. First State Bank*, 835 S.W.2d 609, 615 (Tex. 1992). Before filing a claim in a temporary administration, a creditor should determine if the order appointing the temporary administrator grants the authority to act on claims against the estate. If the order does not confer this power, filing a claim may be fruitless. Texas law is unclear regarding the effect of filing a claim if the administrator lacks authority to act on it.

§ 29.6:2 Administration of Community Property

When a husband or wife dies intestate and the community property passes to the surviving spouse, no administration is necessary. Tex. Prob. Code § 155. Although the surviving spouse need not qualify before a court, the community property subject to sole and joint management of a spouse during marriage continues to be subject to the liabilities of the now-deceased spouse. In addition, any nonexempt property that passes to that spouse's heirs or devisees remains subject to liabilities against it while the spouse was alive. The surviving spouse or informal administrator must keep a distinct account of all community debts allowed or paid in the settlement of the estate. Tex. Prob. Code § 156. The surviving spouse may sue or be sued for the recovery of community property. Tex. Prob. Code § 160.

§ 29.6:3 Probate of Will as Muniment of Title

A probated will is documentary evidence of a person's right to the devised property, otherwise known as a muniment of title. *See Ochoa v. Miller*, 59 Tex. 460 (1883). For a will to be probated as a muniment of title, there must be no debts owed by the estate except for those secured by liens against real estate, and the decedent must have died less than four years before the date of application. Tex. Prob. Code § 89B. The four-year requirement was promulgated in 1997 and eliminated a useful title curative procedure for wills not probated within four years of death.

The order admitting a will to probate as a muniment of title acts as legal authority that the devisee or legatee is entitled to receive the named assets without administration. *See* Tex. Prob. Code § 89C(c). No representative will be appointed by the court, and no letters testamentary will issue. If the decedent's estate is handled

in this manner, the attorney should proceed directly against the heirs as established in the will. See section 29.9 below.

§ 29.6:4 Informal Probate

The estates of decedents who died testate before September 1, 1997, can be probated by a statutory informal probate of the decedent's will. A representative or beneficiary who acquires property by informal probate is liable to the extent of the value of the property acquired to a person or creditor of the estate with a superior right to the property for damages caused by the transfer. Acts 1993, 73d Leg., R.S., ch. 712, § 7 (S.B. 479), eff. Sept. 1, 1993, *repealed by* Acts 1997, 75th Leg., R.S., ch. 540, § 5 (H.B. 2007), eff. Sept. 1, 1997 (former Texas Probate Code sections 501–510). As with a probate of a will as a muniment of title, the creditor can proceed directly against the heirs. See section 29.9 below.

§ 29.6:5 Small Estate Affidavit

If the value of an estate, not including homestead and exempt property, does not exceed $50,000 and no application for an administration has been filed, the distributees of the estate may complete and file a small estate affidavit. Tex. Prob. Code § 137(a). This affidavit must list the estate's known assets, liabilities, and distributees. It will not transfer title to the decedent's real property, except for the decedent's homestead (and then only if the affidavit is recorded in the deed records of the county in which the homestead is located). If the decedent left a will, the affidavit does not affect the disposition of property left under the will. Tex. Prob. Code § 137(b), (c). If the decedent's estate is dealt with in this manner, the attorney should proceed directly against the heirs as shown on the affidavit. See section 29.9 below.

§ 29.7 No Probate

If a decedent's heirs do not need a probate proceeding to pass title to the decedent's property or if they wish to avoid the probate process for another reason, they may simply choose not to probate the decedent's estate. Several devices, such as living trusts and survivorship agreements, take a decedent's property out of probate. See section 29.9 below regarding successor liability for a decedent's debts and part VI. in this chapter regarding nonprobate assets.

§ 29.8 Creditor's Ability to Institute Administration of Debtor's Estate

A creditor of a decedent may open probate administration and receive letters testamentary or letters of administration. If a named executor, the surviving spouse, any beneficiary, or any next of kin also applies for letters, their applications will take priority over the creditor's application. Tex. Prob. Code § 77.

If appointed personal representative of the estate, the creditor will be held to the same duties and standards as any other personal representative. He will be charged with dealing with the decedent's property as a prudent person would take care of his own property. Tex. Prob. Code § 230. He will be held to a fiduciary's standard of care in the administration of the estate. *Humane Society v. Austin National Bank*, 531 S.W.2d 574, 577 (Tex. 1975), *cert. denied*, 425 U.S. 976 (1976). A corporate fiduciary may be held to an even higher standard. *Ertel v. O'Brien*, 852 S.W.2d 17, 20 (Tex. App.—Waco 1993, writ denied); *but see FCLT Loans, L.P. v. Estate of Bracher*, 93 S.W.3d 469, 481–82 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (appointment as independent executor does not necessarily give rise to fiduciary duty to creditors). Furthermore, the creditor will have to post bond. Tex. Prob. Code § 194.

If an interested person wants to prevent the creditor from becoming personal representative of the estate, he can either pay the claim; prove that the creditor's claim is fictitious, fraudulent, illegal, or barred by limitation; or post bond of double the amount of the debt. The bond is secured by all the estate in the hands of the distributees. Tex. Prob. Code § 80.

Other creditors may have priority for being paid out of the estate; the creditor–personal representative should be wary of volunteering payment of any estate debt without prior provision of reimbursement and prioritization. *See* Tex. Prob. Code § 320(a).

As personal representative, the creditor can play an active role in expediting the claims process. Also, the personal representative is entitled to a compensation of 5 percent of amounts received and paid out in cash, subject to certain limitations, and to recover all reasonable expenses incurred in administering the estate. *See* Tex. Prob. Code §§ 241, 242.

§ 29.9 Beneficiary's Liability for Decedent's Debts

§ 29.9:1 No Liability in General

While an estate is in administration the heirs or distributees are generally not liable for the decedent's debts. *Bailey v. Cherokee County Appraisal District*, 862 S.W.2d 581, 583 (Tex. 1993).

§ 29.9:2 No Administration or Administration Ceased

If an estate is distributed without any administration, the distributees are individually liable for a pro rata share of a claim against the decedent. *Blinn v. McDonald*, 46 S.W. 787 (Tex. 1898); *Potts v. W.Q. Richards Memorial Hospital*, 558 S.W.2d 939, 945 (Tex. Civ. App.—Amarillo 1977, no writ); *Perkins v. Cain's Coffee Co.*, 466 S.W.2d 801, 802–03 (Tex. Civ. App.—Corpus Christi 1971, no writ). The pro rata share is of assets actually received by the distributees or, if the property has been disposed of, is of the value of the disposed property. *Chadwick v. Watkins*, 258 S.W.2d 194, 197–98 (Tex. Civ. App.—Texarkana 1953, no writ). This pro rata liability also applies when the estate is withdrawn from administration. Tex. Prob. Code § 269.

§ 29.9:3 After Final Distribution

No claim for money against a decedent's estate may be allowed after final distribution of the estate. If the action is not barred by limitations, however, a creditor may sue the distributees directly, but his recovery will be limited to the value of the property received by them. Tex. Prob. Code § 318. The creditor must plead and prove the distribution of the property. *Perkins v. Cain's Coffee Co.*, 466 S.W.2d 801, 803 (Tex. Civ. App.—Corpus Christi 1971, no writ).

§ 29.10 Exempt Property in Probate

§ 29.10:1 Homestead

If a decedent left a surviving spouse, minor child, or unmarried adult child remaining with the family, his homestead is not liable for debts of the estate, except for purchase money, taxes due on it, work and material used in constructing improvements on it, an owelty of partition imposed against the entirety of the property, the refinance of a lien against the homestead, an extension of credit on the homestead, or a reverse mortgage. Tex. Prob. Code § 270; *National Union Fire Insurance Co. of Pittsburgh v. Olson*, 920 S.W.2d 458, 461–62 (Tex. App.—Austin 1996, no writ). It does not matter that the surviving family member does not occupy the property. *Olson*, 920 S.W.2d at 462. See sections 27.34 through 27.40 in this manual for a discussion of the homestead.

§ 29.10:2 Personal Property

The personal property of a decedent that is exempt from forced sale at his death remains exempt from forced sale to satisfy debts of his estate, except for payment of funeral expenses and the expenses of his last illness, if claims for those expenses are timely presented. Tex. Prob. Code §§ 281, 322. See sections 27.32 and 27.41 in this manual for a discussion of exempt personal property.

§ 29.11 Allowances

§ 29.11:1 Allowance in Lieu of Exempt Property

If a decedent did not leave property exempted from forced sale, the court will make a reasonable allowance to substitute for the property and order it paid to the surviving spouse and children. The allowance in lieu of a homestead may not exceed $15,000, and the allowance in lieu of all other exempt property may not exceed $5,000, exclusive of the allowance for the support of the surviving spouse, minor children, and adult incapacitated children. Tex. Prob. Code § 273.

§ 29.11:2 Family Allowance to Spouse, Minor Children, and Adult Incapacitated Children

The surviving spouse or any person authorized to act on behalf of minor children or adult incapacitated children of a deceased may petition the court for payment of a family allowance sufficient to provide maintenance for one year from the time of the decedent's death. Tex. Prob. Code §§ 286, 287. Payment of this allowance takes precedence over all claims against the estate except those for funeral expenses and expenses of the decedent's last illness. Tex. Prob. Code §§ 290, 322. The family allowance is in addition to the passage of homestead and exempt property or an allowance in lieu of that property.

§ 29.12 Monitoring Probate Court Proceedings

§ 29.12:1 Request for Notice

A creditor may request notification of all motions, applications, and proceedings. The requesting party must pay the fees and costs for such notices. Tex. Prob. Code § 33(j).

§ 29.12:2 Inventory and Appraisement; Affidavit in Lieu of Inventory, Appraisement, and List of Claims

A personal representative must file an inventory, appraisement, and list of claims of the estate within ninety days of qualifying unless the court extends the time for filing. Tex. Prob. Code §§ 250(a), (b), 251. Alternatively, within ninety days of qualifying unless the court extends the time for filing, if there are no unpaid debts, except for secured debts, taxes, and administration expenses, at the time the inventory is due, the personal representative may file in lieu of the inventory, appraisement, and list of claims an affidavit stating that all debts, except for secured debts, taxes, and administration expenses, are paid and that all beneficiaries have received a verified, full, and detailed inventory. Tex. Prob. Code §§ 250(c). If the personal representative files the affidavit in lieu of inventory, appraisement, and list of claims, any person interested in the estate is entitled to receive a copy of the inventory, appraisement, and list of claims from the personal representative on written request or may apply to the court for an order compelling the personal representative to provide a copy to the interested person. Tex. Prob. Code §§ 250(e). Personal representatives often seek an extension, and the extension is

routinely granted. But this information could be critical to the creditor's strategy, particularly for secured creditors choosing between matured secured claim status and preferred debt and lien status; see section 29.23 below. In an appropriate case, therefore, the attorney should consider opposing the representative's request for an extension to file an inventory.

§ 29.12:3 Contesting Probate Proceedings Generally

Any person interested in an estate may contest any proposed action to be decided by the probate court by filing its opposition in writing. Tex. Prob. Code § 10. Proceedings that could be opposed include payment of claims, allowances or commissions, sales of property, and family allowances.

[Sections 29.13 through 29.20 are reserved for expansion.]

II. Claims Procedure Generally

§ 29.21 Notice

§ 29.21:1 Methods of Notice—Publication, Posting, Mail

Notice to creditors of the opening of administration is given by publication, certified or registered mail, or posting. Published notices must be printed in a newspaper of general circulation in the county in which letters of administration or letters testamentary are issued. Tex. Prob. Code § 33(f)(3). Mailed notices must be sent by certified or registered mail, return receipt requested, to the last known post office address of the creditor. Tex. Prob. Code § 33(f)(4). Posted notices are posted by the sheriff or constable at the courthouse door of the county in which the proceedings occur, for not less than ten days before return day. Tex. Prob. Code § 33(f)(2).

§ 29.21:2 One Notice Sufficient

If notice has been given by a former representative, a corepresentative, or a guardian, repeated or additional notice does not have to be given. Tex. Prob. Code §§ 296, 785.

§ 29.21:3 Failure of Personal Representative to Give Notice

If a representative fails to give any required notice, the representative and the sureties on his bond, if any, will be liable for any damages suffered by any person because of that failure unless it appears that the claimant had actual notice. Tex. Prob. Code §§ 297, 785.

§ 29.21:4 Notice Requirements

Specific notice requirements are discussed below at section 29.34 (dependent administrations), section 29.53 (independent administrations), and section 29.63 (guardianships).

§ 29.22 Claims Generally

§ 29.22:1 Claim for Money vs. Contingent or Unliquidated Claim

A claim for money is a claim for a definite amount based on specific data, not a claim for an undetermined amount. *Anderson v. First National Bank*, 38 S.W.2d 768, 769–70 (Tex. 1931); *Connelly v. Paul*, 731 S.W.2d 657, 659 (Tex. App.—Houston [1st Dist.] 1987, writ

ref'd n.r.e.). A contingent or unliquidated claim is not a claim for money. A tort claim not reduced to judgment, for instance, would be a contingent or unliquidated claim. *Anderson*, 38 S.W.2d at 769–70; *Wilder v. Mossler*, 583 S.W.2d 664, 667 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ). Also, a claim for equitable relief is not a claim for money. *Lusk v. Mintz*, 625 S.W.2d 774, 776 (Tex. App.—Houston [14th Dist.] 1981, no writ).

§ 29.22:2 Claim Reduced to Judgment before Death

If a defendant dies after judgment is rendered against him, execution may not issue on the judgment; the debt must be presented and proved in the course of administration. Tex. R. Civ. P. 625. It appears that an alternative method of presentment is to file a certified copy of the judgment with the probate court. *Conrad v. Judson*, 465 S.W.2d 819, 827 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.).

If the judgment has not been abstracted by the time the judgment debtor dies, subsequent abstracting of the judgment will not convert the claim into a secured claim. *First National Bank v. Cone*, 170 S.W.2d 782 (Tex. Civ. App.—Fort Worth 1943, writ ref'd). If the judgment lien did not attach to the decedent's homestead during his life, it does not attach to the homestead property on death. *Harms v. Ehlers*, 179 S.W.2d 582 (Tex. Civ. App.—Austin 1944, writ ref'd). Otherwise, a properly abstracted judgment that attached to the decedent's property before death is a valid lien against the nonexempt real property owned by the decedent at death, and the judgment creditor should proceed as a secured creditor. See Tex. Prob. Code § 3(v), defining "mortgage" or "lien" as including a judgment, attachment, or garnishment lien.

§ 29.22:3 Attorney's Fees

If a document evidencing or supporting a claim provides for attorney's fees, the claimant may include the portion of the fee he has already paid or contracted to pay the attorney to prepare, present, and collect the claim. Tex. Prob. Code §§ 307, 794. Attorney's fees ordinarily recoverable under chapter 38 of the Civil Practice and Remedies Code may also be collected. *Childs v. Taylor Cotton Oil Co.*, 612 S.W.2d 245 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.).

§ 29.23 Secured Claim

A secured claim is classed as either a matured secured claim or a preferred debt and lien. The classification depends on the action or inaction of the creditor.

§ 29.23:1 Matured Secured Claim

A secured creditor holding a matured secured claim can treat the debt as fully matured, even if it has not yet matured under the terms of the original obligation. *See* Tex. Prob. Code §§ 306, 793. The creditor has priority against the collateral over all other creditors and claims, except for (1) funeral expenses and expenses of the last illness, in an aggregate amount not exceeding $15,000; (2) allowances made to the surviving spouse and children or to either; and (3) expenses of administration. Tex. Prob. Code § 320(a). If the value of the collateral is not sufficient to pay the debt, the creditor holding a matured secured claim may collect any deficiency as an unsecured claim. Tex. Prob. Code § 306. See section 29.24:1 below regarding handling of mature secured claims by the personal representative and the court generally.

§ 29.23:2 Preferred Debt and Lien

A secured creditor holding a preferred debt and lien may have the debt paid according to the terms of the instrument (typically a note)

secured by the lien. The creditor may look only to the property for satisfaction of the debt; the debt cannot be collected from any other estate assets. If the debt is not paid by the deceased's successors in interest, the creditor must foreclose on the collateral to collect what he can from the proceeds of foreclosure. *See* Tex. Prob. Code §§ 306(d), (e), 793(a)(2). See section 29.24:2 below regarding handling of preferred debts and liens by the personal representative and the court generally.

§ 29.23:3 Choice of Matured Secured Claim or Preferred Debt and Lien

A creditor should opt for matured secured claim status if either (1) the value of the property is substantially less than the debt or is rapidly declining in value, but there appear to be other assets from which to pay any deficiency, after allowances and first- and second-class claims are paid or (2) the creditor deems it worthwhile to accelerate any outstanding installments. If the estate is in dependent administration and the creditor wants to actually foreclose his lien (as opposed to obtaining an order for the personal representative to sell the collateral), the claim must be classified as a preferred debt and lien. See section 29.40:2 below.

§ 29.24 Handling of Secured Claims by Personal Representative and Court Generally

§ 29.24:1 Matured Secured Claim

If a secured claim is a matured secured claim, the court or the personal representative in an independent administration must treat it as a third-class claim and pay it to the extent of the value of the collateral, after first- and second-class claims but before lower-class claims are paid. Tex. Prob. Code §§ 306, 320, 322 (decedent's estate), §§ 793, 805 (guardianship). See section 29.26 below regarding claim priority. If there are not enough funds elsewhere in the estate to pay first- and second-class claims, the representative must invade the collateral to pay those claims. If the collateral does not satisfy the entire claim, the representative must pay the deficiency as a lower-class claim out of other assets of the estate, to the extent those assets are available. Tex. Prob. Code § 322; *see also Wyatt v. Morse*, 102 S.W.2d 396, 398–99 (Tex. 1937).

Probate Code section 146(b–1) states the secured creditor is not entitled to exercise any remedies in a manner that prevents the payment of the higher priority claims and allowances and, during the administration of the estate, is not entitled to exercise any contractual collection rights, including the power to foreclose, without either the prior written approval of the independent executor or court approval. Tex. Prob. Code § 146(b–1)(1).

Section 146(b–1)(1) may not be construed to suspend or otherwise prevent a creditor with a matured secured claim from seeking judicial relief of any kind or from executing any judgment against an independent executor. Except with respect to real property, any third party acting in good faith may obtain good title with respect to an estate asset acquired through a secured creditor's extrajudicial collection rights, without regard to whether the creditor had the right to collect the asset or whether the creditor acted improperly in exercising those rights during an estate administration due to having elected matured secured status. Tex. Prob. Code § 146(b–1)(2).

If a claim approved or established by suit as a matured secured claim is secured by property passing to one or more devisees in accordance with section 71A of the Probate Code, the independent executor shall collect from the devisees the amount of the debt and pay that amount to the claimant or shall sell the property and pay out of the sale proceeds the claim and associated

expenses of sale consistent with the provisions of section 306(c–1) of the Code applicable to court supervised administrations. Tex. Prob. Code § 146(b–1)(3).

§ 29.24:2 Preferred Debt and Lien

If a secured claim is a preferred debt and lien, the court or the personal representative in an independent administration may either pay off the debt or continue making payments. The creditor has priority over all other claims in the collateral, including first- and second-class claims, but can look only to the collateral for satisfaction. *See Cessna Finance Corp. v. Morrison*, 667 S.W.2d 580 (Tex. App.—Houston [1st Dist.] 1984, no writ).

During an independent administration, a secured creditor whose claim is a preferred debt and lien against property securing the indebtedness under Probate Code section 146(b) is free to exercise any judicial or extrajudicial collection rights, including the right to foreclosure and execution, as long as the creditor does not have the right to conduct a nonjudicial foreclosure sale within six months after letters are granted. Tex. Prob. Code § 146(b–2).

§ 29.25 Claim Not Required for Offset

If a creditor, such as a bank, has a right of offset against funds of a decedent it is holding, it may exercise that right (assuming it has the right to do so otherwise) without having to file a claim in probate. *Bandy v. First State Bank*, 835 S.W.2d 609, 617 (Tex. 1992).

§ 29.26 Classification of Claims, Allowances, and Expenses of Decedent's Estate

Claims, allowances, and expenses are classified and have priority of payment as follows:

1. funeral expenses and expenses of the last illness for a reasonable amount not exceeding $15,000;
2. allowances paid to the surviving spouse, the children, or either;
3. expenses of estate administration, preservation, safekeeping, and management, including fees and expenses awarded under section 243 of the Texas Probate Code, and unpaid expenses of administration awarded in a guardianship of the decedent;
4. secured claims, as far as they can be paid from the proceeds of property subject to the lien; if property is encumbered by more than one lien, the oldest is paid first, but no other preference is given to that lien;
5. claims for the principal amount of and accrued interest on delinquent child support and child support arrearages that have been confirmed and reduced to a money judgment under subchapter F, chapter 157, of the Texas Family Code, and claims for unpaid child support obligations under section 154.015 of the Texas Family Code;
6. claims for taxes, penalties, and interest owed the state;
7. claims for cost of confinement in the Texas Department of Criminal Justice;
8. claims for repayment of medical assistance payments made by the state; and
9. all other claims.

Tex. Prob. Code §§ 320(a), 322; *see also* Tex. Prob. Code § 243.

§ 29.27 Foreclosure Generally

The death of a mortgagor or pledgor does not in itself revoke the ability of a secured creditor to conduct a nonjudicial foreclosure sale if the

creditor already had that right. *See Pearce v. Stokes*, 291 S.W.2d 309, 310 (Tex. 1956). See sections 29.40, 29.56, and 29.68 below regarding foreclosure sales in dependent administrations, independent administrations, and guardianships.

[Sections 29.28 through 29.30 are reserved for expansion.]

III. Dependent Administration

§ 29.31 Dependent Administration Generally

In a dependent administration, the judge of the court in which the estate is pending is responsible for ensuring that the administrator acts in compliance with court orders. A dependent administration allows the court to supervise and control the sale of estate property and assets, payment of debts, execution of contracts, settlement of lawsuits, and distribution of the estate. *See* Tex. Prob. Code §§ 233, 234. Any interested person, including a creditor of the estate, may apply for a dependent administration. Tex. Prob. Code § 76.

§ 29.32 When Dependent Administration Instituted

Letters of administration will be granted if no executor is named in a will. Letters of administration may also be granted, if necessary, if the executor fails to qualify within twenty days after letters testamentary have been issued or fails to present the will for probate within thirty days after the testator's death. This type of administration is often referred to as administration with will annexed. The court may also order administration on any other proof that administration is necessary or when the person dies intestate. Tex. Prob. Code § 178(b).

§ 29.33 Administrator

Although it is possible for a personal representative in a dependent administration to be one named in a will admitted to probate, the representative will more likely be an administrator, not an executor. In this part of this chapter, "administrator" refers to the personal representative in a dependent administration.

See section 29.4 above regarding the rights and duties of personal representatives generally and whether bond will be required.

§ 29.33:1 Powers of Administrator

The administrator has a number of statutory powers, some of which may be exercised only with the court's permission. For collections purposes, they include the power to—

1. make compromises or settlements in relation to property or claims in dispute or litigation;
2. compromise or pay in full any secured claim that has been allowed or approved by conveying the collateral to the secured creditor in satisfaction of the claim; and
3. abandon the administration of property of the estate that is burdensome or worthless. If the abandoned property is collateral securing a claim, it may be foreclosed on without further order of court.

These powers may be exercised only after written application to the probate court and authorization by court order. Tex. Prob. Code § 234(a).

§ 29.33:2 Duties of Administrator

For purposes of creditors' claims against the estate, an adminstrator must—

1. give notice of his appointment (as described in section 29.34 below) (Tex. Prob. Code § 294);
2. prepare and file an inventory, appraisement, and list of claims or affidavit in lieu of inventory, appraisement, and list of claims with the probate court within ninety days of qualifying as administrator (Tex. Prob. Code § 250);
3. report to the court annually regarding the claims allowed, paid, rejected, or sued on, as well as a variety of other matters incident to the estate (Tex. Prob. Code § 399);
4. pay claims approved or established by suit, in order of priority (Tex. Prob. Code §§ 319, 320);
5. close the administration when all debts known to exist against the estate have been paid in full or as far as the assets in the administrator's hands permit, and there is no further need for adminstration (Tex. Prob. Code § 404); and
6. file a final verified account for final settlement of the estate (Tex. Prob. Code § 405).

§ 29.34 Notice

§ 29.34:1 Notice by Publication or Posting

An administrator must, within one month of receiving letters, publish a notice of administration. If no newspaper of general circulation is published in the county in which letters were issued, notice must be posted. Tex. Prob. Code § 294.

§ 29.34:2 Notice to Secured Creditors

An administrator must, within two months of receiving letters, give notice by mail to each creditor known to have a claim against the estate that is secured by property of the estate. If the administrator later learns of another secured creditor, he must send notice to that creditor within a reasonable time. Tex. Prob. Code § 295(a).

§ 29.34:3 Permissive Notice to Unsecured Creditors

No notice besides publication or posting is required, but an administrator may at any time before administration is closed give notice by mail to an unsecured creditor. This notice must contain the date of issuance of letters, the address where claims may be presented, an identification of to whom the claim should be addressed, and a notice that, unless the claim is presented within four months of receipt of the notice, it will be barred. Tex. Prob. Code § 294(d). The creditor must give notice of its claim within 120 days of receiving this notice, or the claim will be barred. This notice may be given by written instrument hand-delivered or mailed by certified mail with proof of receipt to the administrator or the administrator's attorney, in a pleading filed in a suit with respect to the claim, or in a written instrument filed in the court in which administration of the estate is pending. Tex. Prob. Code § 146(d), (e).

§ 29.35 Claims in Dependent Administration

§ 29.35:1 Claim for Money vs. Contingent or Unliquidated Claim

If a claim is not a claim for money, the claimant need not present it within six months of death or present it in statutorily prescribed form. *Carter v. Kahler*, 902 S.W.2d 85, 87 (Tex. App.—Houston [1st Dist.] 1995, no writ); *Donaldson v. Taylor*, 713 S.W.2d 716 (Tex. App.—Beaumont 1986, no writ).

A claim for money is a claim for a definite amount based on specific data, not a claim for an undetermined amount. See section 29.22:1 above.

§ 29.35:2 Form of Claim

A claim for money against an estate in dependent administration must be supported by an affidavit that the claim is just and that all legal offsets, payments, and credits known to the affiant have been allowed. The attorney should attach a copy of the relevant instrument, account, or voucher if one is available, and the affiant should state the facts on which the claim is founded. Tex. Prob. Code § 301. See form 29-1 in this chapter for a form claim.

§ 29.35:3 Evidence of Claim Lost or Destroyed

If evidence of the claim has been lost or destroyed, the affiant must state facts regarding loss or destruction of that evidence, as well as the amount, date, and nature of the claim and that the claimant is still the owner of the claim. The claim must also be proved by disinterested testimony given either in open court or at deposition. If a claim is approved or allowed without this disinterested proof, the approval or allowance is void. Tex. Prob. Code § 303.

