

# 2018 SUPPLEMENT to Texas Real Estate Forms Manual

## Third Edition

DENISE VARGO CHENEY  
*Chair, Manual Committee*

This supplement updates the practice notes and forms and incorporates relevant statutory and case law handed down since 2017.

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### ***INSTRUCTIONS FOR REMOVING AND INSERTING PAGES***

#### ***REMOVE OLD PAGES***

#### ***INSERT NEW PAGES***

---

#### ***VOLUME 1***

Title page – x

Title page – x

#### ***Behind tab HOW TO DOWNLOAD THIS MANUAL***

Doc-1 – Doc-2

Doc-1 – Doc-2

#### ***Behind tab CHAPTER 2***

2-i – 2-64

2-i – 2-64

#### ***Behind tab CHAPTER 3***

3-13 – 3-18

3-13 – 3-18

3-31-1 – 3-31-2

3-31-1 – 3-31-2

#### ***Behind tab CHAPTER 4***

4-i – 4-12

4-i – 4-12

4-22-5 – 4-22-6

4-22-5 – 4-22-6

#### ***Behind tab CHAPTER 5***

5-i – 5-viii

5-i – 5-viii

5-11 – 5-24

5-11 – 5-24

5-25-1 – 5-25-4

5-25-1 – 5-25-6

#### ***Behind tab CHAPTER 7***

7-i

#### ***VOLUME 2***

Title page – copyright page

Title page – copyright page

**Behind tab CHAPTER 11**

11-i – 11-1-6  
11-4-1 – 11-5-8  
\_\_\_\_\_

11-i – 11-1-6  
11-4-1 – 11-5-8  
11-8-1 – 11-9-4

**Behind tab CHAPTER 14**

14-i – 14-20  
14-15-1 – 14-40-2

14-i – 14-20  
14-15-1 – 14-41-2

**Behind tab CHAPTER 15**

\_\_\_\_\_

15-i

**VOLUME 3**

Title page – copyright page

Title page – copyright page

**Behind tab CHAPTER 18**

18-i – 18-10  
18-4-5 – 18-4-18

18-i – 18-10  
18-4-5 – 18-4-18

**Behind tab CHAPTER 19**

19-i – 19-1-4  
19-1-31 – 19-1-32

19-i – 19-1-4  
19-1-31 – 19-1-32

**Behind tab CHAPTER 22**

\_\_\_\_\_

22-i

**VOLUME 4**

Title page – copyright page

Title page – copyright page

**Behind tab CHAPTER 25**

25-11 – 25-12

25-11 – 25-12

**Behind tab CHAPTER 26**

26-i – 26-ii  
26-25-3 – 26-25-4

26-i – 26-ii  
26-25-3 – 26-25-4

*REMOVE OLD PAGES*

*INSERT NEW PAGES*

\_\_\_\_\_

26-37-1 – 26-38-4

***Behind tab APPENDIX***

All contents behind tab

App-1 – App-4

***Behind tab STATUTES & RULES CITED***

All contents behind tab

Stat-1 – Stat-38

***Behind tab CASES CITED***

All contents behind tab

Cases-1 – Cases-6

***Behind tab SUBJECT INDEX TO FORMS***

All contents behind tab

Forms-1 – Forms-12

***Behind tab LIST OF FORMS BY TITLE***

All contents behind tab

List-1 – List-16

***Behind tab SUBJECT INDEX***

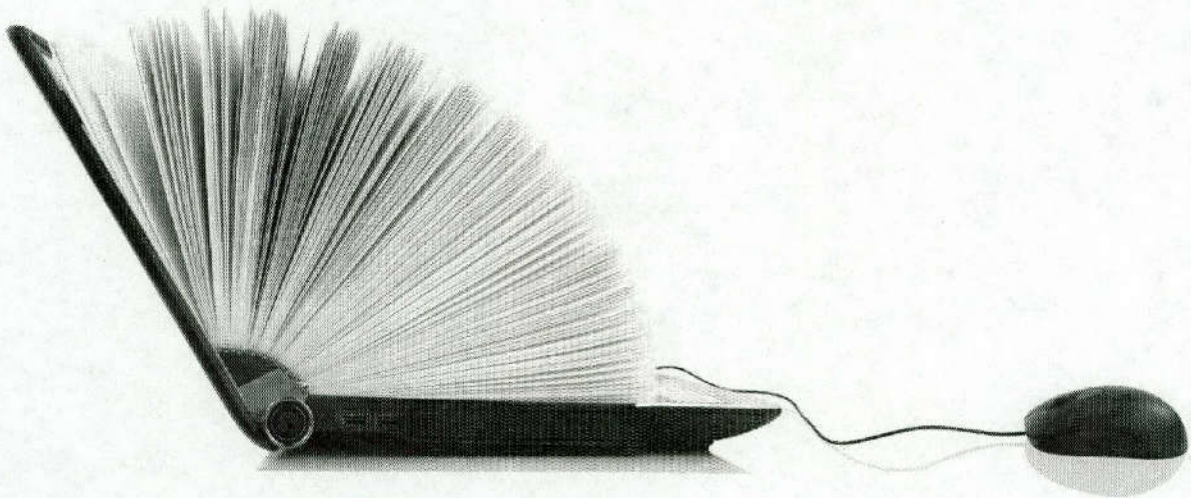
All contents behind tab

Subj-1 – Subj-30

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# **TEXAS REAL ESTATE FORMS MANUAL**

**Third Edition**

**Volume 1**

A project of the  
Real Estate Forms Committee  
of the  
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Austin 2017

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# Contents

## VOLUME 1

Preface

Summary of Contents

How to Download This Manual

Introduction

- 1 Ethics and Professional Conduct
- 2 Laws Affecting Real Estate
- 3 Preparation, Execution, Proof, and Recording of Documents
- 4 Sales Contracts and Transaction Guide
- 5 Deeds, Bills of Sale, and Other Transfers
- 6 Promissory Notes
- 7 reserved

## VOLUME 2

- 8 Deeds of Trust
- 9 Security Agreements
- 10 Ancillary Loan Documents
- 11 Home Equity Loan Documents
- 12 Federal Consumer Disclosure Documents
- 13 Residential Contracts for Deed
- 14 Foreclosure Documents
- 15 reserved

## VOLUME 3

- 16 Water Rights Conveyancing Documents

CONTENTS

- 17 Risk Allocation: Indemnity, Waiver, and Insurance
- 18 Residential Construction Contract Documents
- 19 Commercial Construction Contract Documents
- 20 Contractual Mechanic's Lien Documents
- 21 Involuntary Mechanic's Lien Documents
- 22 reserved

VOLUME 4

- 23 Restrictive Covenants and Property Owners Associations
- 24 Condominium Documents
- 25 Leases
- 26 Miscellaneous Documents

Appendix—Third-Party Legal Opinion Letters

Statutes and Rules Cited

Cases Cited

Subject Index to Forms

List of Forms by Title

Subject Index



## Preface

The State Bar of Texas is proud to publish the third edition of the *Texas Real Estate Forms Manual*. Written, reviewed, and approved by Texas attorneys who contribute their time to the Real Estate Forms Committee, this manual could not have been completed without their dedication, perseverance, and hard work. Their commitment to the fostering of excellence in the practice of law is one of the hallmarks of our profession.

The members of the Committee, in their commitment to excellence, have given countless hours of their volunteer time over the years toward maintaining the manual as the most up-to-date, comprehensive, and practical publication of its kind. Committee members hail from every part of Texas and from every sort of real estate-related practice, enabling them to bring a broad range of experience and expertise to the manual. While there have been remarkable individual contributions, to attempt to single out any names would be to ignore the value of the collaborative process. Working alone and in pairs, in subcommittees, and in full meetings, the Committee has identified and responded to changes in the law and enhanced the value of the material provided to the members of the State Bar of Texas.

The original manual began as a project of the San Antonio Bar Association in 1949 to draft legal forms and sell them to lawyers. Those forms were collected into a pamphlet, then published as a manual that came to be known as the “brown book” because of the color of its cover. The brown book was both scholarly and practical, and it was widely used and highly regarded. The State Bar assumed responsibility for the project in 1970 and published the “gray book” in 1973 and the “blue book” in 1986. The “black book” carried the tradition forward in 1999, with another gray book in 2011, and now we offer a new “blue book” for the second decade of the twenty-first century.