§ 29.35:4 Claim of Corporation

A claim presented on behalf of a corporation or other entity must include an affidavit made by an authorized officer or representative. The affidavit must also state that the affiant has made diligent inquiry and examination. Tex. Prob. Code § 304.

§ 29.36 Presentment

§ 29.36:1 Procedure Generally

A creditor may either present a claim for money directly to the administrator or deposit the claim with the court clerk. If it is deposited with the clerk, the clerk must notify the representative of the claim. Tex. Prob. Code §§ 298, 308. A claim for money may be presented at any time during the pendency of administration. Tex. Prob. Code § 298(a).

§ 29.36:2 Deadline for Presentation of Unsecured Claim after Permissive Notice

A claimant holding an unsecured claim against an estate in a dependent administration who has received permissive notice regarding claims against the estate must present his claim within four months of receipt of the notice or the claim will be barred. Tex. Prob. Code §§ 294(d), 298.

§ 29.36:3 Deadline for Presentation of Secured Claim

If a secured creditor wants matured secured claim status, he must present his claim (with the matured secured claim election) within six months from the date of issuance of letters or four months after receiving notice of the issuance of letters, whichever is later. Failure to present the claim with proper election within this period makes the secured claim a preferred debt and lien. Tex. Prob. Code § 306(b).

§ 29.37 Handling of Claims by Administrator and Court

§ 29.37:1 Acceptance or Rejection of Claims by Administrator

Once a creditor presents or files his claim, the administrator has thirty days to either accept or reject the claim in its entirety or to reject part and indicate which part is allowed or rejected. Tex. Prob. Code § 309. The failure to timely accept or reject the claim constitutes a rejection. Tex. Prob. Code § 310. The administrator is not required to notify the creditor that the claim has been rejected. *Russell v. Dobbs*, 354 S.W.2d 373, 376 (Tex. 1962). See section 29.38:1 below regarding strategies for creditors in this situation. If the administrator allows the claim to be rejected through inaction and the claim is subsequently proved through suit, the creditor can recover the costs of suit from the administrator individually. Tex. Prob. Code § 310.

The administrator also has thirty days to object to the form of the claim. Tex. Prob. Code § 302.

§ 29.37:2 Action by Court

Once an administrator has filed an acceptance or rejection of a claim, the court clerk enters the claim on the court's claim docket. Tex. Prob. Code § 311. If the administrator has allowed the claim and it has been entered on the claims docket for ten days, it will be either approved in whole or in part or rejected by the court, and the court will also classify approved claims. Tex. Prob. Code § 312(b). See section 29.26 above regarding classification of claims. The court cannot approve a claim that has not been presented to the administrator. Tex. Prob. Code § 314.

If the claim is barred by limitations, the administrator is not supposed to approve it. If he does, the court should not allow it. Tex. Prob. Code § 298(b). Even though the claim is in proper form and approved, if the court is not satisfied that the claim is just, it may hold a hearing and receive evidence on the issue to determine the justness of the claim. Tex. Prob. Code § 312(c).

If the administrator rejects the claim, the court cannot override the objection until the rejected claim is established by suit. See section 29.39 below regarding suit on a rejected claim.

§ 29.38 Claims Handling and Payment

§ 29.38:1 Rejected Claim

If a claim is rejected in whole or in part by the administrator, the claimant must institute suit within ninety days of the rejection or his claim is barred. Tex. Prob. Code § 313. See section 29.37:1 above regarding how claims can be either actively rejected or rejected through the inaction of the administrator. Although the administrator has thirty days in which to accept or reject the claim, he is free to file his rejection anytime after receiving it and does not have to inform the creditor of his rejection. *Russell v. Dobbs*, 354 S.W.2d 373, 376 (Tex. 1962). Also, if the administrator accepts the claim after the thirty-day period expires, the claim is still deemed rejected. *Lusk v. Mintz*, 625 S.W.2d 774, 776 (Tex. App.—Houston [14th Dist.] 1981, no writ).

Administrators have been known to reject a claim immediately, starting the ninety-day limitations period before the unwary creditor knows it has begun. Therefore, after the thirty-day period expires, the attorney should check the court file to determine the administrator's disposition, if any, of the claim. It is recommended that the petition be prepared at the same time the claim is prepared so it can be filed as soon as possible after ascertaining that the claim has been rejected. See section 29.39 below regarding suits on rejected claims.

If the creditor's suit is barred by the ninety-day rule, the creditor may still proceed against any codebtor. *See Albiar v. Arguello*, 612 S.W.2d 219, 220 (Tex. Civ. App.—Eastland 1980, no writ).

The ninety-day limitation does not apply to claims other than claims for money. *Lusk*, 625 S.W.2d at 776; *National Guaranty Loan & Trust Co. v. Fly*, 69 S.W. 231 (Tex. Civ. App. 1902, no writ).

§ 29.38:2 Collection of Approved Claims

If a creditor's claim has been approved or established by suit and the personal representative does not pay the claim, the creditor may petition the court to be paid at any time after twelve months from the granting of letters testamentary. *See* Tex. Prob. Code § 326. If the estate has sufficient funds on hand, the court will order the creditor to be paid from those funds.

§ 29.39 Suit on Rejected Claim

§ 29.39:1 Jurisdiction

A suit on a rejected claim should be brought in the court in which administration of the estate is pending. *Bailey v. Cherokee County Appraisal District*, 862 S.W.2d 581, 585 (Tex. 1993); *Howe State Bank v. Crookham*, 873 S.W.2d 745 (Tex. App.—Dallas 1994, no writ); *but see Phifer v. Nacogdoches County Central Appraisal District*, 45 S.W.3d 159, 169–70 (Tex. App.—Tyler 2000, pet. denied) (exception exists for suit to collect delinquent taxes on property located in different county from where probate located).

§ 29.39:2 Pleading Requirements

The suit should be filed against the administrator of the estate and should be styled, for example, "Jane Doe, Administrator of the estate of John Doe, deceased." An estate is not a legal entity and may not be sued. *See Price v. Estate of Anderson*, 522 S.W.2d 690, 691 (Tex. 1975).

The petition should state the elements supporting the underlying cause of action—for example, a sworn account. Several additional elements must also be pleaded: the presentation of the claim to the administrator, its rejection, and the fact that ninety days have not elapsed since its rejection. *Butler v. Summers*, 253 S.W.2d 418, 422 (Tex. 1952); *Podgoursky v. Frost*, 394 S.W.2d 185 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.). Although pleading that all conditions precedent have occurred or have been performed would seem to fulfill these pleading requirements (*see* Tex. R. Civ. P. 54), the manual committee is not aware of Texas case law in support. The better practice, therefore, is to plead the specific procedural acts or omissions giving rise to the suit. See form 29-2 in this chapter for a petition that not only pleads the elements specifically but also contains an "all conditions precedent" allegation.

The plaintiff should request that the final judgment in his favor be entered in the claims docket as if originally approved for classification and payment. Tex. Prob. Code § 313; Tex. R. Civ. P. 313.

§ 29.39:3 Cost Allocation

Costs for suits on claims are allocated as follows:

1. If the claim is allowed and approved, the estate pays.
2. If the claim is allowed but disapproved by the court, the claimant pays.
3. If the claim is rejected but established by suit, the estate pays.
4. If the claim is rejected but not established by suit, the claimant pays,

unless the claim was rejected by operation of law because the personal representative failed to allow or reject it (*see* Tex. Prob. Code § 310).

5. In suits to establish a claim after rejection in part, if the claimant fails to recover a judgment for a greater amount than was allowed or approved, the claimant pays.

Tex. Prob. Code § 315.

§ 29.40 Foreclosure and Other Court-Supervised Sales

§ 29.40:1 Generally

A creditor holding a claim secured by a valid lien that has been allowed and approved or established by suit may apply to the probate court to sell the property or as much of it as is necessary to satisfy the claim. The clerk will issue citation requiring the administrator to appear and show cause why the application should not be granted. If it appears advisable to discharge the lien out of the general assets of the estate or that the claim be refinanced, the court will so order; otherwise, the property will be ordered sold at public or private sale. Tex. Prob. Code § 338. Although the sale is to be performed "as in ordinary cases of sales of real estate," there is no other statutory reference regarding its limitation to real property; presumably a creditor holding a security interest in personal property could use this statute to force the sale of the property.

The property can be either real or personal, but if real property is selected to be sold, it will be that whose sale the court deems most advantageous to the estate. Tex. Prob. Code § 340. No property of any kind may be sold without court order. Tex. Prob. Code § 331. If the court orders a sale, the proceeds will be used to pay the claim to the extent that it is not needed to discharge the liabilities of higher-priority claims unless the lien is classed as a preferred debt and lien. Tex. Prob. Code § 320(b). In that event, higher-priority claims are not paid before the lien claimant is paid. *See* Tex. Prob. Code § 306(d). An application and an order for court-ordered sale of collateralized property are at forms 29-3 and 29-4 in this chapter.

The deed that conveys title to real property must refer to and identify the decree of the court confirming the sale. *See* Tex. Prob. Code § 356.

§ 29.40:2 Preferred Debt and Lien

If a lien is classed as a preferred debt and lien and the property is not sold within six months after the granting of letters, the administrator is supposed to pay all accrued maturities and perform all other contractual terms. If he fails to do so, the creditor may apply to have the property sold. Tex. Prob. Code § 306(e). The application must be supported by an affidavit of the claimholder. Tex. Prob. Code § 306(f). See form 29-5 in this chapter for an application and affidavit. The clerk must issue citation to the administrator and any other person described in the application as having a debt secured by the property; these people must be personally served. Tex. Prob. Code § 306(g).

At the hearing, after determining that there is a default, the court must—

1. require the sale of the property subject to the unmatured part of the debt and apply the proceeds of the sale to the liquidation of the maturities;

2. require the sale of the property free of the lien and apply the proceeds to the payment of the whole debt; or

3. authorize foreclosure by the claimholder as allowed by the terms of the mortgage instrument or security agreement or as authorized by law. The court may fix a minimum price for the

property that does not exceed the property's fair market value.

Tex. Prob. Code § 306(i). See forms 29-6 through 29-8 for an order authorizing sale of property, a report of sale, and a decree confirming sale.

If foreclosure is authorized and the property is not sold because no bid for the minimum amount was made, the claimholder may file another application. The court, in its discretion, may eliminate or modify the minimum price requirement and permit another foreclosure sale. Tex. Prob. Code § 306(k).

§ 29.41 Claims by Administrator

The provisions of the Texas Probate Code regarding presentment of claims do not apply to any claim of an administrator. However, the administrator must file a verified claim within six months after his qualification, or the claim is barred. Tex. Prob. Code § 317(a).

[Sections 29.42 through 29.50 are reserved for expansion.]

IV. Independent Administration

§ 29.51 Nature of Independent Administration

Independent administration is the administration of an estate with limited court involvement. *See Cunningham v. Parkdale Bank*, 660 S.W.2d 810 (Tex. 1983). It may be created if the decedent provided in his will that no action shall be had in relation to the settlement of his estate other than the probate and recording of his will and the return of an inventory, appraisement, and list of claims of the estate; or if the distributees of a decedent, testate or intestate, consent to independent administration. Tex. Prob. Code § 145(b)–(e).

If the decedent dies intestate and the heirs desire independent administration, they must first obtain a determination of heirship by judgment to avoid dependent administration. The heirship proceeding and appointment of independent administrator are often done in the same hearing. An independent personal representative appointed by will is an independent executor, whereas one appointed in another manner is an independent administrator. *See* Tex. Prob. Code § 3(q).

§ 29.52 Independent Executor

Just as it is possible for an executor to be named in a dependent administration, an administrator may be named in an independent administration. Generally, though, the personal representative in an independent administration is an executor named in the will. In this part of this chapter, "executor" refers to any personal representative in an independent administration.

See section 29.4 above regarding the rights and duties of personal representatives generally and whether bond will be required.

§ 29.52:1 Powers of Executor

An executor has the power to perform any act that a court-supervised executor or administrator could perform only under court order. *See Rowland v. Moore*, 174 S.W.2d 248 (Tex. 1943). An independent executor or administrator therefore has full authority to deal with creditors and resolve claims. *See* Tex. Prob. Code § 234(a). See section 29.33:1 above regarding powers of an administrator.

§ 29.52:2 Duties of Executor

An executor has the duty to give proper notice to creditors and to approve, classify, and pay or reject claims against the estate in order of priority. Tex. Prob. Code § 146. See section 29.53 below regarding notice to creditors.

§ 29.52:3 Liabilities of Executor

An executor is not required to give bond if the will states that no bond is necessary, unless it is shown that he has mismanaged the estate, has betrayed or is about to betray his trust, or is disqualified in some other way. Tex. Prob. Code § 149. If the executor is not required to give bond, the heirs or other beneficiaries of an estate under independent administration may be required to do so if requested by any person having a claim against the estate. If bond is not given as ordered, the court can order a dependent administration. A creditor may sue on the bond if a claim goes unsatisfied. Tex. Prob. Code § 148. Heirs and beneficiaries are rarely required to give bond. *See Kauffman v. Wooters*, 13 S.W. 549 (Tex. 1890).

§ 29.53 Notice

§ 29.53:1 Notice by Publication or Posting

An executor must, within one month of receiving letters, publish a notice of administration. If no newspaper of general circulation is published in the county in which letters were issued, notice must be posted. Tex. Prob. Code § 294.

§ 29.53:2 Notice to Secured Creditors

An executor must, within two months of receiving letters, give notice by mail to each creditor known to have a claim against the estate that is secured by property of the estate. If the executor later learns of another secured creditor, he must send notice to that creditor within a reasonable time. Tex. Prob. Code § 295(a).

§ 29.53:3 Permissive Notice to Unsecured Creditors

No notice besides publication or posting is required, but an executor may at any time before administration is closed give notice by mail to an unsecured creditor. This notice must contain the date of issuance of letters, the address where claims may be presented, an identification of to whom the claim should be addressed, and a notice that, unless the claim is presented within four months of receipt of the notice, it will be barred. Tex. Prob. Code § 294(d). The creditor must give notice of its claim within 120 days of receiving this notice, or the claim will be barred. This notice may be given by written instrument hand-delivered or mailed by certified mail with proof of receipt to the executor or the executor's attorney, in a pleading filed in a suit with respect to the claim, or in a written instrument filed in the court in which administration of the estate is pending. Tex. Prob. Code § 146(d), (e).

§ 29.54 Claims in Independent Administration

§ 29.54:1 Presentment

Although presentment of claims in an independent administration is permitted, it is not required. Tex. Prob. Code § 146. Therefore, the creditor is not penalized if the claim is not presented in proper form. *Ditto Investment Co. v. Ditto*, 293 S.W.2d 267, 269 (Tex. Civ. App.—Fort Worth 1956, no writ).

The creditor may enforce payment by filing suit against the independent executor. *Bunting v. Pearson*, 430 S.W.2d 470 (Tex. 1968); *El Paso National Bank v. Leeper*, 538 S.W.2d 803, 806 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.). If such a suit is filed, the executor is not required to plead until after six months from the

creation of the independent administration and the issuance of letters testamentary. Tex. Prob. Code § 147.

Practice Note: The procedures for establishing claims and suits on rejected claims that apply to dependent administrations do not apply to independent administrations. *See Bunting*, 430 S.W.2d at 473. The language in section 146 of the Probate Code, dealing with payment of claims in an independent administration, cannot reasonably be construed to refer to sections 309, 310, and 313 of the Code in such a way as to make them apply to an independent executor. In an independent administration, there is no requirement that the creditor's claim be presented before it can be sued on, and the ninety-day requirement before filing suit does not apply. For a detailed explanation of the difference between claims against independently and dependently administered estates, see Stanley M. Johanson, *Johanson's Texas Probate Code Annotated* § 298, Commentary, pp. 340–41 (2011 ed.); *see also* Tex. Prob. Code §§ 146, 309, 310, 313.

§ 29.54:2 Deadline for Presentation of Unsecured Claim after Permissive Notice

A claimant holding an unsecured claim against an estate in independent administration who has received permissive notice regarding claims against the estate must give notice to the executor of the nature and amount of his claim not later than the 120th day after receipt of the notice or his claim will be barred. Tex. Prob. Code § 146(d), (e). *See also* Tex. Prob. Code § 146(b–3).

Notice to the independent executor must be contained in (1) a written instrument that is hand-delivered with proof of receipt or mailed by certified mail, return receipt requested, to the independent executor or the executor's attorney; (2) a pleading filed in a lawsuit with respect to the claim; or (3) a written instrument or pleading filed in the court in which the administration of the estate is pending. Tex. Prob. Code § 146(e). *See also* Tex. Prob. Code § 146(b–4).

§ 29.54:3 Deadline for Presentation of Secured Claim

If a secured creditor wants his claim classed as a matured secured claim, he must notify the executor by certified or registered mail of his choice of matured secured claim status within either six months of the issuance of letters or four months after receiving notice of the granting of letters, whichever is later. Tex. Prob. Code § 146(b). In addition to giving the notice, a creditor whose claim is secured by real property must record a notice of the creditor's election in deed records of the county in which the real property is located. Tex. Prob. Code § 146(b). The creditor's notice may be given by written instrument hand-delivered or mailed by certified mail with proof of receipt to the executor or the executor's attorney, in a pleading filed in a suit with respect to the claim, or in a written instrument filed in the court in which administration of the estate is pending. Tex. Prob. Code § 146(e). If no election to be a mature secured creditor is made, or the election is made but not within the prescribed period or is made within the prescribed period but the creditor has lien against real property and fails to record notice of the claim in the deed records, the claim will be relegated to preferred debt and lien status. Tex. Prob. Code § 146(b).

Notice to the independent executor must be contained in (1) a written instrument that is hand-delivered with proof of receipt or mailed by certified mail, return receipt requested, to the independent executor or the executor's attorney; (2) a pleading filed in a lawsuit with respect to the claim; or (3) a written instrument or pleading filed in the court in which the administration of the estate is pending. Tex. Prob. Code § 146(b–4).

See section 29.23 above regarding matured secured claim and preferred debt and lien status generally.

§ 29.55 Suits against Independent Estate

§ 29.55:1 Jurisdiction

In an independent administration, a district court, rather than a probate court, has jurisdiction over all claims against the estate and over other causes of action not regulated by special statute. *Rowland v. Moore*, 174 S.W.2d 248, 250 (Tex. 1943). But see section 5A of the Texas Probate Code, which expands probate jurisdiction to matters in which the controlling issue is the settlement, partition, or distribution of an estate and gives preference to statutory probate courts over district courts. *See also Estate of Lee*, 981 S.W.2d 288 (Tex. App.—Amarillo 1998, pet. denied).

§ 29.55:2 Creditor's Pleading Requirements

With one exception, there are no formal requirements for presentment of a claim against an independently administered estate before it can be sued on. Therefore, a suit against an independent executor should look essentially like any other collections suit. *See Bunting v. Pearson*, 430 S.W.2d 470 (Tex. 1968); *Collins v. State*, 506 S.W.2d 293 (Tex. Civ. App.—San Antonio 1973, no writ). See form 29-9 in this chapter for a petition. The exception is in the prayer, in which the plaintiff should pray that execution issue against property of the estate in the hands of the personal representative or his successor. Tex. Prob. Code § 147; Tex. R. Civ. P. 313.

§ 29.55:3 Executor's Pleading Requirements

Although the suit may be brought at any time not otherwise barred by limitations, the executor does not have to plead until after six months from the date independent administration was created and the order appointing an executor was entered. Tex. Prob. Code § 147.

§ 29.56 Foreclosure

A secured creditor has the same right of nonjudicial foreclosure that he would have if the debtor were alive. *See Pearce v. Stokes*, 291 S.W.2d 309, 310–11 (Tex. 1956). The executor, however, can enjoin such a foreclosure sale if the estate is insolvent and if the sale would result in claims' being paid out of statutory priority. *Farmers' & Merchants' National Bank v. Bell*, 71 S.W. 570 (Tex. Civ. App. 1902, writ ref'd).

If the creditor elects matured secured claim status, his right to foreclose may be limited if foreclosure would prevent the preferential payment of allowances or first- or second-class claims. Tex. Prob. Code § 306(c). If the secured claim is classed as a preferred debt and lien, the creditor may not seek a deficiency. *See Wyatt v. Morse*, 102 S.W.2d 396, 398–99 (Tex. 1937).

For a judicial foreclosure, the attorney should sue both the executor and the distributees or heirs taking title to the collateral as determined by the court sitting in probate, either by will or heirship determination. The suit should be brought in a court having general jurisdiction over the cause of action, not in the probate court handling the administration of the estate. However, note section 5B of the Texas Probate Code as recently amended, which allows for transfers from general jurisdiction courts to statutory probate courts. In personal injury, death, or property damage actions by or against an estate representative, however, proper venue is determined by section 15.007 of the Texas Civil Practice and Remedies Code.

[Sections 29.57 through 29.60 are reserved for expansion.]

V. Guardianship

§ 29.61 Guardianship Generally

If a person is totally without capacity to care for himself, to manage his property, to operate a motor vehicle, and to vote in a public election, the court may appoint a guardian of his person, estate, or both. Tex. Prob. Code § 693(a). If he lacks capacity to do some but not all tasks necessary to care for himself, the court can appoint a guardian with limited powers. Tex. Prob. Code § 693(b). The incapacitated person is referred to as a "ward." Tex. Prob. Code §§ 3(mm), 601(31).

§ 29.62 Guardian

§ 29.62:1 Powers of Guardian

A guardian has a number of statutory powers. For collections purposes, they include the power to—

1. make compromises or settlements in relation to property or claims in dispute or litigation;
2. compromise or pay in full any secured claim that has been allowed or approved by conveying the collateral to the secured creditor in satisfaction of the claim; and
3. abandon the administration of property of the estate that is burdensome or worthless. If the abandoned property is collateral securing a claim, it may be foreclosed on without further order of court.

These powers may be exercised only after written application to the probate court and authorization by court order. Tex. Prob. Code § 774(a).

§ 29.62:2 Duties of Guardian

For purposes of creditors' claims against the estate, a guardian must—

1. give notice of his appointment (as described in section 29.63 below) (Tex. Prob. Code § 783);
2. prepare and file an inventory, appraisement, and list of claims with the probate court within thirty days of qualifying as guardian (Tex. Prob. Code § 729);
3. report to the court annually regarding the claims allowed, paid, rejected, or sued on, as well as a variety of other matters incident to the estate (Tex. Prob. Code § 741);
4. pay claims approved or established by suit, in order of priority (Tex. Prob. Code §§ 804, 805);
5. close the guardianship when all debts known to exist against the estate have been paid in full or as far as the assets in the guardian's hands permit, and there is no further need for guardianship (Tex. Prob. Code § 745); and
6. file a final verified account for final settlement of the estate (Tex. Prob. Code § 749).

§ 29.63 Notice

§ 29.63:1 Notice Generally

A guardian must, within one month of receiving letters, publish a notice of guardianship. If no newspaper of general circulation is published in

the county in which letters were issued, notice must be posted. Tex. Prob. Code § 783(a).

§ 29.63:2 Secured Creditors and Claims of Which Guardian Has Actual Knowledge

Notice by mail must be given to all persons having a claim for money against a ward's estate if the claim is secured by a deed of trust, mortgage, or vendor's, mechanic's, or other contractor's lien on real estate belonging to the estate or if the guardian has actual knowledge of the claim. This notice must be given within four months of the receipt of letters. Tex. Prob. Code § 784(a), (b).

§ 29.63:3 One Notice Sufficient

If notice has been given by a former or coguardian, repeated or additional notice need not be given. Tex. Prob. Code § 785(a).

§ 29.63:4 Failure of Guardian to Give Notice

If a guardian fails to give any required notice, the guardian and any sureties on his bond will be liable for damages suffered by any person because of that failure unless it appears that the claimant had actual notice. Tex. Prob. Code § 785(b).

§ 29.64 Claims in Guardianship

§ 29.64:1 Claim Defined

A "claim" includes a liability against the estate of a ward. Tex. Prob. Code § 601(4). Except in the notice provisions set out in section 29.63:2 above, there is no distinction in guardianships between claims for money and contingent or unliquidated claims.

§ 29.64:2 Form of Claim

Except as provided by section 792 of the Texas Probate Code, a claim for money against a guardianship must be supported by an affidavit that the claim is just and that all legal offsets, payments, and credits known to the affiant have been allowed. The attorney should attach a copy of the relevant instrument, account, or voucher if one is available, and the affiant should state the facts on which the claim is founded. Tex. Prob. Code § 788. See form 29-1 in this chapter for a form claim. See also section 29.64:5 below for a short discussion of section 792 of the Texas Probate Code.

§ 29.64:3 Evidence of Claim Lost or Destroyed

If evidence of a claim has been lost or destroyed, the affiant must state facts regarding loss or destruction of that evidence, as well as the amount, date, and nature of the claim and that the claimant is still the owner of the claim. The claim must also be proved by disinterested testimony given either in open court or at deposition. If a claim is approved or allowed without this disinterested proof, the approval or allowance is void. Tex. Prob. Code § 790.

§ 29.64:4 Claim of Corporation

A claim presented on behalf of a corporation must include an affidavit made by the cashier, treasurer, or managing official of the corporation. The affidavit must also state that the affiant has made diligent inquiry and examination. Tex. Prob. Code § 791.

§ 29.64:5 Unauthenticated Claim

A guardian may pay an unauthenticated claim if he believes it to be just but will be liable for the amount paid if the court subsequently determines the claim is unjust. Tex. Prob. Code § 792. Claims for daily living expenses and util-

ity bills, for instance, might be paid in this manner without submission of an authenticated claim to the guardian or the court.

§ 29.65 Presentment

§ 29.65:1 When Claims May Be Presented

A claim against a guardianship estate may be presented at any time before the closing of the guardianship if suit on the claim would not be barred by limitation. Tex. Prob. Code § 786.

§ 29.65:2 Presentation of Secured Claim

A secured creditor desiring matured secured claim status must present a claim electing that status within the time provided by law, or the claim will be classed as a preferred debt and lien. The creditor may also elect preferred debt and lien status. Tex. Prob. Code § 793(a), (b).

§ 29.66 Handling of Claims by Guardian and Court

§ 29.66:1 Acceptance or Rejection of Claims by Guardian

Once a creditor presents or files his claim, the guardian has thirty days to either accept or reject the claim in its entirety or reject part and indicate which part is allowed or rejected. Tex. Prob. Code § 796. The failure to timely accept or reject the claim constitutes a rejection. Tex. Prob. Code § 797. The guardian is not required to notify the creditor that the claim has been rejected. *See Russell v. Dobbs*, 354 S.W.2d 373, 376 (Tex. 1962) (decedent's estate). If the guardian allows the claim to be rejected through inaction and the claim is subsequently proved through suit, the creditor can recover the costs of suit from the guardian individually. Tex. Prob. Code § 797.