The manual has expanded to four volumes and contains a digital download version with enhanced word-processing forms and a PDF file of the manual. A custom toolbar for Word allows users to show, hide, print, and delete all instructional material in the forms, while the PDF file includes links to primary research, assisting practitioners in both knowing the law and understanding not just how, but why, to handle a transaction in a certain way.

This expanded and updated edition of the manual stems from the passion for the law and its practice held by each member of the Real Estate Forms Committee. It would be difficult to exaggerate the contributions of this group’s members or their boundless energy, care, diligence, and amazing (sometimes painful) attention to detail. The members maintained good

will and a sense of humor throughout the countless hours during which this manual was developed. It has been a privilege to work with each of them.

—Denise Vargo Cheney, *Chair*  
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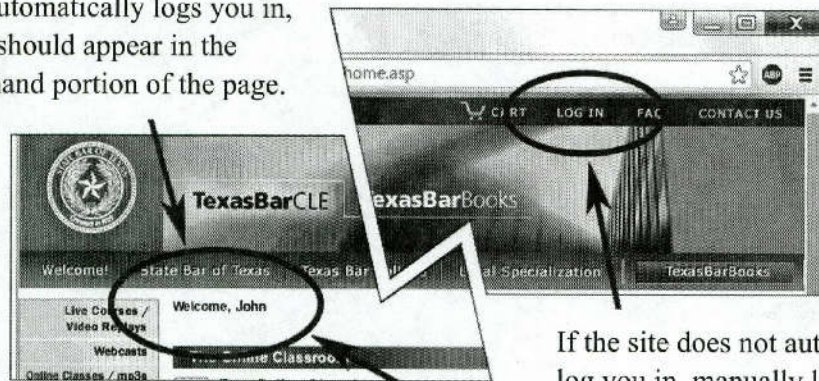
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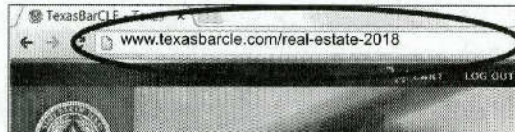
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The “http://” and “www” are optional for most browsers.

## Chapter 2

### Laws Affecting Real Estate

§ 2.1	Abandonment .....	2-1
§ 2.2	Abstracts of Judgment .....	2-1
§ 2.3	Acceleration of Note .....	2-1
§ 2.4	Acknowledgments .....	2-1
§ 2.5	Ad Valorem Taxes .....	2-2
§ 2.6	Adverse Possession .....	2-3
§ 2.7	Affidavits of Heirship .....	2-3
§ 2.8	Affordable Housing Investments .....	2-3
§ 2.9	Agricultural Development Districts .....	2-3
§ 2.10	Agricultural Liens .....	2-3
§ 2.11	Agricultural Use Exemption .....	2-4
§ 2.12	Aircraft Liens .....	2-4
§ 2.13	Alcoholic Beverages .....	2-4
§ 2.14	Alternative Dispute Resolution (ADR) .....	2-4
§ 2.15	Americans with Disabilities Act and Related Statutes .....	2-4
§ 2.16	Annexation .....	2-5
§ 2.17	Antiquities .....	2-5
§ 2.18	Appraisers .....	2-5
§ 2.19	Arbitration .....	2-5
§ 2.20	Architects .....	2-6
§ 2.21	Asbestos .....	2-6
§ 2.22	Assumed Names .....	2-6
§ 2.23	Astronomical Observatories .....	2-6
§ 2.24	Automatic Teller Machines (ATMs) .....	2-6
§ 2.25	Bankruptcy .....	2-7
§ 2.26	Beaches .....	2-7
§ 2.27	Beauty Shop Leases .....	2-7
§ 2.28	Billboards .....	2-7
§ 2.29	Blind Trusts and Undisclosed Beneficiaries .....	2-7
§ 2.30	Brokers .....	2-7