The guardian also has thirty days to object to the form of the claim. Tex. Prob. Code § 789.

§ 29.66:2 Action by Court

Once a guardian has filed an acceptance or rejection of the claim, the court clerk enters the claim on the court's claim docket. Tex. Prob. Code § 798. If the guardian has allowed the claim and it has been entered on the claims docket for ten days, it will be either approved in whole or in part or rejected by the court, and the court will also classify approved claims. Tex. Prob. Code § 799(b). See section 29.66:3 below regarding classification of claims. The court cannot approve a claim that has not been presented to the guardian. Tex. Prob. Code § 801(a).

If the claim is barred by limitations, the guardian is not supposed to approve it. If he does, the court should not allow it. Tex. Prob. Code § 786(b). Even though the claim is in proper form and approved by the guardian, if the court is not satisfied that the claim is just, it may hold a hearing and receive evidence on the issue to determine the justness of the claim. Tex. Prob. Code § 799(c).

If the guardian rejects the claim, the court cannot act on the claim until the rejected claim is established by suit. See section 29.67 below regarding suit on a rejected claim.

§ 29.66:3 Order of Payment of Claims

Guardians must pay claims in the following order:

1. expenses for the care, maintenance, and education of the ward or the ward's dependents;
2. funeral expenses and expenses of the last illness of a deceased ward, subject to prior payment of claims allowed

and approved or established by suit before the ward's death;

3. expenses of administration; and

4. other claims against the ward or the ward's estate.

Tex. Prob. Code § 805(a)(1).

If the estate is insolvent, the guardian must give first priority to the payment of claims relating to administration of the guardianship. Tex. Prob. Code § 805(b).

§ 29.67 Suit on Rejected Claim

§ 29.67:1 Jurisdiction

A suit on a rejected claim should be brought in the court with jurisdiction over the guardianship. Tex. Prob. Code §§ 607, 800.

§ 29.67:2 Deadline for Filing Suit

As with a dependent administration, a creditor has ninety days to file suit after the guardian rejects the claim in whole or in part; otherwise, the claim will be barred. Tex. Prob. Code § 800.

§ 29.67:3 Pleading Requirements

The suit should be filed against the guardian in that capacity and should be styled, for example, "Jane Doe, Guardian of the Estate of John Doe." See form 29-2 in this chapter for a petition. Otherwise, the pleadings should follow the form used for suing a dependent administrator. *See* Tex. Prob. Code § 800. See also section 29.39 above.

§ 29.67:4 Cost Allocation

Costs for suits on claims are allocated as follows:

1. If the claim is allowed and approved, the guardianship estate pays.

2. If the claim is allowed but disapproved by the court, the claimant pays.

3. If the claim is rejected but established by suit, the estate pays.

4. If the claim is rejected but not established by suit, the claimant pays, unless the claim was rejected by operation of law because the guardian failed to allow or reject it (*see* Tex. Prob. Code § 797).

5. In suits to establish a claim after rejection in part, if the claimant fails to recover a judgment for a greater amount than was allowed or approved, the claimant pays.

Tex. Prob. Code § 802.

§ 29.68 Sale of Guardianship Property

On written application of a creditor who holds a secured claim or lien that has been allowed and approved, the court may order the sale of as much of the property as necessary to satisfy the creditor's claim unless the guardian can show cause why it should not be sold. If it appears to the court that it would be advisable to discharge the lien out of the general assets of the estate or that it be refinanced, the court may so order. Tex. Prob. Code § 817.

A nonjudicial foreclosure sale during the pendency of a guardianship is void. *Crowley v. Redmond*, 41 S.W.2d 274, 278 (Tex. Civ. App.—Fort Worth 1931), *aff'd*, 70 S.W.2d 1113 (Tex. 1934).

[Sections 29.69 and 29.70 are reserved for expansion.]

VI. Nonprobate Assets

§ 29.71 Multiple-Party Accounts

§ 29.71:1 Accounts Generally

Multiple-party accounts are joint accounts, convenience accounts, pay-on-death accounts, and trust accounts and include checking accounts, savings accounts, certificates of deposit, share accounts, and other similar arrangements. Tex. Prob. Code § 436(1), (5).

§ 29.71:2 Joint Account

A joint account is an account payable on request to one or more parties whether there is a right of survivorship or not. Tex. Prob. Code § 436(4). A joint account belongs to the parties, during their lifetimes, in proportion to the net contributions each party makes, unless there is clear and convincing evidence of a different intent. Tex. Prob. Code § 438(a). "Net contribution" is defined at Tex. Prob. Code § 436(6). If the joint account contains a right of survivorship, the interest of the party who dies vests immediately in the surviving cosigner(s). Tex. Prob. Code § 439(a).

§ 29.71:3 Convenience Account

If an account is established by one or more parties in the names of the parties and one or more convenience signers and the terms of the account provide that the amounts on deposit are paid or delivered to the parties or to the convenience signers "for the convenience" of the parties, the account is a convenience account. Tex. Prob. Code § 438A.

The making of a deposit in a convenience account does not affect title to the deposit. A party establishing a convenience account is not considered to have made a gift of any portion of the deposit to the convenience signer. Tex. Prob. Code § 438A(b), (c). Otherwise, ownership of a convenience account is established by each account holder's net contributions, as in other joint accounts. *See* Tex. Prob. Code § 438(a).

§ 29.71:4 Pay-on-Death Account

A pay-on-death (P.O.D.) account is payable on request to one person during his lifetime, then to one or more persons, called "P.O.D. payees," on that person's death. Tex. Prob. Code § 436(10). The account belongs to the original payee during his lifetime and not to the P.O.D. payees. Tex. Prob. Code § 438(b). If there are two or more original payees, then each payee's interest is proportional to the amount of his net contribution, as in other joint accounts. Tex. Prob. Code § 438(a).

§ 29.71:5 Trust Account

A trust account, for purposes of the multiple-party account provisions of the Probate Code, is an account in the name of one or more parties as trustee for one or more beneficiaries in which the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the amounts on deposit in the account. It does not include a regular trust account under a testamentary trust or a trust agreement having significance apart from the account or a fiduciary account arising from a fiduciary relationship such as attorney and client. Tex. Prob. Code § 436(14). Unless a contrary intent is shown by the terms of the account or deposit agreement or there is other clear and convincing evidence of an irrevocable trust, a trust account belongs beneficially to the trustee during his lifetime. If there are two or more

trustees, beneficial ownership is determined by their net contributions to the account. Tex. Prob. Code § 438(c).

§ 29.71:6 Rights of Creditors, Survivors, and Personal Representatives to Reach Deceased's Interest in Multiple-Party Account

Section 442 of the Texas Probate Code states that a multiple-party account is not effective against the claim of a secured creditor who has a lien on the account. Although a convenience signer may not pledge or create a security interest in a multiple-party account, a party to the account may pledge it without joinder of other parties with a substantial interest in the account. If a secured interest is perfected, certain secured creditors must send written notice of the account's pledge to the other parties to the multiple-party account.

Generally, however, if other assets of a deceased party's estate are insufficient to pay debts, taxes, claims, and expenses of administration, the deceased's interest in a multiple-party account can be recovered by the personal representative from either the account itself or the subsequent payee of the account according to the account's terms. Until the financial institution receives written notice from the representative stating the amounts needed to pay debts, taxes, claims, and expenses of administration, it is free to pay account proceeds according to the terms and nature of the account and agreement. Payees are liable only to the extent of funds actually received from the account.

To recover these amounts, the representative must first have received a demand for payment from either a surviving spouse, a creditor of the decedent, or one acting for the decedent's minor child. No recovery proceeding may commence more than two years after death. Amounts recovered by the representative are distributed as part of the decedent's estate. Tex. Prob. Code § 442.

If the creditor is aware of amounts passing outside probate to payees under any of these multiple-party accounts, he should consider demanding that the personal representative take steps to recover these funds into the probate estate. The efficacy of taking this action must be balanced against the amount of money the creditor will recover after expenses of administration and statutory allowances are paid.

§ 29.71:7 Liability of and Offset to Financial Institutions

A detailed discussion of the rights and liabilities of financial institutions regarding payment of funds from multiple-party accounts to various payees is beyond the scope of this manual. In general, the financial institution will not be liable for disbursements made in good faith to parties appearing to have rights in the account. Tex. Prob. Code §§ 443–448. Without having to present a claim, a financial institution has a right to offset debt against the account of any amount in proportion to that to which the party was entitled. Tex. Prob. Code § 449.

§ 29.72 Community Property with Right of Survivorship

Spouses may agree at any time that title to all or part of their community property, then existing or to be acquired, will vest in the surviving spouse on death. Tex. Prob. Code § 451. A detailed discussion of how this right of survivorship is created, proved, or revoked is beyond the scope of this manual. Property passing to a surviving spouse in this manner is removed from the probate estate.

As with a multiple-party account, the personal representative of a deceased spouse can demand recovery of amounts paid to a surviving spouse under such a survivorship arrangement if the

estate is otherwise unable to pay debts, taxes, or expenses of administration. Otherwise, the community property subject to the sole or joint management, control, or disposition of a spouse during marriage continues to be subject to the liabilities of that spouse on death without regard to a right of survivorship in the decedent's spouse. Tex. Prob. Code § 461.

§ 29.73 Trusts

§ 29.73:1 Generally

Although a trustee holds legal title to trust property, that property is not liable for the trustee's obligations. Tex. Prop. Code § 114.0821; *Adams v. Williams*, 248 S.W. 673 (Tex. 1923). The beneficiary holds equitable title in trust property; unless the instrument creating the trust made it a spendthrift trust, the trust property will be liable for the beneficiary's debts. *See Estes v. Estes*, 267 S.W. 709 (Tex. 1924).

§ 29.73:2 Spendthrift Trust

A spendthrift trust cannot be reached by the beneficiary's creditors unless the settlor created it with himself as beneficiary. *Bank of Dallas v. Republic National Bank of Dallas*, 540 S.W.2d 499, 501 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.). *See also* Tex. Prop. Code § 112.035.

§ 29.73:3 Living Trust

A living trust is an inter vivos trust taking effect during the settlor's lifetime, with vesting provisions for the trust property at his death. Because the settlor no longer owns the property—the trust owns it—the property is not part of his estate at death.

§ 29.73:4 Trust Property Not Subject to Execution

Property that a judgment debtor has conveyed in trust may not be seized in execution if the trustee points out other property of the debtor in the county sufficient to satisfy the execution. Tex. Civ. Prac. & Rem. Code § 34.004.

§ 29.73:5 Notice to Trust Beneficiaries

In an action brought on a contract executed by a trustee or against a trustee as representative of the trust for a tort committed in the course of the trust's administration, the plaintiff must give notice to each beneficiary known to have a present or contingent interest. This notice must be given either within thirty days after the action is commenced or at any other time fixed by the court that is more than thirty days before judgment. Tex. Prop. Code § 115.015(a). It must be sent by registered or certified mail, return receipt requested. The plaintiff should make a written request to the trustee-defendant for the names and addresses of all such beneficiaries; the trustee must provide this list within ten days from the date of the request. Tex. Prop. Code § 115.015(b).

§ 29.74 Life Insurance Proceeds

Life insurance proceeds are exempt from execution, attachment, garnishment, or other process. Tex. Ins. Code §§ 1108.051–.053.

§ 29.75 Qualified Plan Benefits

A person's right to the assets held in or to receive payments from a pension or other retirement plan is exempt from execution, attachment, or seizure if the plan qualifies under applicable provisions of the Internal Revenue Code of 1986. Tex. Prop. Code § 42.0021. The exemption, however, does not apply to voluntary contributions by the beneficiary in excess of those provided by the qualified plan.

[Sections 29.76 through 29.80 are reserved for expansion.]

VII. Special Situations

§ 29.81 Debtor as Beneficiary of Estate

§ 29.81:1 Generally

A creditor may discover that a debtor is a beneficiary or an heir of an estate and has not yet received his bequest. The creditor should research the probate file to ascertain the status of the estate, what the debtor is entitled to receive, and when the bequest might be paid.

If the creditor learns that the debtor has inherited or will inherit assets, he should consider using turnover or injunctive relief as a means of reaching those assets. See part V. in chapter 27 of this manual regarding turnover and sections 8.33 through 8.40 regarding injunctions.

The debtor may offer to assign his inherited interest in order to satisfy his debt. *See* Tex. Prob. Code § 37B. The creditor should use extreme caution in deciding whether to accept any such assignment. For instance, the will may contain a "spendthrift clause" that prohibits the assignment of an inheritance expectancy. This would present a problem to the creditor who releases the debtor from his liability only to discover that the assignment is invalid and there is no other means of recovery, although the creditor may seek to vitiate the transaction based on absence of consideration, mutual mistake, or otherwise.

§ 29.81:2 Disclaimer of Interest in Estate by Beneficiary

A beneficiary under a will, including the guardian of an incapacitated beneficiary, an heir at law, or anyone who would receive property from a decedent through other means such as right of survivorship or contract, has an absolute right to disclaim any portion of the property received through intestate succession or by will. Tex. Prob. Code § 37A. The disclaimer is evidenced by filing a sworn memorandum within nine months of the decedent's death. Tex. Prob. Code § 37A(g), (h). The effect of disclaimer is to divest the beneficiary or heir of any liability to creditors of the estate.

§ 29.82 Effect of Death on Litigation

§ 29.82:1 Suggestion of Death

When a party to a suit dies, entry of a suggestion of death into the court record permits the suit to proceed. Tex. R. Civ. P. 151, 152. If there are surviving defendants and no action is taken regarding the deceased defendant, the suit can proceed against the survivors, but any judgment will have no effect on the estate of the decedent and will bar any subsequent proceeding against the estate or the decedent's heirs. Tex. R. Civ. P. 155; *First National Bank v. Hawn*, 392 S.W.2d 377 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

To bring the heirs or personal representative of a deceased debtor into litigation already filed, the attorney should file a suggestion of death and request the clerk to issue a scire facias against the heirs or personal representative. If the debtor's family has not instituted probate, the attorney should consider having a scire facias issued against the surviving spouse and any other known heirs; taking this action will either encourage the family to open probate or identify the decedent's heirs. See form 29-10 in this chapter for a suggestion of death and scire facias.

§ 29.82:2 Tolling of Limitations by Defendant's Death

The death of a person against whom there may be a cause of action suspends the running of the applicable statute of limitation for either twelve months from death or until an executor or administrator is appointed, whichever comes first. Tex. Civ. Prac. & Rem. Code § 16.062.

Limitations are also tolled on the date a claim is filed or deposited with the clerk or on the date suit is brought against the personal representative with respect to a claim against the estate that is not required to be brought as a claim against the estate (as in an independent administration). Tex. Prob. Code § 299.

If suit is brought against a personal representative, a successor personal representative cannot claim a limitations defense if he knows of the suit against the prior representative. *Rooke v. Jenson*, 838 S.W.2d 229 (Tex. 1992).

§ 29.83 Death or Incapacity of Creditor

If a creditor dies, the claims owned by the creditor may still be pursued. The personal representative of an estate may recover all property belonging to the estate, including all claims and debts due. Tex. Prob. Code §§ 233(a), 233A. To recover on the claim, a person interested in the creditor's estate should open administration, and the administrator or executor should file the claim. If the claim is in litigation, the petition on the claim should be amended to substitute the personal representative as the plaintiff. *See* Tex. R. Civ. P. 63. Similarly, if the creditor becomes incapacitated, the guardian of the creditor's estate may pursue the claim or continue the suit on the claim on the creditor's behalf. Tex. Prob. Code §§ 768, 772–773.

§ 29.84 Ongoing Business

If the decedent owned a farm, ranch, factory, or other business, the court may grant the personal representative the powers to operate the business that the court determines are appropriate if the disposition of the business was not specifically directed by the decedent's will, it is not necessary to sell the business for the payment of debts or other lawful purposes, and the operation of the business by the personal representative is in the best interest of the estate. Tex. Prob. Code § 238(b). In deciding, the court will consider the condition of the estate, the necessity that may exist for the future sale of the business to pay debts or claims against the estate, the effect on the speedy settlement of the estate, and the best interests of the estate. Tex. Prob. Code § 238(f).

If the decedent was a partner in a general partnership and the articles of partnership provide that the personal representative will be entitled to the deceased partner's place, the representative may assume that position, liable only to the extent of the deceased partner's share in the partnership. Tex. Prob. Code § 238A.

Chapter 35

Bankruptcy

I. Overview

II. Automatic Stay

III. Claims

IV. Chapter 7 Bankruptcy

V. Chapter 13 Bankruptcy

VI. Avoidance Actions

VII. Executory Contracts and Unexpired Leases

Forms

Chapter 35

Bankruptcy

I. Overview

§ 35.1 Bankruptcy in General

§ 35.1:1 Federal Bankruptcy Code

Title 11 of the United States Code governs bankruptcies and is generally referred to as the Bankruptcy Code. Chapters 1, 3, and 5 of the Bankruptcy Code apply to all bankruptcies; Chapter 7 governs liquidation bankruptcies; Chapter 11 applies to business reorganization or liquidation and to some individuals who do not qualify under Chapter 13; and Chapter 13 applies to reorganization for individuals with limited debts and regular income. Chapters 9 and 12 of the Code, which are not dealt with specifically in this chapter, cover municipal debt and family farm debt.

§ 35.1:2 Bankruptcy Courts in Texas

Texas has four federal bankruptcy districts: the Northern District (covering Dallas, Fort Worth, Amarillo, Abilene, Lubbock, San Angelo, and Wichita Falls), the Southern District (covering Houston, Galveston, Victoria, Corpus Christi, Brownsville, McAllen, and Laredo), the Eastern District (covering Tyler, Plano, Texarkana, Beaumont, and Lufkin), and the Western District (covering Austin, El Paso, Midland, San Antonio, and Waco). Each district has its own local rules governing such issues as the format of pleadings, deadlines for certain filings, and the procedure for requesting a hearing. The practitioner should check the local rules and practice guides for each district and each court before filing any document in bankruptcy court. The Web sites for each district are **www.txnb.uscourts.gov** (Northern District), **www.txsb.uscourts.gov** (Southern District), **www.txwb.uscourts.gov** (Western District), and **www.txeb.uscourts.gov** (Eastern District).

§ 35.1:3 Property of Estate

Commencement of a case under the Bankruptcy Code creates an estate composed of all legal or equitable interests of the debtor in property as of the commencement of the case. *See* 11 U.S.C. § 541(a). The estate includes all interests of the debtor and the debtor's spouse in community property to the extent that the interest is under the sole, equal, or joint management and control of the debtor or is liable for an allowable claim against the debtor or the debtor's spouse. 11 U.S.C. § 541(a)(2).

Among other exceptions, the estate does not include a power that the debtor may exercise solely for the benefit of an entity other than the debtor. 11 U.S.C. § 541(b)(1). And property in which the debtor holds legal title but not an equitable interest becomes property of the estate only to the extent of the debtor's legal title to the property. 11 U.S.C. § 541(d).

§ 35.1:4 Role and Duties of United States Trustee

The United States Trustee Program is a component of the U.S. Department of Justice charged with the administrative oversight of bankruptcy cases. The U.S. trustee is the entity charged with

policing the bankruptcy system, that is, monitoring the activities and reporting of the debtor or debtor-in-possession, appointing various official committees and overseeing their operation, and managing the debtor's trip through bankruptcy using a series of guidepost measurements designed to keep the case on track. The U.S. trustee is required to supervise the trustees and the administration of bankruptcy cases under Chapters 7, 11, 12, 13, and 15. 28 U.S.C. § 586. These duties are administrative in nature as they relate to the panel trustee. In Chapter 11 cases, the U.S. trustee appoints and monitors the operation of the official committees and appoints examiners or trustees as directed by the court. 11 U.S.C. §§ 1102, 1104; *see also* 28 U.S.C. § 586. Additionally, the U.S. trustee reviews and objects to fee applications, disclosure statements, and plans that fail to meet the minimum standards under the Bankruptcy Code. *See In re Parsley*, 384 B.R. 138, 146 (Bankr. S.D. Tex. 2008). The U.S. trustee has standing to appear and be heard on any issue. 11 U.S.C. § 307. A U.S. trustee is not authorized to promulgate rules or impose substantive or administrative requirements on bankruptcy debtors. *In re Johnson*, 106 B.R. 623, 624 (Bankr. D. Neb. 1989).

§ 35.1:5 Official Committees

The official committees are created by statute. The Bankruptcy Code authorizes the U.S. trustee to appoint committees of creditors or of equity security holders as the U.S. trustee deems appropriate. 11 U.S.C. § 1102(a)(1). Committee members have a fiduciary responsibility to act on behalf of the entire class of creditors represented. Among the duties assumed by committee members are fiduciary duties of undivided loyalty and impartial service to all creditors. *See In re Pierce*, 237 B.R. 748, 758 (Bankr. E.D. Cal. 1999).

§ 35.1:6 Role and Duties of Bankruptcy Trustee

The bankruptcy trustee, regardless of the Chapter filed, is generally the central figure in the bankruptcy case. It is the trustee with whom the debtor has the most contact during the course of the case. The trustee examines the debtor, verifies and evaluates exemptions, gathers property of the estate, liquidates such property, and ultimately distributes such property to the creditors. The trustee makes sure the debtor complies with the requirements of the Bankruptcy Code. The duties of a Chapter 7 trustee are set forth in 11 U.S.C. § 704.

Generally, a trustee has a fiduciary duty to conserve the assets of the estate and to maximize distribution to creditors. *In re Rigden*, 795 F.2d 727, 730 (9th Cir. 1986). He also has the equitable responsibility to act with the care and diligence of an ordinary prudent person. *In re Rigden*, 795 F.2d at 730. Trustees, in their official capacity, are officers of the court and as such are held to high fiduciary standards of conduct. *In re Topco, Inc.*, 894 F.2d 727, 739 n.16 (5th Cir. 1990).

In addition to statutory duties, under rule 2015(a) of the Federal Rules of Bankruptcy Procedure, a trustee must—

1. in a Chapter 7 or, in some cases, a Chapter 11 case, file and transmit to the U.S. trustee a complete inventory of the property of the debtor within thirty days after qualifying as a trustee or debtor-in-possession, unless such an inventory has already been filed;
2. keep a record of receipts and the disposition of money and property received;
3. file the reports and summaries required by section 704(a)(8) of the Bankruptcy Code, which shall include a statement, if payments are made to

employees, of the amounts of deductions for all taxes required to be withheld or paid for and on behalf of employees and the place where these amounts are deposited;

4. as soon as possible after the commencement of the case, give notice of the case to every entity known to be holding money or property subject to withdrawal or order of the debtor, including every bank, savings or building and loan association, public utility company, and landlord with whom the debtor has a deposit, and to every insurance company that has issued a policy having a cash surrender value payable to the debtor, except that notice need not be given to any entity who has knowledge or has previously been notified of the case; and

5. in a Chapter 11 reorganization case, on or before the last day of the month after each calendar quarter until a plan is confirmed or the case is converted or dismissed, file and transmit to the U.S. trustee a statement of disbursements made during the calendar quarter and a statement of the amount of the fee required pursuant to 28 U.S.C. § 1930(a)(6) that has been paid for such calendar quarter.

Additionally, the local rules of the bankruptcy court may impose other duties that the trustee must perform. In any bankruptcy case, it is crucial to review the local bankruptcy rules that apply to that jurisdiction.

§ 35.1:7 Party in Interest

The Bankruptcy Code defines "party in interest" to include "the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee." 11 U.S.C. § 1109(b). This list is nonexclusive. *See, e.g., In re Sullivan Central Plaza I, Ltd.*, 935 F.2d 723, 726 (5th Cir. 1991). And courts have broadly interpreted the term to include "any other person with a sufficient stake in [the] outcome of a proceeding so as to require representation." *International Transactions, Ltd. v. Embotelladora Agral Regiomontana, S.A. de C.V.*, 347 F.3d 589, 595 (5th Cir. 2003). Put another way, "persons whose pecuniary interests are directly affected by the bankruptcy proceedings" are parties in interest. *In re Orchard at Hansen Park, LLC*, 347 B.R. 822, 825 (Bankr. N.D. Tex. 2006) (quoting *In re E.S. Bankest*, 321 B.R. 590, 594 (Bankr. S.D. Fla. 2005)).

§ 35.1:8 Rooker-Feldman Doctrine

The Rooker-Feldman doctrine is a rule of civil procedure enunciated by the U.S. Supreme Court in two cases, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). The doctrine holds that lower U.S. federal courts other than the Supreme Court have no subject-matter jurisdiction to sit in direct review of state court decisions unless Congress has enacted legislation that specifically authorized such relief. *Feldman*, 460 U.S. at 476 (citing *Rooker*, 263 U.S. at 415).

In 2005, the Supreme Court revisited the doctrine in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005). The Court noted that the U.S. Supreme Court has exclusive appellate jurisdiction to reverse or modify a state-court judgment based on the certiorari jurisdiction statute, 28 U.S.C. § 1257. The Court also confined the Rooker-Feldman doctrine to cases "brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments. . . . [The Rooker-Feldman doctrine] does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in defer-

ence to state-court actions." *Exxon Mobil Corp.*, 544 U.S. at 283–85.

§ 35.2 Bankruptcy Procedure

§ 35.2:1 Local Procedural Rules

In addition to the Federal Rules of Bankruptcy Procedure, each of the four federal districts in Texas has its own local rules (and sometimes each judge in the district has rules specific to that judge's court). Each federal district maintains a Web site that includes the local rules for that district as well as other instructions and requirements. The practitioner should check a court's Web site before filing any documents in an unfamiliar court. See section 35.1:2 above for the Web addresses for each federal district. See also section 35.2:2 below concerning local rules regarding negative notice.

§ 35.2:2 Motion Practice

Under the Federal Rules of Bankruptcy Procedure (found in title 11 of the U.S. Code), a request for an order from the bankruptcy court must be made by written motion unless an application is authorized by the rules or unless the motion is made during a hearing. *See* Fed. R. Bankr. P. 9013. The motion must state with particularity the grounds and set forth the relief or order sought. Fed. R. Bankr. P. 9013. Unless the motion is one that may be considered ex parte, it must be served by the moving party on the trustee or debtor-in-possession and on those entities specified by the Rules of Bankruptcy Procedure or on the entities that the court directs. Fed. R. Bankr. P. 9013.

When the Bankruptcy Code indicates that an action must be taken "after notice and hearing," it means after notice that is appropriate in the particular circumstances and after the opportunity for a hearing. 11 U.S.C. § 102(1)(A). The court may act without an actual hearing if notice is properly given and a hearing is not timely requested by a party in interest. 11 U.S.C. § 102(1)(B)(i). To fulfill the notice requirement, the motion must contain certain specific language alerting the debtor to the period within which he must respond to the motion. This language is commonly referred to as the "negative notice." *See In re Stogsdill*, 102 B.R. 587, 588 (Bankr. W.D. Tex. 1989). The time frame for responding to the motion varies depending on the type of motion and the local rules. Each district has specific negative-notice language that is required in that district. The practitioner should consult the local rules for the specific language required and the applicable time frame before filing any motion. See form 35-18 in this chapter for sample notice language. See also section 35.2:1 above regarding the local rules for each district.

§ 35.3 PACER

Public Access to Court Electronic Records (PACER) is an electronic public access service that allows users to obtain case and docket information from federal appellate, district, and bankruptcy courts and from the U.S. Party/Case Index. PACER is a service of the U.S. Judiciary. The PACER Service Center is run by the administrative office of the U.S. courts. Currently, most courts have their own Web sites, and links to these sites are provided on the PACER Web site at **http://www.pacer.gov/index.html**. Electronic access is available for most courts by registering with the PACER Service Center, the judiciary's centralized registration, billing, and technical support center.

A user can request information about a particular individual or case through the PACER system. The data is displayed directly on the user's computer. Training on using the PACER system is available through the PACER Web site. All registered agencies and individuals are charged a user fee for access to the site. Users are also charged on a per-page or per-minute basis for

each search. A schedule of fees is available on the PACER Web site.

§ 35.4 Electronic Filing

The bankruptcy courts for all districts in Texas require that all documents be filed electronically as Adobe PDF files. The practice generally requires participation in a training course. On completion of the training course, the court issues the practitioner a login ID and a password, which is an electronic "signature." Effective December 1, 2004, all the bankruptcy courts in the four federal districts in Texas adopted Appendix 5005, the "Administrative Procedures for the Filing, Signing, and Verifying of Documents by Electronic Means in Texas Bankruptcy Courts." A copy can be located online at **www.txeb.uscourts.gov/BAPCPA/Appendix_5005_December_1_2004.pdf**.

Posting a credit card for filing documents requiring a fee may also be part of the procedure in some courts. The practitioner should consult the specific court for filing requirements. See section 35.1:2 above for a list of the official Web addresses for the bankruptcy courts in Texas.

Practice Note: Registration for electronic filing constitutes consent to receive notices electronically. The practitioner is advised to check frequently for filings involving matters in which the practitioner has an interest. Once an appearance has been entered in a case, copies of all documents filed in the case will automatically be sent to the practitioner by e-mail.

[Sections 35.5 through 35.10 are reserved for expansion.]

II. Automatic Stay

§ 35.11 Scope

On the filing of a bankruptcy petition, the debtor receives automatic injunctive relief that prohibits creditors from taking further action against the debtor, the property of the debtor, or the property of the estate to collect their claims or enforce their liens. 11 U.S.C. § 362.

The stay arises at the time of filing, not when notice is given to or received by the creditor. 11 U.S.C. § 362(a); *In re Sumpter*, 171 B.R. 835, 841–42 (Bankr. N.D. Ill. 1994). The stay is often effective before creditors learn of it. A creditor may innocently obtain a default judgment or hold a foreclosure sale in violation of the automatic stay. *See, e.g., In re Abusaad*, 309 B.R. 895 (Bankr. N.D. Tex. 2004). The Fifth Circuit Court of Appeals has held that an action taken in violation of the automatic stay is voidable. *See In re Coho Resources, Inc.*, 345 F.3d 338, 344 (5th Cir. 2003); *contra In re Elder*, 12 B.R. 491 (Bankr. M.D. Ga. 1981) (action is void).

The scope of the automatic stay is extremely broad. The stay prohibits—

1. commencing or continuing an action or proceeding that was or could have been commenced before the bankruptcy case began;
2. commencing or continuing an action to recover a claim that arose prebankruptcy;
3. enforcing a judgment obtained prebankruptcy;
4. obtaining possession of property of or from the estate or exercising control over such property;
5. creating, perfecting, or enforcing against the property of the debtor any

lien to the extent that the lien secures a claim that arose prebankruptcy;

6. collecting, assessing, or recovering a prebankruptcy claim against the debtor;

7. setting off any prebankruptcy debt owing to the debtor against any claim against the debtor; or

8. commencing or continuing a proceeding before the U.S. Tax Court concerning a corporate debtor's tax liability for a taxable period that may be determined by the bankruptcy court or concerning the tax liability of an individual debtor for a taxable period ending before the date of the order for relief.

11 U.S.C. § 362(a).

However, a counterclaim asserted by the debtor is not an action "against the debtor" under 11 U.S.C. § 362(a) and, therefore, is not subject to the automatic stay. *In re United States Abatement Corp.*, 39 F.3d 563, 568 (5th Cir. 1994); *see also In re Voluntary Purchasing Groups, Inc.*, 205 B.R. 80, 80–81 (Bankr. E.D. Tex. 1996).

§ 35.12 Codebtor's Stay

The automatic stay of section 362 of the Bankruptcy Code does not prohibit demands, suits, or any other action by the creditor against guarantors or other codebtors of the bankrupt debtor. *See Lynch v. Johns-Manville Sales Corp.*, 710 F.2d 1194 (6th Cir. 1983); *Pitts v. Unarco Industries, Inc.*, 698 F.2d 313 (7th Cir. 1983); *In re Smith*, 14 B.R. 956 (Bankr. D. Conn. 1981); *Royal Truck & Trailer, Inc. v. Armadora Maritima Salvadorena*, 10 B.R. 488 (N.D. Ill. 1981); *In re Avis*, 3 B.R. 205 (Bankr. S.D. Ohio 1980); *In re Lamar Estates, Inc.*, 5 B.R. 328 (Bankr. E.D.N.Y. 1980).

The codebtor's stay of Chapter 13 was modified by the Bankruptcy Reform Act of 2005. 11 U.S.C. § 1301 provides that the codebtor's stay does not stop the creditor from pursuing the codebtor if the codebtor became liable on or secured the debt in the ordinary course of the codebtor's business or if the Chapter 13 case is closed, dismissed, or converted to a case under Chapter 7 or 11. *See* 11 U.S.C. § 1301(a).

Streamlined provisions are added for a creditor to obtain relief from the codebtor's stay. A motion for relief of the codebtor's stay should be granted if—

1. the codebtor received the consideration for the creditor's claim;

2. the debtor's plan proposes not to pay the claim; or

3. the creditor's interest would be irreparably harmed by the continuation of the codebtor's stay.

11 U.S.C. § 1301(c). Unless a written opposition is filed to the motion within twenty days after it is filed, the codebtor's stay lifts without the necessity of a court order. 11 U.S.C. § 1301(d).

§ 35.13 Exceptions to Automatic Stay

Despite the broad reach of the automatic stay, there are exceptions. Some of the exceptions are—

1. the commencement or continuation of a criminal action or proceeding against the debtor (11 U.S.C. § 362(b)(1));

2. the commencement or continuation of an action for paternity, modification of domestic support obligations, child custody or visitation, dissolution of marriage (unless the action seeks to determine division of property), domestic violence, collection of a domestic support obligation from property that is not included in the

bankruptcy estate, or the withholding of income that is property of the estate or of the debtor for payment of a domestic support obligation (11 U.S.C. § 362(b)(2)(A)–(C));

3. certain acts as specified in the Social Security Act (11 U.S.C. § 362(b)(2)(D)–(G));

4. certain acts to perfect or maintain the perfection of an interest in property (11 U.S.C. § 362(b)(3));

5. the commencement or continuation of proceedings under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction and pursuant police and regulatory powers (11 U.S.C. § 362(b)(4));

6. certain contractual rights exercised by commodity brokers, forward contract merchants, stockbrokers, financial institutions, or securities clearing agencies (11 U.S.C. § 362(b)(6));

7. certain contractual rights exercised by repo participants or financial participants (11 U.S.C. § 362(b)(7));

8. action by the secretary of Housing and Urban Development to foreclose a mortgage or deed of trust covering property consisting of five or more living units (11 U.S.C. § 362(b)(8));

9. certain actions by tax authorities, including—

   a. an audit to determine tax liability;

   b. issuance of a notice of tax deficiency;

   c. a demand for tax returns; and

   d. a tax assessment and issuance of a notice and demand for payment of such an assessment (11 U.S.C. § 362(b)(9));

10. an act by a lessor under a lease of nonresidential real property that has terminated by expiration of the stated term of the lease to obtain possession of the property (11 U.S.C. § 362(b)(10));

11. presentment of a negotiable instrument and giving notice of and protesting dishonor of a negotiable instrument (11 U.S.C. § 362(b)(11));

12. certain acts by the U.S. secretary of education regarding the eligibility of the debtor to participate in education loan programs (11 U.S.C. § 362(b)(16));

13. certain contractual rights exercised by swap participants or financial participants (11 U.S.C. § 362(b)(17));

14. the creation or perfection of a statutory lien for an ad valorem property tax or other special tax or special assessment on real property imposed by a government unit if the tax comes due after the petition was filed (11 U.S.C. § 362(b)(18)); and

15. the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant if the lessor has obtained before the date of the filing of the bankruptcy petition a judgment for possession of the property (11 U.S.C. § 362(b)(22)).

§ 35.14 Termination of Automatic Stay

An automatic stay terminates automatically against acts against property of the estate when such property is no longer property of the estate. 11 U.S.C. § 362(c)(1). The stay also terminates

automatically against all other actions and proceedings subject to the automatic stay when the bankruptcy proceeding is closed or dismissed or when the debtor receives or is denied a discharge. 11 U.S.C. § 362(c)(2). While the automatic stay in a Chapter 7 case has a limited duration, the automatic stay in a Chapter 12 or Chapter 13 case may not terminate for years. However, it is possible to obtain an earlier termination of the automatic stay.

If the debtor is an individual and the debtor was a debtor in a prior bankruptcy case that was pending within the preceding one year but was dismissed, the automatic stay expires thirty days after the filing of the subsequent case unless the debtor files a motion to continue the stay and obtains an order from the court continuing the stay. 11 U.S.C. § 362(c)(3). If two or more cases were pending for an individual debtor within the previous year but were dismissed, the automatic stay does not go into effect. 11 U.S.C. § 362(c)(4)(A).

Relief from Automatic Stay for Secured Creditors: A secured party or a mortgagee may obtain relief from the automatic stay if he can establish that the debtor does not have equity in the encumbered property and the encumbered property is not necessary for an effective reorganization. 11 U.S.C. § 362(d)(2).

A secured creditor may also obtain relief from the bankruptcy stay by showing that the creditor's interest in the property is not adequately protected. 11 U.S.C. § 362(d)(1). See section 35.15 below for a discussion of adequate protection.

The party requesting relief from the stay has the burden of establishing the debtor's lack of equity in the encumbered property. The party opposing the relief from the stay has the burden of proof on all other issues. 11 U.S.C. § 362(g).

§ 35.15 Adequate Protection

"Adequate protection" is a critical issue in controversies under Bankruptcy Code sections 362 (relief from the automatic stay), 363 (use, sale, or lease of property), and 364 (obtaining credit). Unfortunately, the Code does not define adequate protection.

When adequate protection is required under Bankruptcy Code sections 362, 363, and 364, the three nonexclusive methods of providing adequate protection are—

1. requiring the trustee to make periodic cash payments to the lien creditor equal to the decrease in value of the creditor's interest in the collateral;
2. providing to the entity an additional or replacement lien; and
3. granting such other relief (except allowing the creditor to claim an administrative expense under section 503(b)(1)) as will compensate the creditor for the decrease in value of the creditor's interest in the collateral.

11 U.S.C. § 361.

§ 35.16 Prepetition Repossession

An important issue that has generated sharp controversy is whether a creditor that has lawfully repossessed a debtor's property prepetition violates the automatic stay simply by retaining possession of that property postpetition until adequate protection is assured. Most courts have held that the repossessing secured creditor must turn over the lawfully repossessed property on demand, even without adequate protection, or be in violation of the stay. *See, e.g., Thompson v. General Motors Acceptance Corp.*, 566 F.3d 699, 701–03 (7th Cir. 2009); *In re Bunton*, 246 B.R. 851 (Bankr. N.D. Ohio 2000); *In re Zaber*, 223 B.R. 102 (Bankr. N.D. Tex. 1998); *In re Bersheidt*, 223 B.R. 579 (Bankr. D. Wyo. 1998);

but see In re Fitch, 217 B.R. 286 (Bankr. S.D. Cal. 1998) (refusal of creditor to return vehicle without adequate protection did not violate automatic stay).

§ 35.17 Consequences of Violating Stay

An individual injured by a willful violation of the automatic stay is entitled to recover actual damages, including costs and attorney's fees, and, in appropriate circumstances, may recover punitive damages. 11 U.S.C. § 362(k)(1). If, however, the violation was made in good faith, the damages may be limited to actual damages. 11 U.S.C. § 362(k)(2). "Individual" in this context includes only human beings, not other entities. *In re LATCL&F*, Nos. 3:99-CV-2953-R, 398-35100-HCA, 2001 WL 984912 (N.D. Tex. Aug. 14, 2001); *but see In re Freemyer Industrial Pressure, Inc.*, 281 B.R. 262 (Bankr. N.D. Tex 2002).

Typically, the debtor or other party must bear the damages unless the violation is, in fact, willful. Willfulness is proven if the violator knew of the automatic stay and his actions were intentional. *Mitchell v. BankIllinois*, 316 B.R. 891, 901 (S.D. Tex. 2004). Willfulness may also occur even if the stay is violated before notice of the bankruptcy if the violator does not act to restore the status quo when he does receive notice. *In re Wariner*, 16 B.R. 216, 218 (Bankr. N.D. Tex. 1981); *see also In re Zaber*, 223 B.R. 102, 107 (Bankr. N.D. Tex. 1998).

Actual damages are not necessary to bring and maintain a violation of the stay. *See In re Hill*, 19 B.R. 375 (Bankr. N.D. Tex. 1982). Damages for emotional distress and relational injuries are part of "actual damages." If property of the debtor is taken and held, actual damages may be measured by the value of the property at the time it is taken plus a rate per day for every day the property was out of the debtor's possession. Further, the court must award attorney's fees in a successful action for violation of the stay, and such fees are not limited to the amount of the debtor's damages. *See* 11 U.S.C. § 362(k).

[Sections 35.18 through 35.20 are reserved for expansion.]

III. Claims

§ 35.21 Types of Claims

General Unsecured Claims: The Bankruptcy Code determines the order in which unsecured claims will be paid if there is not enough money to pay all unsecured claims in full. *See* 11 U.S.C. §§ 502, 507.

Priority Claims: A priority claim is an unsecured claim that is entitled to be paid ahead of other unsecured claims that are not entitled to priority status. 11 U.S.C. § 507.

Secured Claims: A creditor may have a secured claim either through a security interest in property in the bankruptcy estate or because of a lien. "Security interest" means a lien created by an agreement. 11 U.S.C. § 101(51). A lien is a charge against or interest in property to secure payment of a debtor or performance of an obligation. 11 U.S.C. § 101(37). A judicial lien is a lien obtained by judgment, levy, sequestration, or another legal or equitable process or proceeding. 11 U.S.C. § 101(36).

For an explanation of the mechanics of a determination of the value of a secured claim, see 11 U.S.C. § 506(a).

Practice Note: If your client is oversecured, include interest on the claim and any reasonable fees, costs, or charges provided for under the agreement under which the claim arose. *See* 11 U.S.C. § 506(b).

Administrative Claims: A party that agrees to postpetition financing of the debtor may seek priority status on such financing, including—

1. credit with priority over any or all administrative expenses of the kind specified in 11 U.S.C. §§ 503(b), 507(b);
2. credit secured by a lien on property of the estate that is not otherwise subject to a lien; or
3. credit secured by a junior lien on property of the estate that is subject to a lien.

See 11 U.S.C. § 364(c).

The bankruptcy court may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if the trustee is unable to obtain such credit otherwise, and there is adequate protection of the interest of the holder of the lien on the property of the estate on which the senior or equal lien is proposed to be granted. 11 U.S.C. § 364(d).

§ 35.22 Proof of Claim

The proof of claim is a written statement describing the reason a debtor owes a creditor money. There is an official form for this purpose (*see* Fed. R. Bankr. P. 3001, 3003, and 3005 and Official Bankruptcy Form No. 10), which is reproduced at form 35-6 in this chapter.

For Chapter 7, 12, or 13 cases, the proof of claim must be filed within ninety days after the first date set for the creditors meeting; however, some exceptions apply:

1. A governmental unit has 180 days after the entry of the order for relief to file a proof of claim.
2. An infant or incompetent may have the deadline extended at the court's discretion.
3. An unsecured claim that is the result of a judgment may be filed within thirty days after the judgment becomes final.
4. A claim arising from the rejection of an executory contract or lease "may be filed within such time as the court may direct."
5. If a no-asset notice was served, and thereafter a notice of distribution is served, parties have ninety days after the mailing of the notice of distribution to file proofs of claim.

Fed. R. Bankr. P. 3002(c).

Several courts have held that the bankruptcy court does not have authority in a case under Chapter 7, 12, or 13 to allow a late-filed proof of claim outside the exceptions listed in Fed. R. Bankr. P. 3002(c). *See, e.g., In re McLarry*, 273 B.R. 753 (Bankr. S.D. Tex. 2002); *In re Kelley*, 259 B.R. 580 (Bankr. E.D. Tex. 2001); *In re Duarte*, 146 B.R. 958 (Bankr. W.D. Tex. 1992). A debtor or trustee may file a proof of claim for a creditor that fails to timely file within thirty days after the rule 3002(c) deadline passes. Fed. R. Bankr. P. 3004.

The filing of a proof of claim in a case under Chapter 9 or 11 of the Bankruptcy Code is governed by Fed. R. Bankr. P. 3003. In cases under Chapter 9 or 11, the court may extend the time to file a proof of claim for cause. Fed. R. Bankr. P. 3003(c)(3); *see also In re Eagle Bus Manufacturing, Inc.*, 62 F.3d 730, 737 (5th Cir. 1995) (creditor's late-filed proof of claim was allowed where there was no evidence of bad faith and neither other creditors nor debtor would be prej-

udiced by allowing claim); *In re AMWC, Inc.*, 109 B.R. 210, 214 (Bankr. N.D. Tex. 1989) (court reviewed motion to file late proof of claim under "excusable neglect" test). See form 35-7 for a sample creditor's motion to allow late filing of proof of claim.

Practice Note: In a no-asset case, many practitioners will file a proof of claim on receipt of the initial notice of the bankruptcy in the event that assets are later discovered.

§ 35.23 Objections to Claim

At any time before the case is closed, the trustee, the debtor-in-possession, or another party in interest may file an objection to a proof of claim. *See* 11 U.S.C. § 502. To oppose the objection, the creditor must file a written response to the objection with the bankruptcy court. Although section 502(a) provides that timely filed proofs of claim are presumed to be valid and the trustee has the burden of proof, in practice, the creditor must be able to present evidence at the hearing to show that a debt is owed, the amount of the debt, and, if the creditor is secured, that the creditor's rights in the collateral are perfected.

§ 35.24 Setoffs

A creditor may offset a mutual debt owing by the creditor to the debtor that arose before the commencement of the case against a claim the creditor has against the debtor that arose before the commencement of the case. However, a setoff will not be allowed if—

1. the claim of the creditor against the debtor is disallowed;
2. the claim was transferred, by an entity other than the debtor, to the creditor after commencement of the case;
3. the claim was transferred, by an entity other than the debtor, to the creditor after ninety days before the date the petition was filed and while the debtor was insolvent; or
4. the debt owed to the debtor by the creditor was incurred by the creditor after ninety days before the date of filing, while the debtor was insolvent, and for the purpose of obtaining a right of setoff against the debtor.

11 U.S.C. § 553(a).

§ 35.25 Executory Contracts and Unexpired Leases

The bankruptcy trustee is authorized to assume or reject executory contracts and unexpired leases; the decision to assume or reject a contract or lease must be approved by the court. 11 U.S.C. § 365(a). The statute does not define the term *executory contract*, but legislative history indicates that the term generally includes contracts on which performance remains due to some extent on both sides. *See* H.R. Rep. No. 95-595, at 347 (1977); S. Rep. No. 95-989, at 58 (1978) (quoted in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984)). Section 365 contains provisions allowing the trustee to cure certain defaults before assumption and to provide adequate assurance of future performance of contracts that are in default. *See* 11 U.S.C. § 365(b). Section 365 permits not only the assumption but also the assignment of most contracts, notwithstanding contractual provisions that might otherwise limit assumption or assignment. *See* 11 U.S.C. § 365(f).

For a more detailed discussion of executory contracts and unexpired leases, see part VII. in this chapter.

[Sections 35.26 through 35.30 are reserved for expansion.]

IV. Chapter 7 Bankruptcy

§ 35.31 Introduction

A bankruptcy under Chapter 7 of the Bankruptcy Code is often referred to as liquidation bankruptcy. The goal is straightforward: to allow an individual debtor to obtain a discharge, keep exempt property allowed by law, and provide an orderly liquidation. The typical debtor in a Chapter 7 bankruptcy is one who has primarily unsecured debts, who does not have significant problems with secured creditors, and who does not have potential problems with discharge, dischargeability, or substantial abuse.

A debtor who filed a Chapter 7 bankruptcy and received a discharge within the previous eight years is ineligible for Chapter 7 relief. 11 U.S.C. § 727(a)(8); *see also* 11 U.S.C. § 727(a)(9).

Under the federal Fair Credit Reporting Act, a bankruptcy under Chapter 7 remains on an individual's credit record for ten years. 15 U.S.C. § 1681c(a)(1).

§ 35.32 Exemptions

Under Chapter 7, the individual debtor selects exempt property on Official Bankruptcy Form 6C, better known as Schedule C. If no one objects to the claim of exemptions within thirty days after the conclusion of the first meeting of creditors, the debtor keeps the property listed on Schedule C. *See Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992). In Texas, the debtor may choose between two potential lists of exempt property: the Texas state exemptions and the federal exemptions. See section 35.32:1 below for discussion of the Texas state exemptions and section 35.32:3 for discussion of the federal exemptions.

§ 35.32:1 Texas State Exemptions

When the Bankruptcy Code was passed in 1979, states were given the option to "opt out" of the federal exemptions and prohibit their citizens from claiming the list of federal exemptions. Texas is one of sixteen states that chose not to opt out; therefore, debtors in Texas may choose between the Texas state exemptions and the federal exemptions. In most cases, the Texas state exemptions are more generous than the federal exemptions.

Homestead Exemption: The Texas homestead exemption allows unlimited value as long as the homestead is located on not more than ten acres in the city or not more than 200 acres for a family in the country. Tex. Prop. Code § 41.002. In contrast, the federal exemption allows equity not to exceed $21,625 per spouse. 11 U.S.C. § 522(d)(1). A million-dollar house on ten urban acres would be exempt under Texas law, while only $43,250 in equity would be available to a couple under the federal exemptions. For a more detailed discussion of the Texas homestead exemption, see sections 27.35 through 27.40 in this manual. Some limits, however, are placed on the amount of the state homestead exemption that may be allowed to a debtor in bankruptcy. A debtor electing state exemptions may not exempt any interest in real or personal property that the debtor or a dependent of the debtor uses as a residence that was acquired by the debtor during the 1,215-day period (three years plus 120 days) preceding the date of the filing of the petition that exceeds, in the aggregate, $136,875 in value. This limit does not include any interest transferred from the debtor's previous principal residence. 11 U.S.C. § 522(p).

Personal Property Exemptions: See sections 27.41 and 27.42 for a full discussion of the Texas personal property exemptions.

§ 35.32:2 Federal Exemptions

Most of the federal exemptions place strict limits on each type of property and, in some cases, the value of each specific item under a type of property. *See* 11 U.S.C. § 522(d). The federal exemptions have some aspects, however, that benefit a small class of debtors who do not have to worry about excess equity in their homestead.

"Wild Card" Exemption: The exemptions include what is known as the "wild card." With this exemption, each debtor can claim $1,150 plus up to $10,825 of any unused amount of the homestead exemption for any property. 11 U.S.C. § 522(d)(5). In contrast, cash is not exempt under Texas law. *See* Tex. Prop. Code § 42.002.

Crime Victim's Awards: The federal exemptions include provisions for awards under crime victim's reparation laws, payment on account of wrongful death, and personal injury awards. 11 U.S.C. § 522(d)(11). None of these is exempt under Texas law.

§ 35.32:3 Objecting to Exemptions

It is the duty of the trustee to review the debtor's claim of exempt property and to file an objection if the claimed exemptions exceed the lawful items or amount.

§ 35.33 Discharge

The bankruptcy discharge makes certain debts unenforceable. The discharge has the effect of an injunction prohibiting enforcement of the discharged debt. Any judgments against the debtor with respect to discharged debts become void. 11 U.S.C. § 524(a).

Section 727 of the Bankruptcy Code defines which debtors are entitled to a discharge. *See* 11 U.S.C. § 727. Discharge is an all-or-nothing proposition; either the debtor receives a discharge, or he does not.

Certain debtors are not entitled to a Chapter 7 discharge regardless of the debtor's culpability. A debtor is not eligible for discharge under Chapter 7 if—

1. the debtor is not an individual (corporations and partnerships may receive a discharge only under Chapter 11 or 12) (11 U.S.C. § 727(a)(1));
2. the debtor has been granted a discharge under Chapter 7 or 11 in a case filed within the preceding eight years (11 U.S.C. § 727(a)(8)); or
3. the debtor received a discharge under Chapter 12 or 13 in a case commenced within the preceding six years that paid less than 70 percent of the debts (although in some instances the debtor may be eligible to receive a discharge under Chapter 13) (11 U.S.C. § 727(a)(9)).

A debtor may also be ineligible for discharge because of an infraction against the bankruptcy system. These infractions often constitute criminal offenses as well. *See* 18 U.S.C. § 152. Grounds for denying discharge based on the debtor's culpability include—

1. the transfer, removal, mutilation, or concealment of the debtor's property with intent to hinder, delay, or defraud a creditor or the trustee within one year before filing for bankruptcy (11 U.S.C. § 727(a)(2)(A));
2. the transfer, removal, mutilation, or concealment of property of the estate with intent to hinder, delay, or defraud a creditor or the trustee (11 U.S.C. § 727(a)(2)(B));
3. the concealment, destruction, mutilation, falsification, or failure to keep or

preserve financial records sufficient to determine the debtor's financial condition (11 U.S.C. § 727(a)(3));

4. knowingly and fraudulently making a false oath or account or presenting a false claim in connection with the case (11 U.S.C. § 727(a)(4)(A), (B));

5. bribery (11 U.S.C. § 727(a)(4)(C));

6. withholding recorded information, books, documents, records, and papers relating to the debtor's property or financial affairs from the trustee or a court officer (11 U.S.C. § 727(a)(4)(D));

7. failure to satisfactorily explain any loss of assets or deficiency of assets to meet the debtor's liabilities (11 U.S.C. § 727(a)(5));

8. refusal to obey any lawful order of the court or refusal to answer a question (except where there is a proper claim of the privilege against self-incrimination and no immunity is granted) (11 U.S.C. § 727(a)(6)); and

9. commission of any act prohibited under 11 U.S.C. § 727(a)(2)–(6) in another case concerning an insider during the year before bankruptcy (11 U.S.C. § 727(a)(7); *see also* 11 U.S.C. § 101(31)).