CHAPTER CONTENTS

§ 2.31	Brownfields Statute.....	2-7
§ 2.32	Building Codes.....	2-7
§ 2.33	Business Organizations Code.....	2-8
§ 2.34	Camping Resorts.....	2-8
§ 2.35	Cash Proceeds.....	2-8
§ 2.36	Cemeteries.....	2-8
§ 2.37	Certificates of Convenience and Necessity.....	2-8
§ 2.38	Certification of Trust.....	2-8
§ 2.39	Certified Mail.....	2-8
§ 2.40	Child Support Liens.....	2-9
§ 2.41	Choice of Law.....	2-9
§ 2.42	Coastal Properties.....	2-9
§ 2.43	Colonias.....	2-10
§ 2.44	Community Homes; Group Homes.....	2-10
§ 2.45	Community Property with Right of Survivorship.....	2-10
§ 2.46	Condemnation and Eminent Domain.....	2-10
§ 2.47	Condominiums.....	2-11
§ 2.48	Confessions of Judgment.....	2-12
§ 2.49	Confidentiality Notice.....	2-12
§ 2.50	Conspicuous Text.....	2-12
§ 2.51	Construction Accounts.....	2-13
§ 2.52	Construction Contracts.....	2-13
§ 2.53	Construction Payment Bond Claims.....	2-13
§ 2.54	Consumer Laws.....	2-13
§ 2.55	Contracts for Deed.....	2-14
§ 2.56	Copyrights.....	2-14
§ 2.57	Corporations.....	2-15
§ 2.58	Covenants Not to Compete.....	2-15
§ 2.59	Criminal Record Checks of Employees.....	2-15
§ 2.60	Deceptive Trade Practices—Consumer Protection Act (DTPA).....	2-15
§ 2.61	Deeds.....	2-15
§ 2.62	Deeds of Trust.....	2-16
§ 2.63	Deficiency Litigation after Foreclosure.....	2-16

§ 2.64	Disclaimer of Interest in Decedent's Estate	2-16
§ 2.65	Disclosure of Interested Parties When Contracting with Governmental Entities	2-16
§ 2.66	Disclosures and Notices	2-16
§ 2.67	Discrimination	2-20
§ 2.68	Divorce	2-20
§ 2.69	Dodd-Frank Wall Street Reform and Consumer Protection Act	2-20
§ 2.70	Dry Cleaners	2-21
§ 2.71	Due-on-Sale Clauses	2-21
§ 2.72	Durable Powers of Attorney	2-21
§ 2.73	Easements, Pipeline	2-22
§ 2.74	Economically Distressed Counties	2-22
§ 2.75	Economic Development	2-22
§ 2.76	Elderly Housing	2-22
§ 2.77	Electronic Commerce	2-22
§ 2.78	Electronic Filing of Documents	2-22
§ 2.79	Eminent Domain	2-23
§ 2.80	Endangered Species Act	2-23
§ 2.81	Engineer's Liens against Real Estate	2-23
§ 2.82	Environmental Laws	2-23
§ 2.83	Equal Credit Opportunity	2-25
§ 2.84	Equal Housing Opportunity	2-25
§ 2.85	Escheat	2-25
§ 2.86	Estate Tax Liens	2-25
§ 2.87	Eviction	2-25
§ 2.88	Excavators	2-26
§ 2.89	Exempt Property and Liens	2-26
§ 2.90	Extraterritorial Jurisdiction	2-26
§ 2.91	Failed Depository Institutions	2-26
§ 2.92	Fair Credit Reporting Act	2-26
§ 2.93	Fair Debt Collection Practices	2-27
§ 2.94	Fair Housing	2-27
§ 2.95	Family Law	2-28
§ 2.96	Federal Lien Registration Act	2-28