No action is required to deny discharge under 11 U.S.C. § 727(a)(1), (8), or (9); these provisions are self-executing. *See* Fed. R. Bankr. P. 4004(c)(1). A timely filed complaint is necessary, however, to deny discharge under 11 U.S.C. § 727(a)(2)–(7). *See* Fed. R. Bankr. P. 4004(a), (b). A complaint objecting to discharge must be filed not later than sixty days following the first date set for the meeting of creditors pursuant to section 341(a). Fed. R. Bankr. P. 4004(a). In a Chapter 11 case, the complaint must be filed not later than the first date set for the hearing on confirmation. Fed. R. Bankr. P. 4004(a). The court may extend this deadline as long as the request is made before the deadline. Fed. R. Bankr. P. 4004(b).

See form 35-16 in this chapter for a sample complaint to determine dischargeability.

A discharge may be revoked in some instances. Within one year of discharge, the discharge can be revoked if the debtor obtains his discharge through fraud and the party requesting revocation did not know of the fraud until after the discharge was granted. 11 U.S.C. § 727(d)(1), (e)(1). The discharge may be revoked before the later of one year after granting the discharge or the date the case is closed if—

1. the debtor knowingly and fraudulently acquires or becomes entitled to acquire property of the estate and fails to disclose it;

2. the debtor fails to obey a lawful order or respond to a material question; or

3. the debtor fails to explain satisfactorily a material misstatement in an audit or fails to make records and documents available for inspection, as referred to in section 586(f) of title 28.

11 U.S.C. § 727(d)(2)–(4), (e)(2).

The trustee, a creditor, or the U.S. trustee may request revocation of a discharge. The discharge may be revoked only after notice and a hearing. 11 U.S.C. § 727(d).

Waiver of Discharge: The debtor may choose to waive his discharge under 11 U.S.C. § 727(a)(10).

Time between Successive Cases: A debtor cannot receive a discharge under Chapter 7 if the debtor has received a discharge under Chapter 7 or Chapter 11 during the preceding eight years or under Chapter 13 during the preceding six years. 11 U.S.C. § 727(a)(8), (a)(9). A debtor cannot receive a discharge under Chapter 13 if

the debtor received a discharge under Chapter 13 during the previous two years or under Chapter 7, 11, or 12 during the previous four years. 11 U.S.C. § 1328(f).

§ 35.34 Dischargeability

Automatically Nondischargeable: Certain debts require no action to ensure their nondischargeability. A creditor may attempt to enforce these debts long after the bankruptcy is discharged without seeking permission from the bankruptcy court. Some debts that are automatically nondischargeable include—

1. most debts for taxes, although some income taxes may be discharged under certain circumstances (11 U.S.C. § 523(a)(1));
2. debts that are neither listed nor scheduled if they were not listed in time to file a proof of claim or in time to file a timely nondischargeability complaint (11 U.S.C. § 523(a)(3));
3. a domestic support obligation (including some debts for attorney's fees used to establish the obligation) (11 U.S.C. § 523(a)(5); *see also In re Hudson*, 107 F.3d 355 (5th Cir. 1997); *In re Fulton*, 236 B.R. 626 (Bankr. E.D. Tex. 1999));
4. most debts for fines, penalties, or forfeitures payable to and for the benefit of a governmental unit (11 U.S.C. § 523(a)(7));
5. student loans, unless the debtor obtains a determination that failure to discharge the debt would impose an undue hardship on the debtor and the debtor's dependents (11 U.S.C. § 523(a)(8); *see also In re Gerhardt*, 348 F.3d 89 (5th Cir. 2003) (outlining test for "undue hardship"));
6. debts for death or personal injury caused by the debtor's operation of a motor vehicle or boat while intoxicated from using alcohol, a drug, or another substance (although a debt for property damage caused while intoxicated may be dischargeable) (11 U.S.C. § 523(a)(9));
7. debts the debtor waived or was denied a discharge for in a prior case (11 U.S.C. § 523(a)(10));
8. instances of fiduciary fraud against an insured bank or savings and loan (11 U.S.C. § 523(a)(11));
9. malicious or reckless failure to maintain a commitment to maintain the capital of an insured depository institution (11 U.S.C. § 523(a)(12));
10. restitution orders issued under title 18 of the United States Code (11 U.S.C. § 523(a)(13));
11. debts incurred to pay a nondischargeable tax (11 U.S.C. § 523(a)(14)); and
12. condominium fees and homeowners association dues incurred after filing the bankruptcy case as long as the debtor received an actual benefit (such as residing there or renting the property out to a tenant) (11 U.S.C. § 523(a)(16)).

In some instances, the debtor or the creditor may want to obtain a determination that the debt is or is not dischargeable. This is absolutely necessary to establish a hardship discharge of a student loan. *In re Gerhardt*, 348 F.3d 89. Also, because the rules relating to dischargeability of tax debts are quite complicated, it may be preferable to obtain a ruling from the bankruptcy court than to bring the issue before a state court.

There may be questions concerning the nature of domestic support obligations or fact issues sur-

rounding a hardship discharge that require litigation in the bankruptcy proceeding.

Debts that Must Be Proven to Be Nondischargeable: Three categories of nondischargeable debt require the creditor to file a timely complaint seeking a determination of nondischargeability. 11 U.S.C. § 523(c). The creditor's failure to file a timely complaint could result in the loss of the ability to collect the debt. The three categories of debt are—

1. debts for money or property obtained through fraud or false pretenses including money obtained or renewals or extensions obtained through use of a false written financial statement (11 U.S.C. § 523(a)(2));
2. debts incurred as a result of fraud or defalcation while acting in a fiduciary capacity, larceny, or embezzlement (11 U.S.C. § 523(a)(4)); and
3. debts for willful and malicious injury (11 U.S.C. § 523(a)(6)).

The court determines the dischargeability of these debts after notice and hearing. 11 U.S.C. § 523(c)(1).

§ 35.35 Abuse

If the court finds that a debtor's case would constitute an "abuse," the court has the authority to dismiss the case. 11 U.S.C. § 707(b)(1). A motion for dismissal may be brought by the court on its own motion, by the U.S. trustee, the trustee (or bankruptcy administrator), or any party in interest. The abuse concept applies to only an individual debtor who owes primarily consumer debts. 11 U.S.C. § 707(b)(1).

"Abuse" is not defined in the Bankruptcy Code, but section 707(b)(2)(A) of the Code sets out a test for the presumption of abuse. *See* 11 U.S.C. § 707(b)(2).

A finding of abuse will generally not close the door on bankruptcy completely. The court may also, with the debtor's consent, convert the case to Chapter 11 or 13.

§ 35.36 Reaffirmation

Reaffirmation relates to both exempt property and discharge. If a debt is reaffirmed, the debtor does not get the benefit of the discharge of the debt. Reaffirmation is frequently used in the case of secured or nondischargeable debts.

Reaffirmation is sometimes used for secured debts. With a secured debt, the liability on the debt may be dischargeable, but the lien is not discharged. This means that the creditor is still free to enforce its lien once the bankruptcy case is over. The Bankruptcy Code gives debtors three options for dealing with property subject to a lien in Chapter 7: reaffirmation, redemption, or surrendering the collateral. *See* 11 U.S.C. § 521.

The debtor must file with the clerk of the court a statement of his intentions for the retention or surrender of a secured creditor's collateral and to specify whether the debtor intends to redeem (for cash) the collateral or reaffirm the debt secured by the collateral. 11 U.S.C. § 521.

The Fifth Circuit Court has held that the choices under section 521—surrendering the collateral, redeeming it, or reaffirming the debt—are unambiguous and mandatory and that, therefore, there are no other choices. *See In re Johnson*, 89 F.3d 249 (5th Cir. 1996).

Of the three options, reaffirmation and surrender are the most commonly used. Redemption requires paying the value of the property in cash. Obviously, this may be difficult if the collateral is a house or a car. If the debtor wants to keep collateral that has a high value, the only practical option is likely to be reaffirmation of the debt.

The reaffirmation agreement must—

1. be entered into before the discharge is granted; and

2. be filed with the court and either contain a certification from the debtor's attorney that the agreement is voluntary, it does not impose undue hardship, and the debtor has been advised on the legal effect and consequences of the agreement or, if the individual is not represented by an attorney during negotiation of the agreement, the court approves that the agreement does not impose an undue hardship and is in the best interest of the debtor.

11 U.S.C. § 524(c)(1), (3), (6).

Also, the agreement is enforceable only if—

1. the debtor received the disclosures described in 11 U.S.C. § 524(k) at or before the time the debtor signed the agreement;

2. the debtor has not rescinded the agreement before discharge or within sixty days after the agreement is filed with the court (whichever occurs later); and

3. provisions of 11 U.S.C. § 524(d) have been complied with.

11 U.S.C. § 524(c)(2), (4), (5).

See form 35-9 for a sample reaffirmation agreement.

§ 35.37 Lien Avoidance

A debtor may completely avoid certain types of liens on property in which the debtor has an interest if the lien impairs an exemption on that property to which the debtor would otherwise be entitled. 11 U.S.C. § 522(f).

Judicial Liens: Judicial liens are liens "obtained by judgment, levy, sequestration or other legal or equitable process or proceeding," including writs of garnishment. 11 U.S.C. § 101(36). Although judicial liens are avoidable under section 522(f)(1), judicial liens to a spouse, former spouse, or child of the debtor for domestic support are not avoidable. 11 U.S.C. § 522(f)(1)(A). Judgments on mortgage foreclosures are not avoidable. 11 U.S.C. § 522(f)(2)(c).

Nonpossessory, Non–Purchase-Money Security Interests: The debtor may avoid nonpossessory, non–purchase-money security interests in—

1. household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are primarily for the personal or household use of the debtor or the debtor's dependents;

2. implements, professional books, or tools of the trade of the debtor or debtor's dependents; and

3. professionally prescribed health aids for the debtor or the debtor's dependents.

11 U.S.C. § 522(f)(1)(B). Non–purchase-money liens on motor vehicles are not avoidable under section 522(f) because motor vehicles are not considered household goods. A lien on property in which the security interest was taken not only for purchase but for additional funds advanced is not avoidable. Consolidation, renewal, and refinancing loans, however, can transmute a nonavoidable lien into one that is avoidable.

Trustee's Power to Avoid Liens: The trustee may avoid liens and transfers of the debtors. 11 U.S.C. § 544. The trustee can avoid transfers and liens on the debtor's property that could have been avoided by a creditor under the applicable state statute and liens arising by statute

(such as a landlord's lien). The individual debtor may also use these powers when the trustee refuses to do so. 11 U.S.C. § 522(h). The purpose of the "strong arm powers" under section 544 is to cut off unperfected security interests, secret liens, and undisclosed prepetition claims against the debtor's property as of the commencement of the case.

Under section 544, the trustee is granted the following powers:

Status of Creditor with Judicial Lien: The trustee has the status of a creditor with a judicial lien on all property on which a creditor could have obtained a judicial lien. Thus, the trustee has the rights and powers, as of the date of the commencement of the case, to avoid any transfer or obligation of the debtor that is avoidable by a hypothetical creditor and may subordinate any other creditor who holds a security interest in the debtor's property but failed to take the necessary steps to perfect his security interest under applicable state law. 11 U.S.C. § 544(a)(1).

Right of Creditor with Unsatisfied Writ of Execution: The trustee has the rights of a creditor who obtains a writ of execution against the debtor that is returned unsatisfied. The effect of this provision is to vest the trustee with the equitable rights of a hypothetical creditor that has exhausted its legal remedies. The trustee may raise a presumption that the debtor is insolvent and has the ability, in some states, to invoke the equitable doctrine of marshaling. 11 U.S.C. § 544(a)(2).

Right of Bona Fide Purchaser of Real Property: The trustee has the rights of a bona fide purchaser of real property (but not of personal property) if, at the time of the commencement of the case, a hypothetical buyer could have obtained bona fide purchaser status. 11 U.S.C. § 544(a)(3). The trustee has the right to avoid an unrecorded transfer of land. A debtor-in-possession may also prosecute such a cause of action because the test is whether the trustee, not the debtor, qualifies as a bona fide purchaser. Thus, the mortgage valid between the debtor and a mortgagee, which could not be avoided before bankruptcy, may be avoided after bankruptcy. 11 U.S.C. § 544(a)(3).

Right to Avoid Voidable Transfers: The trustee has the right to avoid any transfer of the debtor or obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim. This includes any cause of action under state law for a fraudulent transfer or to avoid a bulk transfer in violation of state law. An actual unsecured creditor must be in existence; otherwise, if there are no creditors against whom the transfer is voidable under state law, the trustee is powerless. 11 U.S.C. § 544(b).

[Sections 35.38 through 35.40 are reserved for expansion.]

V. Chapter 13 Bankruptcy

§ 35.41 Overview

Chapter 13 allows an individual with regular income to file a plan for the reorganization of debts. The three main issues in Chapter 13 are—

1. eligibility to file;
2. confirmation of a plan; and
3. the extent of the discharge.

A complete discussion of Chapter 13 is beyond the scope of this manual. The following is intended to provide the collections practitioner with an idea of the structure of a bankruptcy

under Chapter 13 and some indication of the issues that may arise.

§ 35.42 Eligibility to File

To file for bankruptcy under Chapter 13, a debtor must—

1. be an individual or an individual and the individual's spouse;
2. have regular income; and
3. owe, on the date of filing of the petition, noncontingent, liquidated unsecured debts of less than $360,475 and noncontingent, liquidated secured debts of less than $1,081,400.

11 U.S.C. § 109(e); *see also* 11 U.S.C. § 101(30).

The requirement that a debtor be an individual or an individual and a spouse eliminates corporations and partnerships from filing for bankruptcy under Chapter 13. These entities may reorganize under Chapter 11 or, in rare circumstances, under Chapter 12.

An additional requirement for staying in Chapter 13 is filing all necessary income tax returns. *See In re Koval*, 205 B.R. 72 (Bankr. N.D. Tex. 1996).

§ 35.42:1 "Regular Income"

The requirement that the debtor have regular income simply means that the debtor must have some level of income on a recurring basis. Social Security payments, welfare payments, disability payments, and pension income have all been held to satisfy the regular income test. *See In re Hammonds*, 729 F.2d 1391 (11th Cir. 1984); *In re Devall*, 704 F.2d 1513 (11th Cir. 1983). Support from family members, however, standing alone, will not be sufficient to constitute "regular" income because such support can cease at any time.

Practice Note: The "regular income" test is independent of the feasibility test for confirming a plan. Thus, a debtor may qualify for filing under Chapter 13 but still not have enough income to confirm a plan. In that instance, the case would subsequently be dismissed or converted to Chapter 7.

§ 35.42:2 Debt Limits

The debt limits under Chapter 13 pose another restriction on eligibility. A debtor's eligibility to file under Chapter 13 may depend on whether the debt was contingent or unliquidated.

The Bankruptcy Code does not define the terms *contingent* or *unliquidated*, but the courts have supplied definitions. A debt is "noncontingent, if all events giving rise to liability occurred prior to the filing of the bankruptcy petition." *In re Loya*, 123 B.R. 338, 340 (B.A.P. 9th Cir. 1991). A debt is "liquidated" if the amount can be readily determined with precision and is capable of ascertainment by reference to an agreement or a simple mathematical computation. *In re Elrod*, 178 B.R. 5 (Bankr. N.D. Okla. 1995). Thus, a claim on a promissory note will generally be liquidated, while a tort claim may well be unliquidated. Contingent and unliquidated debts do not count toward the debt limits. *See* 11 U.S.C. § 109(e).

§ 35.43 Codebtor's Stay

11 U.S.C. § 1301 provides that the codebtor's stay does not stop the creditor from pursuing the codebtor if the codebtor became liable on or secured the debt in the ordinary course of the codebtor's business, or the Chapter 13 case is closed or dismissed or converted to a case under Chapter 7 or 11. 11 U.S.C. § 1301(a).

Streamlined provisions are added for a creditor to obtain relief from the codebtor's stay. A motion for relief of the codebtor's stay should be granted if—

1. the codebtor received the consideration for the creditor's claim;
2. the debtor's plan proposes not to pay the claim; or
3. the creditor's interest would be irreparably harmed by the continuation of the codebtor's stay.

11 U.S.C. § 1301(c). Unless a written opposition is filed to the motion within twenty days after it is filed, the codebtor's stay lifts without the necessity of a court order. 11 U.S.C. § 1301(d).

§ 35.44 Confirmation of Chapter 13 Plan

To confirm a Chapter 13 plan, a debtor must meet the following requirements:

1. The debtor must pay all of his "projected disposable income" into a plan for the applicable commitment period to unsecured creditors under the plan if the trustee or holder of an allowed unsecured claim objects to the confirmation (11 U.S.C. § 1325(b)(4)).
2. All priority claims must be paid in full without interest.
3. For secured claims, the debtor must make equal monthly periodic payments that equal at least an amount sufficient to provide the creditor with adequate protection (11 U.S.C. § 1325(a)(5)).
4. Unsecured creditors must receive at least as much as they would receive under a Chapter 7 liquidation (11 U.S.C. § 1325(a)(4)).
5. The plan is submitted in good faith (11 U.S.C. § 1325(a)(7)).
6. All amounts required under a domestic support obligation are paid (11 U.S.C. § 1325(a)(8)).
7. All tax returns are filed (11 U.S.C. § 1325(a)(9)).

See generally 11 U.S.C. §§ 1322, 1325 for more about contents of the plan and confirmation.

See forms 35-14 and 35-15 in this chapter for sample objections to confirmation of a plan under Chapter 13 of the Bankruptcy Code.

§ 35.44:1 Disposable Income

The Bankruptcy Code defines "disposable income" as current monthly income that is received by the debtor (other than certain payments) less amounts reasonably necessary to be expended for the maintenance or support of the debtor or his dependents, a domestic support obligation, or certain charitable contributions. For debtors engaged in business, it does not include income that is necessary for the continuation of the debtor's business. 11 U.S.C. § 1325(b)(2).

Thus, "disposable income" is the debtor's total income less reasonable living expenses and domestic support obligations (and less business expenses for a business debtor). This includes charitable contributions of up to 15 percent of the debtor's income. 11 U.S.C. § 1325(b)(2)(A)(ii). Other types of expenses that constitute living expenses include food, housing, clothing, laundry and cleaning, utilities and telephone, medical, insurance, taxes, support, and transportation. Generally, voluntary contributions to a retirement plan are not considered reasonable living expenses. *See In re Johnson*, 241 B.R. 394, 402 (Bankr. E.D. Tex. 1999).

Private school tuition will probably not be allowed as a reasonable living expense. *Univest-Coppell Village, Ltd. v. Nelson*, 204 B.R. 497 (Bankr. E.D. Tex. 1996). Additionally, payments on secured claims for luxury items, such as a boat, may be objected to by the Chapter 13 trustee. *See, e.g., In re Samadi*, No. 02-30336-

H2-13, 2002 WL 31833254 (Bankr. S.D. Tex. Sept. 30, 2002).

Practice Note: Disposable income is initially based on the schedule of income and expenses submitted by the debtor. If no party objects to this schedule, the amount listed by the debtor will be presumed to be reasonable. Any questionable areas will usually be resolved by negotiation with the Chapter 13 trustee. Only rarely will a creditor object to the proposed budget.

§ 35.44:2 Good Faith

To be entitled to confirmation, the Chapter 13 plan must have been proposed in good faith. 11 U.S.C. § 1325(a)(3). Good faith is generally a fact-specific inquiry into whether the debtor is using Chapter 13 for its intended purpose or is attempting to manipulate the system unfairly. *See, e.g., In re Cedar Shore Resort, Inc.*, 235 F.3d 375, 380 (8th Cir. 2000); *In re Elmwood Development Co.*, 964 F.2d 508, 510 (5th Cir. 1992); *In re Little Creek Development Co.*, 779 F.2d 1068, 1072 (5th Cir. 1986).

Serial Filings: The court shall not grant a discharge under Chapter 13 if the debtor has received a discharge in a case filed under Chapter 7, 11, or 12 during the four-year period preceding the filing of the Chapter 13 petition or if the debtor has received a discharge in a case filed under Chapter 13 during the two-year period preceding the filing of the Chapter 13 petition. 11 U.S.C. § 1328(f). Some courts have found that a "serial filer" has filed in bad faith. *See, e.g., In re Thomas*, 123 B.R. 552 (Bankr. W.D. Tex. 1991). If the court finds that the debtor has acted in bad faith, the court can either lift the stay to allow a secured creditor to foreclose its lien on its collateral or dismiss the case with prejudice. An individual or family farmer who previously filed a petition under the Bankruptcy Code is ineligible for relief if the earlier case had been pending within 180 days before the date on which the newer petition was filed and the earlier case either was dismissed by the court on the ground that the debtor disobeyed orders or failed to appear to prosecute the case or was dismissed when the debtor's motion for relief from the automatic stay was filed. 11 U.S.C. § 109(g).

Practice Note: Section 109 is usually invoked by filing a motion to dismiss the subsequent case. The court then decides if the debtor in the earlier case either dismissed the case voluntarily after a motion for relief had been filed or if the debtor intentionally disobeyed an order of the court.

Automatic Termination of Stay in Subsequent Case: If the debtor is an individual and the debtor was a debtor in a prior bankruptcy case that was pending within the preceding one year but was dismissed, the automatic stay expires thirty days after the filing of the subsequent case unless the debtor files a motion to continue the stay and obtains an order from the court continuing the stay. 11 U.S.C. § 362(c)(3). If two or more cases were pending for an individual debtor within the previous year but were dismissed, the automatic stay does not go into effect. 11 U.S.C. § 362(c)(4)(A).

§ 35.44:3 Payment of Claims

Secured Claims: There are two options for payment of secured claims. One option is to surrender the collateral to the creditor. In this instance, the secured claim is extinguished by surrendering the collateral, and the remaining balance is treated as an unsecured claim. If the debtor wishes to keep the collateral, the debtor must provide for the creditor to retain its lien and be paid the value of its claims with interest. *See* 11 U.S.C. § 1325(a)(5). To pay the secured claim, the debtor may continue to make the regular contractual payments outside the plan and make payments to cure the arrearages within the plan (this is the only option allowed for home mortgages) or make equal monthly periodic

payments that equal at least an amount sufficient to provide the creditor adequate protection. 11 U.S.C. § 1325(a)(5).

The entire secured claim to be paid under the plan (whether it is the arrearage or the entire claim) must be paid in full with interest over the life of the plan. Rather than the contract rate on the debt, the interest rate to be paid will be a "prime-plus" rate calculated by the bankruptcy court based on the circumstances of the estate using the national prime rate adjusted to reflect the additional risk of the bankrupt debtor's nonpayment. *Till v. SCS Credit Corp.*, 541 U.S. 465, 478–79 (2004); *see also Drive Financial Services, L.P. v. Jordan*, 521 F.3d 343, 347 (5th Cir. 2008).

Unsecured Claims: Unsecured creditors get whatever is left over. The two requirements for payment of unsecured creditors are—

1. that the unsecured creditors receive at least as much as they would receive in a Chapter 7 liquidation; and
2. that the debtor pays all of his projected disposable income into the plan for the applicable commitment period.

11 U.S.C. § 1325(a)(4), (b)(1).

As long as these two tests are satisfied, it does not matter what percentage unsecured creditors receive back on their claims.

Practice Note: In Texas, where exemptions are generous, unsecured creditors will frequently receive no distribution in a Chapter 7 case. Therefore, it is frequently easy to satisfy the Chapter 7 liquidation test. However, for a debtor with a business or significant nonexempt property, the Chapter 7 liquidation test may require a much higher distribution to creditors.

Payments: Payments into a Chapter 13 plan are typically made on a monthly basis by payroll deduction. A pay order may be waived if the debtor is self-employed. However, the presumption is that debtors with third-party employers will have their plan payments withheld from their paychecks. If the amount of monthly payments under the plan is insufficient to pay the priority claims, the secured claims, and the minimum required payment to unsecured creditors, the plan will not be confirmable unless the debtor shows an ability to make a balloon payment either at the end of the plan or during the plan term. *See* 11 U.S.C. § 1325(a)(6).

§ 35.44:4 Super Discharge

The super discharge formerly available in Chapter 13 was eliminated effective October 17, 2005. The Chapter 13 discharge is essentially the same as the Chapter 7 one except that the debtor does not receive his discharge until he has completed making all payments under his Chapter 13 plan. 11 U.S.C. § 1328.

[Sections 35.45 through 35.50 are reserved for expansion.]

VI. Avoidance Actions

§ 35.51 Preferential Transfers

A preferential transfer is nothing more than a transfer made within ninety days before filing for bankruptcy while the debtor was insolvent. The term *preferential* is misleading. Advance payments or payments within invoice terms do not fall within the definition of preferential transfers, but payments on long-delinquent accounts may. A "preference" is defined as any transfer of an interest of the debtor in property that—

1. is to or for the benefit of a creditor;

2. is for or on account of an antecedent debt owed by the debtor before the transfer was made;

3. is made while the debtor was insolvent;

4. is made on or within ninety days before the date of the filing of the petition or between ninety days and one year before the date of the filing of the petition if the creditor at the time of the transfer was an insider; and

5. enables the creditor to receive more than the creditor would receive if the case were a case under Chapter 7, the transfer had not been made, and the creditor received payment of the debt to the extent provided by the provisions of the Bankruptcy Code.

11 U.S.C. § 547(b).

§ 35.52 Defenses to Recovery of Preference

There are nine statutory defenses to recovery of a preference under section 547 of the Bankruptcy Code. *See* 11 U.S.C. § 547(c).

§ 35.52:1 Transfers in Exchange for New Value

A preference will not be avoided if it was intended by the debtor and the creditor to or for whose benefit the transfer was made to be a contemporaneous exchange for new value given to the debtor and if it was in fact a substantially contemporaneous exchange. 11 U.S.C. § 547(c)(1).

§ 35.52:2 Transfers in Ordinary Course of Business

If the transfer was made in payment of a debt incurred by the debtor in the ordinary course of the business or financial affairs of the debtor and the transferee or was made according to ordinary business terms, the transfer will not be avoided. 11 U.S.C. § 547(c)(2).