CHAPTER CONTENTS

§ 2.97	Federal Tax Liens . . . . .	2-28
§ 2.98	Fences and Gates . . . . .	2-28
§ 2.99	Financing Statement, Fraudulent Filing . . . . .	2-29
§ 2.100	Fixtures . . . . .	2-29
§ 2.101	Flood Insurance. . . . .	2-29
§ 2.102	Forced Sale of Co-Owner's Interest . . . . .	2-29
§ 2.103	Forcible Entry and Detainer . . . . .	2-29
§ 2.104	Foreclosure . . . . .	2-29
§ 2.105	Foreclosure Limitations Concerning FDIC Interests . . . . .	2-30
§ 2.106	Foreign Entities. . . . .	2-30
§ 2.107	Foreign Ownership of Real Property . . . . .	2-30
§ 2.108	Forfeiture Laws. . . . .	2-31
§ 2.109	Franchising . . . . .	2-31
§ 2.110	Fraudulent Filings. . . . .	2-31
§ 2.111	Fraudulent Representations and Promises . . . . .	2-31
§ 2.112	Fraudulent Transfers. . . . .	2-32
§ 2.113	FTC Anti-Holder-in-Due-Course Rule. . . . .	2-32
§ 2.114	Future Estates . . . . .	2-32
§ 2.115	Gifts to Minors Act. . . . .	2-32
§ 2.116	Good Faith and Fair Dealing . . . . .	2-32
§ 2.117	Grantee's Address. . . . .	2-32
§ 2.118	Group Homes . . . . .	2-32
§ 2.119	Guarantors. . . . .	2-32
§ 2.120	Handicapped Parking . . . . .	2-32
§ 2.121	Hart-Scott-Rodino Antitrust Improvements Act. . . . .	2-32
§ 2.122	Hazardous Waste Liens . . . . .	2-33
§ 2.123	Historic Structures . . . . .	2-33
§ 2.124	Home Equity Lending. . . . .	2-33
§ 2.125	Home Improvement Contracts . . . . .	2-33
§ 2.126	Home Mortgage Disclosure Act of 1975 . . . . .	2-33
§ 2.127	Home Solicitations . . . . .	2-33
§ 2.128	Homesteads. . . . .	2-33
§ 2.129	Hotel Occupancy Taxes . . . . .	2-34



§ 2.130	House Trailers	2-34
§ 2.131	Impact Fees	2-34
§ 2.132	Implied Title Covenants	2-34
§ 2.133	Indemnity Agreements	2-34
§ 2.134	Innocent-Purchaser Defense	2-34
§ 2.135	Insurance Claims	2-34
§ 2.136	Interstate Land Sales Full Disclosure Act	2-35
§ 2.137	IRS Information Return (Foreclosures)	2-35
§ 2.138	Joint Tenancy with Right of Survivorship	2-35
§ 2.139	Judgment Liens	2-35
§ 2.140	Landfills	2-36
§ 2.141	Landlord-Tenant Liens	2-36
§ 2.142	Landlord-Tenant Relationship	2-36
§ 2.143	Landowner Liability	2-37
§ 2.144	Landowner's Bill of Rights	2-37
§ 2.145	Landscape Architecture	2-37
§ 2.146	Lead-Based Paint Disclosures	2-37
§ 2.147	Legal Incapacity	2-37
§ 2.148	Letters of Credit	2-37
§ 2.149	Libraries	2-38
§ 2.150	License to Carry Handguns	2-38
§ 2.151	Life Tenants	2-38
§ 2.152	Limitations	2-38
§ 2.153	Limited Liability Companies	2-38
§ 2.154	Limited Liability Partnerships	2-38
§ 2.155	Liquidated Damages Clauses	2-39
§ 2.156	Lis Pendens	2-39
§ 2.157	Loan Documents	2-39
§ 2.158	Lockouts	2-40
§ 2.159	Lost or Found Property	2-40
§ 2.160	Low-Income Affordable Housing Tax Credits	2-40
§ 2.161	Manufactured Housing	2-40
§ 2.162	Master Form Mortgage	2-40

CHAPTER CONTENTS

§ 2.163	Mechanic's Liens .....	2-40
§ 2.164	Military Installations .....	2-41
§ 2.165	Military Personnel .....	2-41
§ 2.166	Mineral Rights .....	2-41
§ 2.167	Mini-Storage Warehouses .....	2-41
§ 2.168	Minors .....	2-41
§ 2.169	Mobile Homes .....	2-42
§ 2.170	Mold Assessors and Remediators .....	2-42
§ 2.171	Money Laundering .....	2-42
§ 2.172	Mortgage Electronic Registration Systems (MERS) .....	2-42
§ 2.173	Mortgage Fraud .....	2-43
§ 2.174	Mortgage Loan Originators .....	2-43
§ 2.175	Municipal Utility Districts (MUDs) .....	2-44
§ 2.176	Naturally Occurring Radioactive Materials (NORM) .....	2-44
§ 2.177	Navigable Streams .....	2-44
§ 2.178	Nonprofit Corporations .....	2-44
§ 2.179	Non-Real Estate Taxes Affecting Real Estate .....	2-44
§ 2.180	North American Free Trade Agreement (NAFTA) .....	2-45
§ 2.181	Notarial Seals, Out-of-State .....	2-45
§ 2.182	Notaries Public .....	2-45
§ 2.183	Nuisance .....	2-45
§ 2.184	Open-Space Exemption .....	2-45
§ 2.185	Outdoor Lighting .....	2-45
§ 2.186	Outdoor Signs .....	2-46
§ 2.187	Parking .....	2-46
§ 2.188	Parks and Recreational Projects .....	2-46
§ 2.189	Partition .....	2-47
§ 2.190	Partnerships .....	2-47
§ 2.191	Personal Property Leases .....	2-47
§ 2.192	Pest Control .....	2-47
§ 2.193	Pipeline Easements .....	2-47
§ 2.194	Plats .....	2-47
§ 2.195	Pool-Yard Enclosures .....	2-47