§ 35.52:3 Purchase-Money Lien Perfected within Thirty Days

A security interest in property acquired by the debtor will not create an avoidable preference to the extent that—

1. the security interest secures new value given;

2. a security agreement describing the property was signed at or before the time the new value was advanced;

3. the new value was given by or on behalf of the secured party under the agreement;

4. the new value was given to enable the debtor to acquire the property;

5. the debtor used the new value to acquire the property; and

6. the security interest was perfected within thirty days after the debtor received possession of the property.

11 U.S.C. § 547(c)(3).

§ 35.52:4 New Value

A preference will not be avoided if it is to or for the benefit of a creditor, to the extent that, after the transfer, the creditor gave new value to or for the benefit of the debtor not secured by an otherwise unavoidable security interest and, on account of the new value, the debtor did not

make an otherwise unavoidable transfer to or for the benefit of the creditor. 11 U.S.C. § 547(c)(4).

§ 35.52:5 Perfected Interest in Inventory or Receivables

A preference will not be avoided if it creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interest for such debt on the later of—

1. ninety days before the date of the filing of the petition or, with respect to a transfer to an insider, one year before the date of the filing of the petition; or
2. the date on which new value was first given under the security agreement creating the security interest.

11 U.S.C. § 547(c)(5).

§ 35.52:6 Unavoidable Statutory Lien

A preference will not be avoided if it is the fixing of a statutory lien that is not avoidable under section 545 of the Bankruptcy Code. 11 U.S.C. § 547(c)(6). A statutory lien is avoidable under section 545 if it first becomes effective on the filing of a bankruptcy, is not perfected or enforceable at the time of filing bankruptcy, is for rent, or is a lien of distress for rent. 11 U.S.C. § 545. A perfected Texas mechanic's lien is an example of a statutory lien that may not be avoided under section 545 and therefore qualifies for the defense under section 547(c)(6).

§ 35.52:7 Domestic Support Payments

A preference will not be avoided to the extent a transfer was a bona fide payment of a debt for a domestic support obligation. 11 U.S.C. § 547(c)(7).

§ 35.52:8 Consumer Payments under $600

A preference will not be avoided if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by the transfer is less than $600. 11 U.S.C. § 547(c)(8).

§ 35.52:9 Nonconsumer Payments under $5,850

A preference will not be avoided if, in a case filed by a debtor whose debts are not primarily consumer debts, the aggregate value of all property that constitutes or is affected by the transfer is less than $5,850. 11 U.S.C. § 547(c)(9).

§ 35.53 Statute of Limitations for Recovery of Preferences

A case to recover a preference must be filed before the later of two years after the entry of the order for relief or one year after the appointment of the first trustee in the case as long as the trustee was appointed less than two years after the case was filed or the time the case is closed or dismissed. 11 U.S.C. § 546(a).

§ 35.54 Fraudulent Conveyances

The trustee can recover transfers made within two years before bankruptcy has been filed if they meet the definition of a fraudulent conveyance. 11 U.S.C. § 548. Fraudulent conveyances may also be recovered under applicable state law.

The two types of fraudulent conveyances under the Bankruptcy Code are—

1. transfers made with actual intent to hinder, delay, or defraud; and
2. transfers made for less than reasonably equivalent value.

11 U.S.C. § 548(a)(1).

§ 35.54:1 Intent Standard

The trustee may avoid a transfer made or obligation incurred "with actual intent to hinder, delay or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted." 11 U.S.C. § 548(a)(1)(A). *See, e.g., In re Major Funding Corp.*, 126 B.R. 504, 508 (Bankr. S.D. Tex. 1990) (there was requisite intent to defraud where debtor commingled various corporate accounts and used corporate funds for personal benefit); *In re Missionary Baptist Foundation of America, Inc.*, 24 B.R. 973, 976 (Bankr. Tex. 1982) (no intent where debtor continued to make charitable contributions while creditors were not paid).

§ 35.54:2 Financial Standard

The trustee may avoid a transfer that was made for "less than a reasonably equivalent value" and the debtor—

1. was insolvent or became insolvent as a result of the transfer;
2. was about to engage in a business or transaction for which the debtor's remaining property was an unreasonably small capital;
3. intended to incur or believed the debtor would incur debts beyond the debtor's ability to repay; or
4. made the transfer or incurred the obligation to or for the benefit of an insider under an employment contract and not in the ordinary course of business.

11 U.S.C. § 548(a)(1)(B).

Securing Existing Debt: The definition of "value" under section 548 includes the securing of a present or antecedent debt. 11 U.S.C. § 548(d)(2)(A). Therefore, granting a lien to secure an existing debt cannot constitute a transfer for less than reasonably equivalent value.

Foreclosures: The consideration paid at a foreclosure sale conducted in accordance with state law conclusively establishes "reasonably equivalent value." *BFP v. RTC*, 511 U.S. 531, 545 (1994).

Charitable Contributions: Charitable contributions made by an individual are protected from recovery as long as the contribution did not exceed 15 percent of the annual gross income of the debtor or, if the transfer was greater than 15 percent of the annual gross income of the debtor, it was "consistent with the practices of the debtor in making charitable contributions." 11 U.S.C. § 548(a)(2). *See also* 11 U.S.C. § 548(d)(3).

§ 35.54:3 Protection for Good-Faith Transferees

If a transfer is recovered from a good-faith transferee who gave value, the transferee is entitled to a lien on the property recovered or may retain the property to the extent of the value given. 11 U.S.C. § 548(c).

§ 35.54:4 Statute of Limitations for Actions to Recover Fraudulent Conveyances

An action to recover a fraudulent conveyance must be brought before the later of two years after the entry of the order for relief or one year after the first trustee is appointed, as long as the trustee is appointed before the expiration of two years; or the time the case is closed or dismissed, whichever is earlier. 11 U.S.C. § 546(a).

[Sections 35.55 through 35.60 are reserved for expansion.]

VII. Executory Contracts and Unexpired Leases

§ 35.61 Scope of Executory Contract Provisions

The trustee is authorized to assume or reject executory contracts. 11 U.S.C. § 365(a). The trustee is empowered to cure certain defaults before assumption and to provide adequate assurance of future performance of contracts that are in default. 11 U.S.C. § 365(b)(1). The trustee may also assign most contracts, notwithstanding contractual provisions that might otherwise limit assumption or assignment. 11 U.S.C. § 365(f). The nondebtor party to the contract may still insist on performance from the debtor rather than a trustee. 11 U.S.C. § 365(c).

The Bankruptcy Code does not define the term *executory contract*. Legislative history indicates that the term generally includes contracts under which performance remains due to some extent on both sides. *See* H.R. Rep. No. 95-595, at 347 (1977); S. Rep. No. 95-989, at 58 (1978); *see also NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

§ 35.62 Deadlines for Assumption or Rejection

Section 365(d) of the Bankruptcy Code fixes the time within which the trustee must assume or reject an unexpired lease or executory contract. *See* 11 U.S.C. § 365(d). In a case under Chapter 7 of the Bankruptcy Code, the trustee must assume or reject an executory contract or unexpired lease of residential real property or of the debtor's personal property within sixty days after the order for relief (there is a different time frame for nonresidential real property; *see* 11 U.S.C. § 365(d)(4)). An extension of this deadline can be accomplished only by filing a motion with the court and obtaining the court's approval. *See* 11 U.S.C. § 365(d)(3), (d)(4). If the trustee fails to act within the period established by section 365, the contract or lease is deemed rejected by operation of law. 11 U.S.C. § 365(d)(1), (d)(4).

In a case under Chapter 9, 11, 12, or 13 of the Bankruptcy Code, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor any time before confirmation of the plan. But the court, on the request of any party to the contract or lease, may order the trustee to determine within a specified period whether to assume or reject the contract or lease. 11 U.S.C. § 365(d)(2). See forms 35-19 and 35-20 in this chapter for a motion compelling assumption or rejection of an unexpired lease and its corresponding order.

A lease of nonresidential real property is governed by section 365(d)(4), and the trustee must assume or reject the lease within the specified time frame or obtain a court order extending the deadline. Otherwise, the lease will be deemed rejected. 11 U.S.C. § 365(d)(4).

§ 35.63 Effects of Existing Defaults

The bankruptcy trustee may not assume an executory contract or unexpired lease on which there has been a default unless the trustee complies with three requirements. The trustee must—

1. cure the default or provide adequate assurance that the default will be promptly cured (with certain exceptions);
2. compensate or provide adequate assurance that the trustee will promptly compensate the other party to the con-

tract or lease for any pecuniary loss to the party resulting from the default; and

3. provide adequate assurance of future performance under the contract or lease.

11 U.S.C. § 365(b)(1).

§ 35.64 Effect of Rejection

If the trustee rejects the executory contract or lease, the rejection generally constitutes a breach of the contract or lease. 11 U.S.C. § 365(g), (h). The other party in a rejected lease will be allowed to keep any money held as deposit and may also seek reimbursement for any amounts due under the lease agreement, subject to the limits of the Bankruptcy Code. The claim of a lessor for damages resulting from the termination of a lease of real property cannot exceed the rent reserved under the lease for the greater of one year or 15 percent, not to exceed three years of the remaining term of the lease plus any unpaid rent due under the lease. 11 U.S.C. § 502(b)(6).

§ 35.65 Allowance of Administrative Expense

A creditor may be entitled to an administrative priority claim for the "actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A). Unless a trustee immediately rejects an unexpired lease for nonresidential real property, the landlord has what amounts to a superpriority administrative claim for the first sixty days after the debtor has filed for relief under the Bankruptcy Code. 11 U.S.C. § 365(d)(1), (3); *see also* 11 U.S.C. § 503(b)(1).

[Reserved]

Form 35-2

Note: Parts of the following form—the generic pleading descriptions and Bankruptcy Code and rule references—are applicable to bankruptcy courts in all four districts of Texas, but the negative notice references and service requirements are specific to the Eastern District. The practitioner should consult the court for the district in which he intends to file for any additional requirements. This form is

Guide to Practice and Procedures—Eastern District of Texas

GUIDE TO PRACTICE AND PROCEDURES[1]
UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
(Revised December 1, 2011)

Description of Desired Action	Applicable Bankruptcy Code Section	Applicable Federal and Local Rules[1]	Type of Pleading Required [2]	Applicable Negative Notice (Suspense) Language[3]	Type of Pleading Notice Required [4]
Abandon, Intent of Trustee to	§ 554(a)	BR 6007 LBR 6007	Notice	14 - Day	Matrix[5]
Abandon, to Compel Trustee to	§ 554(b)	BR 6007 LBR 6007	Motion	14 - Day	Matrix

[1] This guide reflects the provisions of the Local Rules of Bankruptcy Procedure (LBR) which became effective on December 1, 2009 and as thereafter amended. The Local Rules are now available on the Eastern District Bankruptcy Court's website — www.txeb.uscourts.gov.

[2] For general guidelines governing motion practice and preparation for hearings on contested matters, you should consult LBR 9013 and LBR 9014.

[3] Pleadings requiring 21-day negative notice language should be accompanied by a proposed order substantially conforming with *TXEB Local Form 9007-a.* Additionally, pleadings requiring 14-day negative notice language should be accompanied by a proposed order substantially conforming with *TXEB Local Form 4001.*

[4] LBR 9013(f) requires service, not merely upon certain specified parties in specified chapters, but also upon: (1) any party entitled to such under the Federal Rules of Bankruptcy Procedure and (2) any party who has requested notice.

[5] Pleadings requiring service on the matrix must be served upon all parties listed on the master mailing list (matrix) as constituted by the Court on the date of service. An updated matrix sufficient to meet this standard may be downloaded in a particular case from the "Reports" section of the CM-ECF system.

Description of Desired Action	Bankr. Code Section	Applicable Rules	Pleading Required	Neg. Notice Language	Pleading Notice Required
Abstention from Particular Proceeding	28 USC § 1334(c)	BR 5011(b)	Motion	14 - Day	Adv. Parties
Accounting by Custodian	§ 543	BR 6002	Motion	21 - Day	LBR 9013(f)
Administrative Expense, Allowance of	§ 503	None	Motion	21 - Day	Matrix
Adversary Complaint	Various	BR 7001 LBR 7003	Complaint	None	BR 7004
Adversary Proceedings: Motion Practice in	None	LBR 7007	Motion	14 - Day	Adv. Parties
Adversary Proceedings: Obtaining Default Judgment	None	BR 7055 LBR 7055	Motion	None	None
Adversary Proceedings: Obtaining Injunctive Relief / TRO	None	BR 7065 LBR 7065	Application	None	Adv. Parties
Adversary Proceedings: Removal to Bankruptcy Court	28 USC § 1452(a)	BR 9027 LBR 9027	Notice	None	All parties in removed case
Adversary Proceedings: Remand of Removed Case	28 USC § 1452(b)	BR 9027	Motion	14 - Day	All parties in removed case

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Adequate Protection	§ 361	BR 4001 LBR 4001	Motion	14 - Day	LBR 9013(f)
Admission *Pro Hac Vice*	None	LBR 1001(d)	Application	None	None
Alter or Amend Judgment: Adversary [a/k/a motion for reconsideration/new trial/ to vacate order]	None	BR 9023	Motion	14 - Day	Adv. Parties
Alter or Amend Judgment: Contested Matter [a/k/a motion for reconsideration/new trial/ to vacate order]	None	BR 9023	Motion	21 - Day	LBR 9013(f)
Appeals: Extend Time to File Notice of Appeal	None	BR 8002(c)	Motion	14 - Day	LBR 9013(f)
Appeals: For Leave to Appeal	None	BR 8003	Motion	14 - Day	LBR 9013(f)
Appeals: For Stay Pending Appeal	None	BR 8005	Motion	14 - Day	Matrix
Appeals: Request For Certification to Court of Appeals	28 U.S.C. §158(d)(2)	BR 8001(f)	Motion	14 - Day	BRule 8001(f)(3)(B)
Approval of Trustee's Final Report	§ 704(9)	BR 5009	Report	30 - Day	Matrix
Authority to Operate Business [by Trustee]	§ 721	None	Motion	21 - Day	Matrix

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Automatic Stay: Continuation of Stay in Consecutive Case [individual chapter 7-11-13 case only][6]	§362(c) (3)(B)	LBR 4000(a)	Motion	None	Matrix or any affected party
Automatic Stay: Continuation of Stay by Trustee on Personal Property of Individual Debtor	§362(h)(2) §521(a)(6)	LBR 4000(a)	Motion	None	LBR 9013(f)
Automatic Stay: Debtor's Petition Date Certification of Compliance to Invoke Automatic Stay Regarding Lease of Residential Real Property	§362(l)(1)	LBR 4000(b)	Certification	14 - Day	affected lessor
Automatic Stay: Debtor's Post -Petition Certification of Compliance to Continue Automatic Stay Regarding Lease of Residential Real Property	§362(l)(2)	LBR 4000(c)	Certification	14 - Day	affected lessor
Automatic Stay: Imposition of Stay by Small Business Debtor	§362(n)(2)	LBR 4000(a)	Motion	None	Matrix or any affected party
Automatic Stay: Imposition of Stay[7]	§362(c) (4)(B)	LBR 4000(a)	Motion	None	Matrix or any affected party

[6] A motion for continuation of the stay should be accompanied by a proposed deadline order substantially conforming with *TXEB Local Form 4000-a* and a proposed order granting the requested relief substantially conforming to *TXEB Local Form 4000-b*.

[7] A motion for imposition of the stay should be accompanied by a proposed deadline order substantially conforming with *TXEB Local Form 4000-a* and a proposed order granting the requested relief substantially conforming to *TXEB Local Form 4000-b*.

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Automatic Stay: Relief from	§ 362(d)	BR 4001 LBR 4001(b)	Motion	14 - Day	LBR 9013(f)
Automatic Stay: Request to Confirm Status[8]	§362(c)(4)(A); §362(j)	LBR 4000(d)	Request	None	None
Automatic Stay: Damages for Willful Violation	§ 362(k)	None	Motion	21 - Day	LBR 9013(f)
Avoidance of Lien	§ 522(f)	BR 4003(d) LBR 4003(e)	Motion	21 - Day	LBR 9013(f)
Bankruptcy Petition Preparer: Recover Excessive Fees from	§110(h)(3)		Motion	21 - Day	LBR 9013(f)
Bankruptcy Petition Preparer: To Enjoin Practices of	§110(j)(3)		Motion	21 - Day	LBR 9013(f)
Bankruptcy Petition Preparer: To Impose Fine Upon	§110(l)(3)		Motion	21 - Day	LBR 9013(f)

[8] A request to confirm status of automatic stay should be accompanied by a proposed order substantially conforming with *TXEB Local Form 4000-d.*

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Budget Analysis and Credit Counseling: Damages for Willful or Negligent Failure of Agency to Comply with Requirements	§111(g)(2)		Complaint	None	
Budget Analysis and Credit Counseling: Obtain 14-Day Extension of Temporary Exemption	§109(h)(3)	BR 1007(b)(3)	Motion	None	Case trustee; UST
Budget Analysis and Credit Counseling: Certification for 30-Day Temporary Exemption From	§109(h)(3)	BR 1007(b)(3)	Certification	None	LBR 9013(f)
Budget Analysis and Credit Counseling: Permanent Exemption From	§109(h)(4)	BR 1007(b)(3)	Motion	21 - Day	Matrix
Cash Collateral: Authority to Use	§ 363(c)	BR 4001 LBR4001(c)(1)	Motion	14 - Day	Matrix
Cash Collateral: Request for Emergency Hearing [seeking authority to use]	§ 363(c)	BR 4001 LBR 4001(c)(2) LBR 9007(c)	Motion	None	LBR 9013(f)
Cash Collateral: To Prohibit Use	§ 363(c)	BR 4001 LBR 4001	Motion	14 - Day	LBR 9013(f)
Claim, Allowance of Late-Filed	§502(b)(9)	BR 3002(c) BR 3004	Motion	21 - Day	Matrix

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Claim, Objection to[9]	§ 502	BR 3007 LBR 3007	Objection	21 - Day is optional.	LBR 9013(f)
Chapter 7: Objection to Discharge (Due to Prior Discharge)	§ 727(a)(8) § 727(a)(9)	BR 4004(a)	Motion	28 - Day	LBR 9013(f)
Chapter 11: Committee, Appoint or Request for Additional	§ 1102	None	Motion	21 - Day	LBR 9013(f)
Chapter 11: Committee, Change Composition of	§ 1102	None	Motion	21 - Day	LBR 9013(f)
Chapter 11: Disclosure Statement, For Conditional Approval [only by plan proponent in small business case][10]	§ 1125	BR 3017.1 LBR 3017.1(a)	Motion	None	Matrix
Chapter 11: Disclosure Statement, To Waive Requirement [only by plan proponent in small business case][11]	§ 1125	BR 3017.1 LBR 3017.1(b)	Motion	14 - Day	Matrix
Chapter 11: Approve Discharge of Individual Debtor Upon Confirmation	§1141 (d)(5)(A)	None	Motion	21 - Day	Matrix

[9] Any objection to claim should be accompanied by a proposed order substantially conforming with *TXEB Local Form 3007.*

[10] This motion for conditional approval should be accompanied by a proposed order substantially conforming with *TXEB Local Form 3017.1.*

[11] This motion for waiver should be accompanied by a proposed order substantially conforming with *TXEB Local Form 3017.1.*

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Chapter 11: Examiner, Appointment of	§ 1104	BR 2007.1	Motion	21 - Day	Matrix
Chapter 11: Entry of Final Decree [corporation or partnership cases only]	§ 350	BR 3022 LBR 2015(c)(1)	Application	21 - Day	Matrix
Chapter 11: Hearing to Consider Approval of Disclosure Statement	§ 1125	BR 3017 LBR 3017	Notice from Court	None	Matrix
Chapter 11: Hearing on Confirmation of Chapter 11 Plan	§ 1121	BR 3018 LBR 3018	Notice from Court	None	Matrix
Chapter 11: Notice of Plan Completion (individual debtor)[12]	§1141(d)(5)	LBR 4004(b)	Notice	None	None
Chapter 11: Post-Confirmation Modification of Plan	§ 1127	BR 3019 LBR 3019	Motion w/ proposed plan attached	28 - Day (individual) 21- Day (others)	Matrix
Chapter 11: Post-Confirmation Report	None	LBR 2015(c)(1) or 2015(c)(2)(A)	Report	None	Matrix

[12] This notice of plan completion for Chapter 11 individual debtors should substantially conform with *TXEB Local Form 4004-b*.

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Chapter 11: Post-Confirmation Request for Hardship Discharge	§1141 (d)(5)(b)	BR 4007(d) LBR 4004(d)	Motion	21 - Day	Matrix
Chapter 11: Trustee, Appointment of	§ 1104	BR 2007.1	Motion	21 - Day	Matrix
Chapter 11: Trustee, Approval of Appointment	§ 1104	BR 2007.1(C)	Application	None	Matrix
Chapter 11: Trustee, to Resolve Disputed Election	§ 1104	BR 2007.1 (b)(3)(B)	Motion	21 - Day	Matrix
Chapter 11: Trustee, Termination of	§ 1105	None	Motion	21 - Day	Matrix
Chapter 12: Approval of Trustee's Final Report	§ 1202(b)	BR 5009	Report	30 - Day	Matrix
Chapter 12: Co-Debtor Stay Relief	§1201(c)-(d)	None	Motion	14 - Day	LBR 9013(f)
Chapter 12: Hearing on Confirmation of Chapter 12 Plan	§ 1221	BR 2002(a)(8) LBR 3015(d)	Notice from Court	None	Matrix
Chapter 12: Plan & Plan Summary (Pre-Confirmation)	§ 1221	BR 3015 LBR 3015(b)	Plan	None	Matrix
Chapter 12: Post-Confirmation Modification of Plan	§ 1229	BR 3015(g) LBR 3015(h)	Motion w/ proposed plan attached	28 - Day	Matrix

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Chapter 12: Post-Confirmation Request for Hardship Discharge	§ 1228(b)	LBR 4004(d)	Motion	21 - Day	Matrix
Chapter 13: Approval of Trustee's Final Report	§ 1302(b)	BR 5009	Report	30 - Day	Matrix
Chapter 13: Co-Debtor Stay Relief	§1301(c)-(d)	LBR 4001(a)	Motion	14 - Day	LBR 9013(f)
Chapter 13: Debtor's Attorney's Fees in ...	§330(a)(4)(B)	LBR 2016(h)	Application (if required)	21 - Day (if req.)	Matrix, (if required)
Chapter 13: Determine Mortgage Fees, Expenses & Charges	§ 1322(b)(5)	BR 3002.1(e)	Motion	21- Day	LBR 9013(f)
Chapter 13: Determine Final Cure of Mortgage Defaults and Status of Post-Petition Payments	§1322(b)(5)	BR 3002.1(h)	Motion	21- Day	LBR 9013(f)
Chapter 13: Notice of Final Cure Payment by Trustee	§1322(b)(5)	BR 3002.1(c)	Notice	None	LBR 9013(f)
Chapter 13: Objection to Discharge (Due to Prior Discharge)	§ 1328(f)	BR 4004(a)	Motion	28 - Day	LBR 9013(f)
Chapter 13: Plan & Plan Summary (Pre-Confirmation)[13]	§ 1321	BR 3015 LBR 3015(a)	Plan	None	Matrix

[13] A proposed Chapter 13 plan should substantially conform with *TXEB Local Form 3015-a.*

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Chapter 13: Post-Confirmation Request for Hardship Discharge	§ 1328(b)	BR 4007(d) LBR 4004(d)	Motion	21 - Day	Matrix
Chapter 13: Post-Confirmation Modification of Plan	§ 1329	BR 3015(g) LBR 3015(h)	Motion w/ proposed plan attached	28 - Day	Matrix
Compel Action or Enforce Order: Adversary	None	BR 9023	Motion	14 - Day	Adv. Parties
Compel Action or Enforce Order: Contested Matter	Various	None	Motion	21 - Day	LBR 9013(f)
Compensation of Professionals	§ 330 § 331	BR 2016 LBR 2016	Application	21 - Day	Matrix[14]
Compromise or Settlement Agreement, Approval of	None	BR 9019 LBR 9019	Motion	21 - Day	Matrix
Consolidation, Substantive	§ 302(b)	BR 1015(a) LBR 1015	Motion	21 - Day	Matrix
Contempt, Civil	None	BR 9020	Motion	21 - Day	LBR 9013(f)

[14] In lieu of sending the complete fee application with exhibits to all parties on the matrix, a summary of the fee application containing (1) the relevant facts regarding the application, (2) the 21-day negative notice language, and (3) a notification that a complete copy of the application will be sent upon request at no charge, may be sent to the matrix, subject to the requirements of LBR 2016(c).

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Continuance of Hearing	None	None	Motion	None	LBR 9013(f)
Conversion: Chapter 7 case to Ch. 12 or 13 [by debtor]	§ 706(a)	BR 1017 LBR 1017(d)	Motion	14 - Day	Matrix
Conversion: Chapter 7 case to Chapter 11 [by trustee or creditor]	§ 706(b)	BR 1017 LBR 1017(d)	Motion	14 - Day	Matrix
Conversion: Chapter 11 case to Chapter 7 [by debtor]	§ 1112(a)	BR 1017 LBR 1017(d)	Motion	14 - Day	Matrix
Conversion: Chapter 11 case to Ch. 7-12-13 [by trustee or creditor]	§ 1112(b)	BR 1017 LBR 1017(d)	Motion	14 - Day	Matrix
Conversion: Chapter 11 case to Ch. 12 or 13 [by debtor]	§ 1112(d)	BR 1017 LBR 1017(d)	Motion	14 - Day	Matrix
Conversion: Chapter 12 case to Chapter 7 [by debtor]	§ 1208(a)	BR 1017 LBR 1017(d)	Notice of Conversion	None	Matrix
Conversion: Chapter 12 case to Ch. 7 [by trustee or creditor]	§ 1208(d)	BR 1017 LBR 1017(d)	Motion	14 - Day	Matrix
Conversion: Chapter 13 case to Chapter 7 [by debtor]	§ 1307(a)	BR 1017 LBR 1017	Notice of Conversion	None	Matrix

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Conversion: Chapter 13 case to Ch. 7-11-12 [by trustee or creditor]	§ 1307(c)	BR 1017 LBR 1017(d)	Motion	14 - Day	Matrix
Conversion: Chapter 13 case to Ch. 11 or 12 [by debtor]	§ 1307(d)	BR 1017 LBR 1017	Motion	14 - Day	Matrix
Core Proceeding, Determine Existence of	28 USC § 157(b)(3)	None	Motion	21 - Day	adv. parties
Corporate Ownership Statement	None	BR 7007.1	Statement	None	adv. parties
Credit, to Obtain [a/k/a motion to incur debt outside of the ordinary course of business]	§ 364	BR 4001 LBR 4001	Motion	14 - Day	Matrix
Creditor Representation Disclosure, Determine Compliance with....	None	BR 2019	Motion	21 - Day	LBR 9013(f)
Delay Discharge (by Debtor)	None	BR 4004(c)(2)	Motion	None	LBR 9013(f)
Deposit Funds in Court Registry [a/k/a ... for Disposition of Funds]	None	None	Motion	None	Per Court Directive
Disclosure of Names of Minor Children [by UST, case trustee or auditor]	§ 112	None	Motion	21 - Day	LBR 9013(f)

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Dismissal: Chapter 7 Case [for failure to file schedules]	§ 707(a)(3)	BR 1017 LBR 1017(b)	Motion	14 - Day or directly set by Trustee	LBR 9013(f)
Dismissal: Chapter 7 Case [by debtor, trustee or creditor]	§ 707(a)	BR 1017 LBR 1017(b)	Motion	14 - Day or directly set by Trustee	Matrix
Dismissal: Chapter 7 Case for Abuse	§ 707(b)	BR 1017(e) LBR 1017(b)	Motion	14 - Day	LBR 9013(f)
Dismissal: Chapter 12 Case [for failure to file schedules]	§ 1208	BR 1017 LBR 1007(a)	Motion	14 - Day or directly set by UST or Trustee	Matrix
Dismissal: Chapter 11 Case [for failure to file schedules]	§ 1112(e)	BR 1017 LBR 1007(a)	Motion	14 - Day or directly set by UST	Matrix
Dismissal: Chapter 11 Case [by debtor, trustee or creditor]	§ 1112(b)	BR 1017 LBR 1017(b)	Motion	14 - Day or directly set by UST or Trustee	Matrix

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Dismissal: Chapter 12 Case [by debtor,[15] trustee or creditor]	§ 1208(b) § 1208(c)	BR 1017 LBR 1017(b)	Motion	14 - Day or directly set by UST or Trustee	Matrix
Dismissal: Chapter 13 Case [by trustee]	§1307(c)	BR 1017 LBR 1017(b)	Motion	14 - Day or directly set by Trustee	LBR 9013(f)
Dismissal: Chapter 13 Case [by debtor[16] or creditor]	§ 1307(b) § 1307(c)	BR 1017 LBR 1017(b)	Motion	14 - Day	LBR 9013(f)
Disposition of Books & Records, Intent of Trustee Regarding	None	LBR 2015(b)	Notice	21 - Day	LBR 2015(d)
Emergency Hearing, Request for [Need hearing within 7 days or less][17]	None	LBR 9007(b)	Motion w/ affidavit	None	LBR 9013(f)

[15] See TXEB General Order 11-1, issued on January 26, 2011.

[16] *Id.*

[17] This request should be accompanied by a proposed order substantially conforming with *TXEB Local Form 9007-b.*

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Employment of Professional Person[18]	§ 327	BR 2014 LBR 2014	Application	14 - Day	LBR 9013(f)
Employment of Professional Person Nunc Pro Tunc	§ 327	BR 2014 LBR 2014(d)	Motion	21 - Day	Matrix
Examine Debtor's Transactions with Debtor's Attorney	§ 329	BR 2017	Motion	21 - Day	LBR 9013(f)
Executory Contract: Establish Deadline to Assume or Reject	§ 365(d)	BR 6006	Motion	21 - Day	LBR 9013(f)
Executory Contract: Assumption of ... or Rejection of	§ 365	BR 6006	Motion	21 - Day	LBR 9013(f)
Executory Contract: Extension of Deadline to Assume or Reject	§ 365(d)	None	Motion	21 - Day	LBR 9013(f)
Exemptions, Objection to	§ 522	BR 4003 LBR 4003(c)	Objection	21 - Day	LBR 9013(f)
Expedited Hearing, Request for[19] [shorten notice w/expedited hrg. over 5 business days away]	None	LBR 9007(c)	Motion	None	LBR 9013(f)

[18] An application to employ a professional person should be accompanied by a proposed order substantially conforming with *TXEB Local Form 2014.*

[19] Any request for an expedited hearing should be accompanied by a proposed order substantially conforming with *TXEB Local Form 9007-c.*

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Expunging Records: False Involuntary Petition [Dismissed]	§303(l)(3)	None	Motion	None	petitioners & UST
Extension of Time: Claims Bar Date in Chapters 7-12-13 [limited grounds]	§ 501	BR 3002(c)	Motion	None	LBR 9013(f)
Extension of Time: Claims Bar Date in Chapter 11 Case	§ 501	BR 3003(c)(3)	Motion	None	LBR 9013(f)
Extension of Time: Chapter 11 Plan Exclusivity Periods	§ 1121(d)	None	Motion	21 - Day	LBR 9013(f)
Extension of Time: Filing Chapter 12 Plan	§ 1221	BR 3015(a)	Motion	21 - Day	LBR 9013(f)
Extension of Time: Filing Schedules, Statements & Other Required Documents [initial request]	§ 521	BR 1007(c) LBR 1007(b)	Motion	None	LBR 1007(b)
Extension of Time: Filing Schedules, Statements & Other Required Documents [subsequent request]	§ 521	BR 1007(c) LBR 1007(b)	Motion	14 - Day	Matrix
Extension of Time: Deadline to File Complaints to Determine Dischargeability of Debt [by trustee or creditor]	§ 523(c)	BR 4007(c) LBR 4007(a)	Motion	21 - Day	Matrix

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Extension of Time: Deadline to File Complaints to Determine Dischargeability of Debt [by debtor]	§ 523(c)	BR 4007(c) LBR 4007(a)	Motion	None	LBR 9013(f)
Extension of Time: Deadline to File Objections to Discharge [by debtor]	§ 727	BR 4004 LBR 4004	Motion	None	LBR 9013(f)
Extension of Time: Deadline to File New Chapter 13 Plan Under Order Denying Confirmation	None	None	Motion	None	LBR 9013(f)
Extension of Time: Deadline to File Objections to Debtor's Claim of Exemptions	§ 522(l)	BR 4003(b) LBR 4003	Motion	21 - Day	LBR 9013(f)
Extension of Time: Deadline to File Objections to Discharge [by trustee or creditor]	§ 727	BR 4004 LBR 4004	Motion	21 - Day	Matrix
Filing Fee: Request by Individual Debtor for Permission to Pay in Installments	None	BR 1006(b)	Application **[Official Form 3A]**	None	None
Filing Fee: Request by Chapter 7 Individual Debtor To Waive Filing Fee	28 USC § 1930(f)	BR 1006(c)	Application **[Official Form 3B]**	None	None
Filing Fee: Request for Refund	None	None	Application	None	None
Financing Agreement, Approval of	§ 364	BR 4001 LBR 4001	Motion	14 - Day	Matrix

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Health Care Business: Determination of Status	§101(27A)	BR 1021(b)	Motion	21 - Day	Matrix
Incur Secured Debt [see "Credit, to Obtain"]	----------	----------	----------	----------	----------
Joint Administration of Cases	None	BR 1015(b) LBR 1015	Motion	21 - Day	Matrix
Meeting of Creditors (§341): Waive Debtor's Appearance	None	None	Motion	None	Matrix
Meeting of Creditors (§341): Waive Meeting Due to Pre-Petition Solicitation of Plan	§341(e)		Motion	21 - Day	Matrix
New Trial [see "alter/amend judgment"]	----------	----------	----------	----------	----------
Notice to Parties, to Limit or Restrict....	None	BR 9007 LBR 9007	Motion	21 - Day	Matrix
Patient Care: [chapters 7-9-11 only] To Waive Appointment of Patient Care Ombudsman	§ 333(a)(1)	BR 2007.2(a)	Motion	14 - Day	Matrix
Patient Care: [chapters 7-9-11 only] For Appointment of Patient Care Ombudsman	§ 333	BR 2007.2(b)	Motion	14 - Day	Matrix
Patient Care: [chapters 7-9-11 only] To Terminate Appointment of Patient Care Ombudsman	§ 333	BR 2007.2(c)	Motion	14 - Day	Matrix

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Patient Care: [chapters 7-9-11 only] Notice of Ombudsman's Intent to File 60-Day Report	§ 333(b)(2)	BR 2015.1(a)	Notice	None	LBR 9013(f) & all patients
Patient Care: [chapters 7-9-11 only] For Authority to Review Confidential Patient Records [by Patient Care Ombudsman]	§ 333(c)(1)	BR 2015.1(b)	Motion	14 - Day	BR 2015.1(b)
Patient Care: [chapters 7-9-11 only] For Authority to Dispose of Patient Records [by Trustee]	§ 351	BR 6011	Notice	None	BR 6011(b)
Pay Pre-Petition Claims or Pay Taxes [pre- or post-petition]	§ 105	None	Motion	21 - Day	Matrix
Protection Against Disclosure of Personal Information	§ 107(c)(1)	None	Motion	None (auto hrg)	LBR 9013(f)
Property of the Estate: Approval of Agreed Property Division Upon Divorce	None	None	Motion	21 - Day	Matrix
Property of the Estate: Approval of Bidding Procedures for Sale of Property	None	None	Motion	21 - Day	Matrix
Property of the Estate: Authority to Use, Sell, or Lease	§ 363(b)	BR 6004 BR 6004 LBR 6004	Motion or Notice	21 - Day	Matrix

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Property of the Estate: Sell Personally Identifiable Information	§363(b)(1)(B)	BR 6004 LBR 6004(b)	Motion	None (auto hrg)	Matrix
Property of the Estate: Prohibit or Condition Use, Sale or Lease of....	§ 363(e)	BR 4001 LBR 4001	Motion	14 - Day	LBR 9013(f)
Property of the Estate: Sell Free & Clear of Liens	§ 363(f)	BR 6004 LBR 6004	Motion	21 - Day	Matrix
Reconsideration of Order [see "alter or amend judgment"]	----------	----------	----------	----------	----------
Redemption of Property from Lien or Sale	§ 722	BR 6008 LBR 6008	Motion	21 - Day	LBR 6008(b)
Relief from Judgment or Order [when beyond 10-day filing period for m/amend or alter judgment]	None	BR 9024	Motion	21 - Day	Same as orig. doc.
Removal of Trustee or Examiner	§ 324	BR 2012	Motion	21 - Day	Matrix
Reopen Case	§ 350	BR 5010 LBR 5010	Motion	None	Matrix
Retainer: for Distribution of. . . [chapter 11 or 12 only]	None	LBR 2016(g)	Motion	14 - Day	LBR 2016(g)
Retainer: for Payment of Post-Petition	None	LBR 2016(f)	Motion	21 - Day	LBR 9013(f)

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Rule 2004 Examination: Motion for	None	BR 2004 LBR 2004	Motion	14 - Day	LBR 9013(f)
Sanctions [Contested Matter]	Various	Various	Motion	21 - Day	LBR 9013(f)
Schedules & Statements, Original	§ 521	BR 1007 LBR 1007	Schedule	----------	----------
Schedules & Statements, Amended	§ 521	BR 1009 LBR 1009	Schedule	----------	LBR 1009
Sealing of Documents:		BR 9018 LBR 9018	Motion	None	LBR 9013(f)
Sealing of Documents: False Involuntary Petition [Dismissed]	§303(l)(1)		Motion	None	involuntary petitioners & UST
Severance of Case	None	None	Motion	None	Matrix
Shorten Notice Period	----------	BR 9006 LBR 9007	Application	None	same as in affected pleading
Small Business: Determination of Status of Unsecured Creditors' Committee	§101 (51D)(A)	BR 1020 LBR 1020(b)	Motion	21 - Day	LBR 9013(f)

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Small Business: Determination of Small Business Debtor Status	§101 (51D)(A)	BR 1020 LBR 1020(a)	Motion	21 - Day	LBR 9013(f)
Stipulation, to Approve Rule 4001	Various	BR 4001(d)	Motion	14 - Day	Matrix
Substitution of Attorney	None	LBR 2014(c)	Motion	14 - Day	LBR 9013(f)
Suspension or Dismissal of Case	§ 305	BR 1017(c)	Motion	21 - Day	Matrix
Tax Information: Request for Debtor to File with Court [individual chapter 7-11-13 case only]	§521(f)	LBR 4002(c)	Request	None	Debtor & counsel
Tax Information: Access to Information Filed with Court [individual chapter 7-11-13 case only]	§521(g)(2)	LBR 4002(d)	Motion	14 - Day	Debtor & counsel
Tax Liability [Determination of]	§ 505	None	Motion	21 - Day	LBR 9013(f)
Utility Service Deposit, Determine Adequacy of...	§ 366	None	Motion	21 - Day	LBR 9013(f)
Vacate Order [see "alter/amend judgment"]	----------	----------	----------	----------	----------
Valuation of Property or Secured Status, Determination of	§ 506	BR 3012	Motion	21 - Day	LBR 9013(f)

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Venue, Change of	28 USC § 1412	BR 1014	Motion	21 - Day	Matrix
Waive Automatic Dismissal of Case [by Ch 7 or 13 trustee]	§521(i)(4)	LBR 1017(c)	Motion	14 - Day	Matrix
Withdrawal of Attorney	----------	----------	Motion	21 - Day	LBR 9013(f)
Withdrawal of Pleading	----------	----------	Notice	None	LBR 9013(f)

[Reserved]

Form 35-6

Proof of Claim

B 10 (Official Form 10) (12/11)

UNITED STATES BANKRUPTCY COURT		PROOF OF CLAIM
Name of Debtor:	Case Number:	
NOTE: *Do not use this form to make a claim for an administrative expense that arises after the bankruptcy filing. You may file a request for payment of an administrative expense according to 11 U.S.C. § 503.*		
Name of Creditor (the person or other entity to whom the debtor owes money or property):		**COURT USE ONLY**
Name and address where notices should be sent: Telephone number: email:		❒ Check this box if this claim amends a previously filed claim. **Court Claim Number:**_____ (*If known*) Filed on:_____
Name and address where payment should be sent (if different from above): Telephone number: email:		❒ Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach copy of statement giving particulars.

1. Amount of Claim as of Date Case Filed: $_____

If all or part of the claim is secured, complete item 4.

If all or part of the claim is entitled to priority, complete item 5.

❒ Check this box if the claim includes interest or other charges in addition to the principal amount of the claim. Attach a statement that itemizes interest or charges.

2. Basis for Claim: _____
(See instruction #2)

3. Last four digits of any number by which creditor identifies debtor:	**3a. Debtor may have scheduled account as:** (See instruction #3a)	**3b. Uniform Claim Identifier (optional):** (See instruction #3b)
____	_____	_____

4. Secured Claim (See instruction #4)
Check the appropriate box if the claim is secured by a lien on property or a right of setoff, attach required redacted documents, and provide the requested information.

Nature of property or right of setoff: ❒ Real Estate ❒ Motor Vehicle ❒ Other
Describe:

Value of Property: $_____

Annual Interest Rate_____% ❒ Fixed or ❒ Variable
(when case was filed)

Amount of arrearage and other charges, as of the time case was filed, included in secured claim, if any:
$_____

Basis for perfection: _____

Amount of Secured Claim: $_____

Amount Unsecured: $_____

5. Amount of Claim Entitled to Priority under 11 U.S.C. § 507 (a). If any part of the claim falls into one of the following categories, check the box specifying the priority and state the amount.

❒ Domestic support obligations under 11 U.S.C. § 507 (a)(1)(A) or (a)(1)(B).	❒ Wages, salaries, or commissions (up to $11,725*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier – 11 U.S.C. § 507 (a)(4).	❒ Contributions to an employee benefit plan – 11 U.S.C. § 507 (a)(5).	**Amount entitled to priority:**
❒ Up to $2,600* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. § 507 (a)(7).	❒ Taxes or penalties owed to governmental units – 11 U.S.C. § 507 (a)(8).	❒ Other – Specify applicable paragraph of 11 U.S.C. § 507 (a)(__).	$_____

**Amounts are subject to adjustment on 4/1/13 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

6. Credits. The amount of all payments on this claim has been credited for the purpose of making this proof of claim. (See instruction #6)

7. Documents: Attached are **redacted** copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. If the claim is secured, box 4 has been completed, and **redacted** copies of documents providing evidence of perfection of a security interest are attached. *(See instruction #7, and the definition of "**redacted**".)*

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

8. Signature: (See instruction #8)

Check the appropriate box.

❒ I am the creditor. ❒ I am the creditor's authorized agent. (Attach copy of power of attorney, if any.) ❒ I am the trustee, or the debtor, or their authorized agent. (See Bankruptcy Rule 3004.) ❒ I am a guarantor, surety, indorser, or other codebtor. (See Bankruptcy Rule 3005.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: _____
Title: _____
Company: _____
Address and telephone number (if different from notice address above):
_____
_____
_____
Telephone number: email:

_____ (Signature) (Date)

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, exceptions to these general rules may apply.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number:
Fill in the federal judicial district in which the bankruptcy case was filed (for example, Central District of California), the debtor's full name, and the case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is at the top of the notice.

Creditor's Name and Address:
Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

1. Amount of Claim as of Date Case Filed:
State the total amount owed to the creditor on the date of the bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. Basis for Claim:
State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on delivering health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if an interested party objects to the claim.

3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:
State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:
Report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

3b. Uniform Claim Identifier:
If you use a uniform claim identifier, you may report it here. A uniform claim identifier is an optional 24-character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.

4. Secured Claim:
Check whether the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See Definitions.) If the claim is secured, check the box for the nature and value of property that secures the claim, attach copies of lien documentation, and state, as of the date of the bankruptcy filing, the annual interest rate (and whether it is fixed or variable), and the amount past due on the claim.

5. Amount of Claim Entitled to Priority Under 11 U.S.C. § 507 (a).
If any portion of the claim falls into any category shown, check the appropriate box(es) and state the amount entitled to priority. (See Definitions.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

6. Credits:
An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

7. Documents:
Attach redacted copies of any documents that show the debt exists and a lien secures the debt. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary in addition to the documents themselves. FRBP 3001(c) and (d). If the claim is based on delivering health care goods or services, limit disclosing confidential health care information. Do not send original documents, as attachments may be destroyed after scanning.

8. Date and Signature:
The individual completing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. If the claim is filed by an authorized agent, attach a complete copy of any power of attorney, and provide both the name of the individual filing the claim and the name of the agent. If the authorized agent is a servicer, identify the corporate servicer as the company. Criminal penalties apply for making a false statement on a proof of claim.

DEFINITIONS

Debtor
A debtor is the person, corporation, or other entity that has filed a bankruptcy case.

Creditor
A creditor is a person, corporation, or other entity to whom debtor owes a debt that was incurred before the date of the bankruptcy filing. See 11 U.S.C. §101 (10).

Claim
A claim is the creditor's right to receive payment for a debt owed by the debtor on the date of the bankruptcy filing. See 11 U.S.C. §101 (5). A claim may be secured or unsecured.

Proof of Claim
A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

Secured Claim Under 11 U.S.C. § 506 (a)
A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car. A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien.

A claim also may be secured if the creditor owes the debtor money (has a right to setoff).

Unsecured Claim
An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

Claim Entitled to Priority Under 11 U.S.C. § 507 (a)
Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

Redacted
A document has been redacted when the person filing it has masked, edited out, or otherwise deleted, certain information. A creditor must show only the last four digits of any social-security, individual's tax-identification, or financial-account number, only the initials of a minor's name, and only the year of any person's date of birth. If the claim is based on the delivery of health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information.

Evidence of Perfection
Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded.

INFORMATION

Acknowledgment of Filing of Claim
To receive acknowledgment of your filing, you may either enclose a stamped self-addressed envelope and a copy of this proof of claim or you may access the court's PACER system (www.pacer.psc.uscourts.gov) for a small fee to view your filed proof of claim.

Offers to Purchase a Claim
Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 *et seq.*), and any applicable orders of the bankruptcy court.

[Reserved]

Form 35-9

This form is Official Bankruptcy Form 240A, a reaffirmation agreement. This agreement is enforceable only if the debtor received the disclosures described in 11 U.S.C. § 524(k) at or before the time the debtor signs the agreement. *See* 11 U.S.C. § 524(c), (2), (4), (5). The practitioner should consult the local rules for the court in which he will appear in to adapt the form. If the debtor is represented by counsel, the debtor's attorney must sign the certification in part C of the form. *See* 11 U.S.C. § 524(c)(3). If the debtor isn't represented by counsel, the court will set a hearing to consider the reaffirmation agreement. See section 35.36 in this chapter regarding reaffirmation agreements.

Warning: The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2.

Reaffirmation Agreement

B240A/B ALT (Form 240A/B ALT) (Reaffirmation Agreement) (12/11)

☐ **Presumption of Undue Hardship**
☐ **No Presumption of Undue Hardship**
(Check box as directed in Part D: Debtor's Statement in Support of Reaffirmation Agreement.)

UNITED STATES BANKRUPTCY COURT

_____District of_____

In re _____, Debtor

Case No._____
Chapter_____

REAFFIRMATION AGREEMENT

[Indicate all documents included in this filing by checking each applicable box.]

☐ Part A: Disclosures, Instructions, and Notice to Debtor (pages 1 - 5)

☐ Part B: Reaffirmation Agreement

☐ Part C: Certification by Debtor's Attorney

☐ Part D: Debtor's Statement in Support of Reaffirmation Agreement

☐ Part E: Motion for Court Approval

*[**Note:** Complete Part E only if debtor was not represented by an attorney during the course of negotiating this agreement. **Note also:** If you complete Part E, you must prepare and file Form 240C ALT - Order on Reaffirmation Agreement.]*

Name of Creditor:_____

☐ *[Check this box if]* Creditor is a Credit Union as defined in §19(b)(1)(a)(iv) of the Federal Reserve Act

PART A: DISCLOSURE STATEMENT, INSTRUCTIONS AND NOTICE TO DEBTOR

1. DISCLOSURE STATEMENT

Before Agreeing to Reaffirm a Debt, Review These Important Disclosures:

SUMMARY OF REAFFIRMATION AGREEMENT

This Summary is made pursuant to the requirements of the Bankruptcy Code.

AMOUNT REAFFIRMED

The amount of debt you have agreed to reaffirm: $_____

The amount of debt you have agreed to reaffirm includes all fees and costs (if any) that have accrued as of the date of this disclosure. Your credit agreement may obligate you to pay additional amounts which may come due after the date of this disclosure. Consult your credit agreement.

Form 240A/B ALT - Reaffirmation Agreement (Cont.) **2**

ANNUAL PERCENTAGE RATE

[The annual percentage rate can be disclosed in different ways, depending on the type of debt.]

a. If the debt is an extension of "credit" under an "open end credit plan," as those terms are defined in § 103 of the Truth in Lending Act, such as a credit card, the creditor may disclose the annual percentage rate shown in (i) below or, to the extent this rate is not readily available or not applicable, the simple interest rate shown in (ii) below, or both.

(i) The Annual Percentage Rate disclosed, or that would have been disclosed, to the debtor in the most recent periodic statement prior to entering into the reaffirmation agreement described in Part B below or, if no such periodic statement was given to the debtor during the prior six months, the annual percentage rate as it would have been so disclosed at the time of the disclosure statement: _____%.

--- And/Or ---

(ii) The simple interest rate applicable to the amount reaffirmed as of the date this disclosure statement is given to the debtor: _____%. If different simple interest rates apply to different balances included in the amount reaffirmed, the amount of each balance and the rate applicable to it are:

$_____@_____%;
$_____@_____%;
$_____@_____%.

b. If the debt is an extension of credit other than under than an open end credit plan, the creditor may disclose the annual percentage rate shown in (I) below, or, to the extent this rate is not readily available or not applicable, the simple interest rate shown in (ii) below, or both.

(i) The Annual Percentage Rate under §128(a)(4) of the Truth in Lending Act, as disclosed to the debtor in the most recent disclosure statement given to the debtor prior to entering into the reaffirmation agreement with respect to the debt or, if no such disclosure statement was given to the debtor, the annual percentage rate as it would have been so disclosed: _____%.

--- And/Or ---

(ii) The simple interest rate applicable to the amount reaffirmed as of the date this disclosure statement is given to the debtor: _____%. If different simple interest rates apply to different balances included in the amount reaffirmed, the amount of each balance and the rate applicable to it are:

$ _____ @ _____ %;
$ _____ @ _____ %;
$ _____ @ _____ %.

c. If the underlying debt transaction was disclosed as a variable rate transaction on the most recent disclosure given under the Truth in Lending Act:

The interest rate on your loan may be a variable interest rate which changes from time to time, so that the annual percentage rate disclosed here may be higher or lower.

d. If the reaffirmed debt is secured by a security interest or lien, which has not been waived or determined to be void by a final order of the court, the following items or types of items of the debtor's goods or property remain subject to such security interest or lien in connection with the debt or debts being reaffirmed in the reaffirmation agreement described in Part B.

Item or Type of Item	Original Purchase Price or Original Amount of Loan

Optional---At the election of the creditor, a repayment schedule using one or a combination of the following may be provided:

Repayment Schedule:

Your first payment in the amount of $_____ is due on _____(date), but the future payment amount may be different. Consult your reaffirmation agreement or credit agreement, as applicable.

— Or —

Your payment schedule will be: _____(number) payments in the amount of $_____ each, payable (monthly, annually, weekly, etc.) on the _____ (day) of each _____ (week, month, etc.), unless altered later by mutual agreement in writing.

— Or —

A reasonably specific description of the debtor's repayment obligations to the extent known by the creditor or creditor's representative.

2. INSTRUCTIONS AND NOTICE TO DEBTOR

Form 240A/B ALT - Reaffirmation Agreement (Cont.) 4

Reaffirming a debt is a serious financial decision. The law requires you to take certain steps to make sure the decision is in your best interest. If these steps are not completed, the reaffirmation agreement is not effective, even though you have signed it.

1. Read the disclosures in this Part A carefully. Consider the decision to reaffirm carefully. Then, if you want to reaffirm, sign the reaffirmation agreement in Part B (or you may use a separate agreement you and your creditor agree on).

2. Complete and sign Part D and be sure you can afford to make the payments you are agreeing to make and have received a copy of the disclosure statement and a completed and signed reaffirmation agreement.

3. If you were represented by an attorney during the negotiation of your reaffirmation agreement, the attorney must have signed the certification in Part C.

4. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, you must have completed and signed Part E.

5. The original of this disclosure must be filed with the court by you or your creditor. If a separate reaffirmation agreement (other than the one in Part B) has been signed, it must be attached.

6. If the creditor is not a Credit Union and you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court unless the reaffirmation is presumed to be an undue hardship as explained in Part D. If the creditor is a Credit Union and you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court.

7. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, it will not be effective unless the court approves it. The court will notify you and the creditor of the hearing on your reaffirmation agreement. You must attend this hearing in bankruptcy court where the judge will review your reaffirmation agreement. The bankruptcy court must approve your reaffirmation agreement as consistent with your best interests, except that no court approval is required if your reaffirmation agreement is for a consumer debt secured by a mortgage, deed of trust, security deed, or other lien on your real property, like your home.

YOUR RIGHT TO RESCIND (CANCEL) YOUR REAFFIRMATION AGREEMENT

You may rescind (cancel) your reaffirmation agreement at any time before the bankruptcy court enters a discharge order, or before the expiration of the 60-day period that begins on the date your reaffirmation agreement is filed with the court, whichever occurs later. To rescind (cancel) your reaffirmation agreement, you must notify the creditor that your reaffirmation agreement is rescinded (or canceled).

Frequently Asked Questions:

What are your obligations if you reaffirm the debt? A reaffirmed debt remains your personal legal obligation. It is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Otherwise, your obligations will be determined by the reaffirmation agreement which may have changed the terms of the original agreement. For example, if you are reaffirming an open end credit agreement, the creditor may be permitted by that agreement or applicable law to change the terms of that agreement in the future under certain conditions.

Are you required to enter into a reaffirmation agreement by any law? No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments you agree to make.

What if your creditor has a security interest or lien? Your bankruptcy discharge does not eliminate any lien on your property. A ''lien'' is often referred to as a security interest, deed of trust, mortgage or security deed. Even if you do not reaffirm and your personal liability on the debt is discharged, because of the lien your creditor may still have the right to take the property securing the lien if you do not pay the debt or default on it. If the lien is on an item of personal property that is exempt under your State's law or that the trustee has abandoned, you may be able to redeem the item rather than reaffirm the debt. To redeem, you must make a single payment to the creditor equal to the amount of the allowed secured claim, as agreed by the parties or determined by the court.

NOTE: When this disclosure refers to what a creditor ''may'' do, it does not use the word "may'' to give the creditor specific permission. The word ''may'' is used to tell you what might occur if the law permits the creditor to take the action. If you have questions about your reaffirming a debt or what the law requires, consult with the attorney who helped you negotiate this agreement reaffirming a debt. If you don't have an attorney helping you, the judge will explain the effect of your reaffirming a debt when the hearing on the reaffirmation agreement is held.

Form 240A/B ALT - Reaffirmation Agreement (Cont.) **6**

PART B: REAFFIRMATION AGREEMENT.

I (we) agree to reaffirm the debts arising under the credit agreement described below.

1. Brief description of credit agreement:

2. Description of any changes to the credit agreement made as part of this reaffirmation agreement:

SIGNATURE(S):

Borrower:

_____
(Print Name)

_____
(Signature)

Date: _____

Co-borrower, if also reaffirming these debts:

_____
(Print Name)

_____
(Signature)

Date: _____

Accepted by creditor:

_____
(Printed Name of Creditor)

_____
(Address of Creditor)

_____
(Signature)

_____
(Printed Name and Title of Individual Signing for Creditor)

Date of creditor acceptance:

_____

Form 240A/B ALT - Reaffirmation Agreement (Cont.) 7

PART C: CERTIFICATION BY DEBTOR'S ATTORNEY (IF ANY).

[To be filed only if the attorney represented the debtor during the course of negotiating this agreement.]

I hereby certify that (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.

☐ *[Check box, if applicable and the creditor is not a Credit Union.]* A presumption of undue hardship has been established with respect to this agreement. In my opinion, however, the debtor is able to make the required payment.

Printed Name of Debtor's Attorney: _____

Signature of Debtor's Attorney: _____

Date: _____

Form 240A/B ALT - Reaffirmation Agreement (Cont.) **8**

PART D: DEBTOR'S STATEMENT IN SUPPORT OF REAFFIRMATION AGREEMENT

*[Read and complete sections 1 and 2, **OR**, if the creditor is a Credit Union and the debtor is represented by an attorney, read section 3. Sign the appropriate signature line(s) and date your signature. If you complete sections 1 and 2 **and** your income less monthly expenses does not leave enough to make the payments under this reaffirmation agreement, check the box at the top of page 1 indicating "Presumption of Undue Hardship." Otherwise, check the box at the top of page 1 indicating "No Presumption of Undue Hardship"]*

1. I believe this reaffirmation agreement will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received) is $_____, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total $_____, leaving $_____ to make the required payments on this reaffirmed debt.

I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship on me and must be reviewed by the court. However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here: _____
_____
_____.

(Use an additional page if needed for a full explanation.)

2. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.

Signed: _____
(Debtor)

_____
(Joint Debtor, if any)

Date: _____

— Or —

[If the creditor is a Credit Union and the debtor is represented by an attorney]

3. I believe this reaffirmation agreement is in my financial interest. I can afford to make the payments on the reaffirmed debt. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.

Signed: _____
(Debtor)

_____
(Joint Debtor, if any)

Date: _____

PART E: MOTION FOR COURT APPROVAL
[To be completed and filed only if the debtor is not represented by an attorney during the course of negotiating this agreement.]

MOTION FOR COURT APPROVAL OF REAFFIRMATION AGREEMENT

I (we), the debtor(s), affirm the following to be true and correct:

I am not represented by an attorney in connection with this reaffirmation agreement.

I believe this reaffirmation agreement is in my best interest based on the income and expenses I have disclosed in my Statement in Support of this reaffirmation agreement, and because (provide any additional relevant reasons the court should consider):

Therefore, I ask the court for an order approving this reaffirmation agreement under the following provisions (*check all applicable boxes)*:

☐ 11 U.S.C. § 524(c)(6) (debtor is not represented by an attorney during the course of the negotiation of the reaffirmation agreement)

☐ 11 U.S.C. § 524(m) (presumption of undue hardship has arisen because monthly expenses exceed monthly income)

Signed: _____
(Debtor)

_____
(Joint Debtor, if any)

Date: _____

Bibliography

Adkins, Allen L., Lindsay B. Nickle, and Rebecca A. Moss. "Credit Card Debt Collection." In *Best of 2010 Part One, 2010.* Austin: State Bar of Texas, 2010.

Atkins, Bruce A. "Collecting Debts and Judgments." In *Collections and Creditors' Rights Course, 2010.* Austin: State Bar of Texas, 2010.

———. "Summary Judgment in Collection Cases." In *10th Annual Advanced Collections and Creditors' Rights Course, 2012.* Austin: State Bar of Texas, 2012.

———. "Summary Judgment Proof." In *Mastering the Art of Collecting Debts and Judgments, 2010.* Austin: University of Texas School of Law, 2010.

Atkins, Bruce A., and Sharolyn Wood. "Pre-Judgment Remedies." In *Collections and Creditors' Rights Course, 2010.* Austin: State Bar of Texas, 2010.

Barnes, Wayne. "Mechanic's Liens in Texas: From Creation to Enforcement." In *Collections and Creditors' Rights Course, 2008.* Austin: State Bar of Texas, 2008.

Barron, Barbara M., Stephen W. Sather, and Kevin E. Bowens. "Post-Filing Collection Activity . . . Creditors Behaving Badly or Debtors Looking for Debt Collectors to Fund Their Fresh Start?" In *26th Annual Consumer Bankruptcy Law Course, 2010.* Austin: State Bar of Texas, 2010.

Bartlett, Roger A. "Representing the Article 9 Creditor." In *Collections and Creditors' Rights Course, 2010.* Austin: State Bar of Texas, 2010.

Bass, Robert C., Jr. "Mechanic's Liens and Bond Claims." In *Collections and Creditors' Rights Course, 2010.* Austin: State Bar of Texas, 2010.

Baumer, Michael V. "Exemption Issues under BAPCPA." In *Mastering the Art of Collecting Debts and Judgments, 2010.* Austin: University of Texas School of Law, 2010.

Bernstein, Mike. "Turnover & Receiverships." In *10th Annual Advanced Collections and Creditors' Rights Course, 2012.* Austin: State Bar of Texas, 2012.

Blenden, Mark P. "Service of Process and Default Judgments; Article and Forms." In *10th Annual Advanced Collections and Creditors' Rights Course, 2012.* Austin: State Bar of Texas, 2012.

Blenden, Mark P., and David W. Roth. "Creditor Causes of Action." In *Mastering the Art of Collecting Debts and Judgments, 2010.* Austin: University of Texas School of Law, 2010.

———. "Creditors' Causes of Action" In *Collections and Creditors' Rights 101 Course, 2011.* Austin: State Bar of Texas, 2011.

Brown, Donna. "Anatomy of the Collections Process: An Overview with Efficiency Tips from a Seasoned Collections Lawyer." In *10th Annual Advanced Collections and Creditors' Rights Course, 2012*. Austin: State Bar of Texas, 2012.

———. "Multiplying Defendants (to Increase Collectability)." In *Collections and Creditors' Rights Course, 2004*. Austin: State Bar of Texas, 2004.

———. "Post Judgment Remedies, Judgment Liens, Garnishment, Execution, Turnover Proceedings, Receiverships under the DTPA, and 'Other Stuff.'" In *Collections and Creditors' Rights Course, 2011*. Austin: State Bar of Texas, 2011.

Cersonsky, M. H. "Attorneys' Fees for Lawyers in Collection and Commercial Cases." In *10th Annual Advanced Collections and Creditors' Rights Course, 2012*. Austin: State Bar of Texas, 2012.

———. "Collections and Creditor's Rights: Post-Judgments Strategies." In *Collections and Creditors' Rights Course, 2011*. Austin: State Bar of Texas, 2011.

———. "Post-Judgment Discovery and Asset Investigation." In *Collections and Creditors' Rights Course, 2010*. Austin: State Bar of Texas, 2010.

Clark, Bruce H., and Daniel W. Ingersoll. "Overcoming Asset Protection Planning: Reaching Difficult Property Interests." In *Collections and Creditors' Rights Course, 2008*. Austin: State Bar of Texas, 2008.

Durell, Daniel G. "Dealing with Secured Creditors." In *10th Annual Advanced Collections and Creditors' Rights Course, 2012*. Austin: State Bar of Texas, 2012.

Dyer, Patrick J. "Are You Ready Come Judgment Day? Post-Judgment Discovery and Remedies." In *10th Annual Advanced Collections and Creditors' Rights Course, 2012*. Austin: State Bar of Texas, 2012.

———. "Defending Default Judgments." In *Collections and Creditors' Rights Course, 2011*. Austin: State Bar of Texas, 2011.

———. "Defending Default Judgments." In *Mastering the Art of Collecting Debts and Judgments, 2010*. Austin: University of Texas School of Law, 2010.

Engelhart, Mike. "Liability for FDCPA Violations and Exposure to State Bar Discipline in Consumer Debt Collection Practice in 2011: Recent Developments." In *Collections and Creditors' Rights Course, 2011*. Austin: State Bar of Texas, 2011.

———. "Procedure for Enforcing Foreign State, Federal, and Foreign Country Judgments in Texas; Venue; Renewal and Revival of Judgments; Abstracting and Recording Judgments." In *10th Annual Advanced Collections and Creditors' Rights Course, 2012*. Austin: State Bar of Texas, 2012.

Fritsche, David R. "Commercial Landlord/Tenant: Landlord's Remedies." In *Mastering the Art of Collecting Debts and Judgments, 2010.* Austin: University of Texas School of Law, 2010.

Fugate, John E. "Texas Collection Attorney Compliance Issues." In *Collections and Creditors' Rights Course, 2009.* Austin: State Bar of Texas, 2009.

Garcia, Matias Eduardo. "Exemption under State Law." In *Mastering the Art of Collecting Debts and Judgments, 2010.* Austin: University of Texas School of Law, 2010.

Garcia, Matias Eduardo, and Molly L. Mayhall. "Recovery of Attorney's Fees in Texas Collection Cases." In *Collections and Creditors' Rights Course, 2011.* Austin: State Bar of Texas, 2011.

Goldberg, Daniel J. "Representing Creditors in a Chapter 7 Practice." In *Collections and Creditors' Rights Course, 2011.* Austin: State Bar of Texas, 2011.

———. "Ethical Considerations Particular to Collection of Debts and Judgments." In *Mastering the Art of Collecting Debts and Judgments, 2010.* Austin: University of Texas School of Law, 2010.

Habbeshaw, Penny K. "Foreign Judgments." In *Collections and Creditors' Rights Course, 2009.* Austin: State Bar of Texas, 2009.

———. "Interest and Usury—Toothless Tiger." In *Collections and Creditors' Rights Course, 2006.* Austin: State Bar of Texas, 2006.

Hoeffner, James V., and Kelle K. Masters. "Representing Creditors in Bankruptcy: What Every Creditor's Lawyer Should Know About Bankruptcy." In *Mastering the Art of Collecting Debts and Judgments, 2010.* Austin: University of Texas School of Law, 2010.

Huelbig, Larry. "Pre-Judgment Remedies—Sequestration, Attachment and Garnishment." In *Collections and Creditors' Rights Course, 2011.* Austin: State Bar of Texas, 2011.

Hurren, Kathleen A. "Exempt Property Issues." In *Collections and Creditors' Rights Course, 2010.* Austin: State Bar of Texas, 2010.

———. "Garnishment: Pre-Judgment and Post-Judgment." In *Mastering the Art of Collecting Debts and Judgments, 2010.* Austin: University of Texas School of Law, 2010.

Jameson, Christopher P. "Mechanic's Liens and Client Communications." In *Collections and Creditors' Rights Course, 2011.* Austin: State Bar of Texas, 2011.

Jamieson, Lisa H. "Creditors' Claim and Allowances in Decedents' Estates." In *Collections and Creditors' Rights Course, 2006.* Austin: State Bar of Texas, 2006.

Johnson, Anne M., and Heather Bailey New. "Formation of the Judgment and Calculation of Interest." In *Mastering the Art of Collecting Debts and Judgments, 2010.* Austin: University of Texas School of Law, 2010.

Korn, Andrew R. "Handling Writs of Execution." In *Collections and Creditors' Rights Course, 2006.* Austin: State Bar of Texas, 2006.

Liberato, Lynn. "Summary Judgments in Collection Cases." In *Collections and Creditors' Rights Course, 2009.* Austin: State Bar of Texas, 2009.

Madan, Marilee A., and Eric Donowho. "Managing a Collection Practice." In *Collections and Creditors' Rights Course, 2007.* Austin: State Bar of Texas, 2007.

Mayer, John. "Article 2 Cases and Excuses." In *Mastering the Art of Collecting Debts and Judgments, 2010.* Austin: University of Texas School of Law, 2010.

———. "Bankruptcy Strategies for Creditors." In *Collections and Creditors' Rights Course, 2009.* Austin: State Bar of Texas, 2009.

———. "Fraudulent Transfers and Piercing the Corporate Veil." In *10th Annual Advanced Collections and Creditors' Rights Course, 2012.* Austin: State Bar of Texas, 2012.

———. "UCC Article 2 is Your Friend." In *Collections and Creditors' Rights Course, 2011.* Austin: State Bar of Texas, 2011.

Neeley, Karen M., and Larissa Sanchez. "A Bank's Perspective of Garnishment and Records Request." In *10th Annual Advanced Collections and Creditors' Rights Course, 2012.* Austin: State Bar of Texas, 2012.

Newburger, Manuel H. "Fair Debt Collection Practices." In *Collections and Creditors' Rights Course, 2010.* Austin: State Bar of Texas, 2010.

———. "FCRA and FDCPA Issues for Collection Attorneys." In *Mastering the Art of Collecting Debts and Judgments, 2010.* Austin: University of Texas School of Law, 2010.

Noack, Craig A. "Consumer Collections with Purchased Debt Issues (Including Dodd–Frank)." In *Collections and Creditors' Rights Course, 2011.* Austin: State Bar of Texas, 2011.

Reagan, Sean Michael. "Trial Issues and Useful Trial Tactics for the Creditor's Lawyer." In *Mastering the Art of Collecting Debts and Judgments, 2010.* Austin: University of Texas School of Law, 2010.

Richey, Bill. "Lien and Bond Claims." In *Collections and Creditors' Rights Course, 2007.* Austin: State Bar of Texas, 2007.

Schwartz, Stuart R. "Overcoming Defenses." In *10th Annual Advanced Collections and Creditors' Rights Course, 2012.* Austin: State Bar of Texas, 2012.

———. "Pre-Suit Investigation and Discovery Issues." In *Mastering the Art of Collecting Debts and Judgments, 2010.* Austin: University of Texas School of Law, 2010.

Schwartz, Stuart R., David W. Roth, and Mark P. Blenden. "Pre-Suit Investigation and Coaching the Creditor." In *10th Annual Advanced Collections and Creditors' Rights Course, 2012*. Austin: State Bar of Texas, 2012.

Scott, Michael J. "Overview of the Consumer Collection Process: FDCPA and TDCA Issues." In *10th Annual Advanced Collections and Creditors' Rights Course, 2012*. Austin: State Bar of Texas, 2012.

———. "Overview of the Consumer Collection Process: General Issues." In *10th Annual Advanced Collections and Creditors' Rights Course, 2012*. Austin: State Bar of Texas, 2012.

———. "Renewal and Revival of Judgments." In *Collections and Creditors' Rights Course, 2010*. Austin: State Bar of Texas, 2010.

Simmons, Richard A. "Recognizing, Pleading and Proving Fraudulent Transfers." In *Mastering the Art of Collecting Debts and Judgments, 2010*. Austin: University of Texas School of Law, 2010.

Smith, Daniel R. "A Construction Attorney's Guide to the New Lien Waivers." *Texas Lawyer* 27, no. 52 (2012): 26.

Treu, Steven B. "Multiplying Defendants to Increase Collectability." In *Mastering the Art of Collecting Debts and Judgments, 2010*. Austin: University of Texas School of Law, 2010.

Turbyfill, Donald L. "Service Member Civil Relief Act." In *Mastering the Art of Collecting Debts and Judgments, 2010*. Austin: University of Texas School of Law, 2010.

Wagner, Joseph W., Jr. "Sequestration, Attachment and Garnishment." In *Mastering the Art of Collecting Debts and Judgments, 2010*. Austin: University of Texas School of Law, 2010.

Wells, D. Brent. "Mediation and Settlement Strategies for Collection Lawyers." In *10th Annual Advanced Collections and Creditors' Rights Course, 2012*. Austin: State Bar of Texas, 2012.

———. "An Overview of Collection Processes and Practices, with Efficiency Suggestions from a Seasoned Collections Lawyer." In *Collections and Creditors' Rights Course, 2010*. Austin: State Bar of Texas, 2010.

Wilson, Charles M., III. "Collection and Enforcement of Judgment and Attorney's Fees." In *Best of 2009 Part Two, 2010*. Austin: State Bar of Texas, 2010.

Wink, Dulcie Green. "Injunctions in the Texas Debt Collector's Tool Belt." In *Mastering the Art of Collecting Debts and Judgments, 2010*. Austin: University of Texas School of Law, 2010.

———. "The Prejudgment Remedy of Injunction." In *Collections and Creditors' Rights Course, 2011*. Austin: State Bar of Texas, 2011.

Wood, Mike. "Creditors in Probate Court." In *Collections and Creditors' Rights Course, 2010*. Austin: State Bar of Texas, 2010.

[Reserved]

Statutes and Rules Cited

[This index reflects only statutes and rules cited at text sections in the practice notes.]

TEXAS

Texas Constitution

Texas Revised Civil Statutes

Texas Business & Commerce Code

Texas Business Corporation Act

Texas Business Organizations Code

Texas Civil Practice & Remedies Code

Texas Code of Criminal Procedure

Texas Family Code

Texas Finance Code

Texas Government Code

Texas Health & Safety Code

Texas Human Resources Code

Texas Insurance Code

Texas Labor Code

Texas Local Government Code

Texas Occupations Code

Texas Parks & Wildlife Code

Texas Penal Code

Texas Probate Code

Texas Property Code

Texas Tax Code

Texas Transportation Code

Texas Rules of Appellate Procedure

Texas Rules of Civil Procedure

Texas Rules of Evidence

Texas Attorney General Opinions

Texas Disciplinary Rules of Professional Conduct

UNITED STATES

United States Code

Code of Federal Regulations

Federal Rules of Civil Procedure

Cases Cited

[References are to section numbers in the practice notes.]

A

B

C

D

E

F

G

H

I

J

K

L

M

N

O

P

Q

R

S

T

U

V

W

Y

Z

[Reserved]

List of Forms by Title

[All references in this list are to form numbers in chapters.]

A

B

C

D

F

G

H

I

J

L

M

N

O

[All references in this list are to form numbers in chapters.]

[Chapters 1–8, vol. 1; chs. 14–20, vol. 2; chs. 26–35, vol. 3]

P

[All references in this list are to form numbers in chapters.]

[Chapters 1–8, vol. 1; chs. 14–20, vol. 2; chs. 26–35, vol. 3]

R

S

T

U

V

W

[All references in this list are to form numbers in chapters.]

[Chapters 1–8, vol. 1; chs. 14–20, vol. 2; chs. 26–35, vol. 3]

Subject Index

[References are to section numbers in the practice notes.]

A

B

C

D

E

F

G

H

I

J

K

L

M

N

O

P

R

T

U

V

W

[Reserved]

LIST OF EFFECTIVE PAGES

This list shows the current version of each sheet that should be in the *Texas Collections Manual*, fourth edition, after incorporating into it the 2012 supplement. After this supplement has been inserted, use this list to check the completeness of the manual. Only the right-hand pages are listed. Beside the number of each page that was replaced in this supplement, "(8/12)" will appear, and that date should be printed in the lower right corner of the page, underneath the page number, in the manual. No date appears beside the numbers of the pages that were not replaced, which were original in the 2011 edition. The first six pages in volume 1 (half-title page through State Bar of Texas officers) and the first four pages in volumes 2 and 3 (half-title through copyright page) do not bear dates. Please note that pages xiii through xvi are the List of Effective Pages and will be inserted in the manual after you have checked all other pages against this list.

Volume 1

Half-title
Title
Manual Committee
vii ..... ——
ix ..... ——
xi ..... (8/12)
*xiii ..... (8/12)
*xv ..... (8/12)

Summary of Contents

Contents-1 .. ——
Contents-3 .. ——

Digital Product Documentation

Doc-1 ..... (8/12)
Doc-3 ..... (8/12)
Doc-5 ..... (8/12)

Introduction

Intro-1 ..... (8/12)
Intro-3 ..... (8/12)

Chapter 1

1-i ..... (8/12)
1-iii ..... (8/12)
1-1 ..... ——
1-3 ..... ——
1-5 ..... ——
1-7 ..... (8/12)
1-9 ..... (8/12)
1-11 ..... (8/12)
1-13 ..... (8/12)
1-15 ..... (8/12)
1-1-1 ..... ——
1-1-3 ..... ——
1-1-5 ..... ——
1-2-1 ..... ——
1-2-3 ..... ——
1-2-5 ..... ——
1-2-7 ..... ——
1-3-1 ..... ——
1-4-1 ..... ——
1-5-1 ..... ——
1-6-1 ..... ——
1-7-1 ..... ——

Chapter 2

2-i ..... (8/12)
2-iii ..... (8/12)
2-v ..... (8/12)
2-vii ..... (8/12)
2-ix ..... (8/12)
2-1 ..... ——
2-3 ..... ——
2-5 ..... ——
2-7 ..... ——
2-9 ..... ——
2-11 ..... ——
2-13 ..... ——
2-15 ..... (8/12)
2-17 ..... ——
2-19 ..... ——
2-21 ..... ——
2-23 ..... ——
2-25 ..... (8/12)
2-27 ..... (8/12)
2-29 ..... (8/12)
2-31 ..... (8/12)
2-33 ..... (8/12)
2-35 ..... (8/12)
2-37 ..... (8/12)
2-39 ..... (8/12)
2-41 ..... (8/12)
2-43 ..... (8/12)
2-45 ..... (8/12)
2-47 ..... (8/12)
2-49 ..... (8/12)
2-51 ..... (8/12)
2-53 ..... (8/12)
2-55 ..... (8/12)
2-57 ..... (8/12)
2-59 ..... (8/12)
2-61 ..... (8/12)
2-63 ..... (8/12)

Chapter 3

3-i ..... (8/12)
3-1 ..... ——
3-3 ..... ——
3-5 ..... (8/12)
3-7 ..... (8/12)
3-9 ..... (8/12)
3-1-1 ..... ——
3-1-3 ..... ——
3-2-1 ..... ——

Chapter 4

4-i ..... ——
4-1 ..... ——
4-3 ..... ——
4-1-1 ..... ——
4-2-1 ..... ——
4-2-3 ..... ——
4-3-1 ..... ——
4-4-1 ..... ——
4-5-1 ..... ——
4-6-1 ..... ——

Chapter 5

5-i ..... ——
5-iii ..... ——
5-1 ..... ——
5-3 ..... ——
5-5 ..... ——
5-7 ..... ——
5-9 ..... ——
5-11 ..... ——
5-13 ..... ——
5-15 ..... ——
5-17 ..... (8/12)
5-19 ..... ——
5-21 ..... ——
5-23 ..... ——
5-1-1 ..... ——
5-2-1 ..... ——
5-3-1 ..... ——
5-4-1 ..... ——
5-4-3 ..... ——
5-5-1 ..... ——
5-6-1 ..... ——
5-7-1 ..... ——
5-8-1 ..... ——
5-9-1 ..... ——
5-10-1 ..... ——

Chapter 6

6-i ..... ——
6-iii ..... ——
6-1 ..... ——
6-3 ..... ——
6-5 ..... ——
6-7 ..... ——
6-9 ..... ——
6-11 ..... (8/12)
6-13 ..... (8/12)
6-1-1 ..... ——

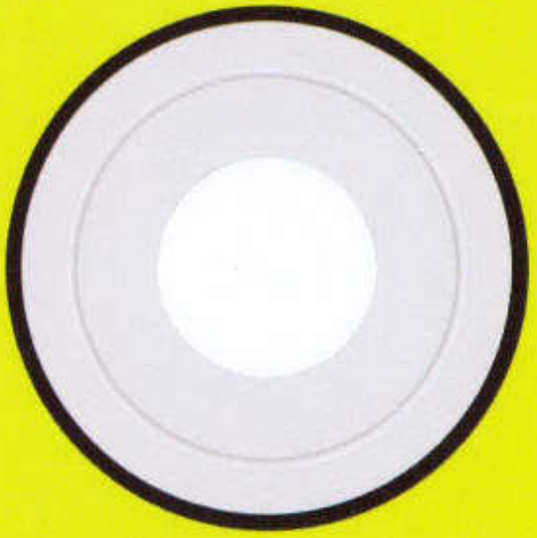
Chapter 7

7-i ..... (8/12)
7-iii ..... (8/12)
7-1 ..... (8/12)
7-3 ..... (8/12)
7-5 ..... (8/12)
7-7 ..... (8/12)
7-9 ..... (8/12)

* Please note that pages xiii through xvi are the List of Effective Pages.

IMPORTANT!

This is not a CD-ROM. TexasBarBooks has recently made the transition to digital downloads. Turn this card over for instructions on how to download the digital version of this title.



TexasBarBooks

To download this manual's complete digital product, go to the following URL:

http://www.texasbarcle.com/collections-2012/

See **http://texasbarbooks.net/download-tips/** for download and installation tips.