§ 2.196	Powers of Attorney .....	2-47
§ 2.197	Private Mortgage Insurance Notice.....	2-47
§ 2.198	Private Property Rights .....	2-48
§ 2.199	Property Inspection .....	2-48
§ 2.200	Property Owners Associations .....	2-48
§ 2.201	Property Tax Consultants .....	2-48
§ 2.202	Property Tax Loans .....	2-49
§ 2.203	Racial Discrimination .....	2-49
§ 2.204	Real Estate Appraisers .....	2-49
§ 2.205	Real Estate Investment Trusts (REITs).....	2-49
§ 2.206	Real Estate License Act .....	2-49
§ 2.207	Real Estate Settlement Procedures Act (RESPA).....	2-49
§ 2.208	Recording .....	2-50
§ 2.209	Record Retention.....	2-50
§ 2.210	Recreational Projects and Recreational Use.....	2-50
§ 2.211	Redemption Rights .....	2-50
§ 2.212	Registered Mail.....	2-50
§ 2.213	Release of Lien by Affidavit.....	2-50
§ 2.214	Release of Lien by Attorney or Others.....	2-51
§ 2.215	Republic of Texas Liens .....	2-51
§ 2.216	Residential Construction Liability .....	2-51
§ 2.217	Residential Rental Locators .....	2-51
§ 2.218	Restrictive Covenants .....	2-51
§ 2.219	Reverse Mortgages .....	2-52
§ 2.220	Right of Rescission .....	2-52
§ 2.221	Risk of Loss .....	2-52
§ 2.222	Roadway Forming County Boundary .....	2-52
§ 2.223	Rule against Perpetuities.....	2-52
§ 2.224	Sale of Trust Property to Governmental Entities .....	2-52
§ 2.225	Sculptures .....	2-52
§ 2.226	Securities Acts.....	2-52
§ 2.227	Security Deposits .....	2-52
§ 2.228	Security Interests.....	2-53

CHAPTER CONTENTS

§ 2.229	Self-Service Storage Facilities	2-53
§ 2.230	Seller's Disclosure of Property Condition	2-53
§ 2.231	Sewer Service	2-53
§ 2.232	Sex Offenders	2-53
§ 2.233	Shopping Center Stores, Open on Sundays	2-53
§ 2.234	Smoke Alarms	2-53
§ 2.235	Soldiers' and Sailors' Civil Relief Act	2-53
§ 2.236	Special Districts	2-54
§ 2.237	State of Texas Leases	2-54
§ 2.238	Statute of Frauds	2-54
§ 2.239	Statute of Limitations	2-54
§ 2.240	Statutes of Repose	2-54
§ 2.241	Stormwater Permits	2-54
§ 2.242	Streets and Roads	2-55
§ 2.243	Subdivisions	2-55
§ 2.244	Subletting or Assignment	2-56
§ 2.245	Submetering	2-56
§ 2.246	Surety	2-56
§ 2.247	Surveyors	2-56
§ 2.248	Survival of Representations and Warranties	2-56
§ 2.249	Surviving Spouse of Mortgagor	2-56
§ 2.250	Swimming Pools	2-57
§ 2.251	Taxes	2-57
§ 2.252	Telecommunications	2-57
§ 2.253	Terrorism Regulation	2-57
§ 2.254	Texas Department of Housing and Community Affairs	2-57
§ 2.255	Texas General Land Office	2-57
§ 2.256	Timber Production	2-57
§ 2.257	Timeshares	2-57
§ 2.258	Title Insurance	2-57
§ 2.259	Towing of Motor Vehicles	2-58
§ 2.260	Trademark and Trade-Name Rights	2-58
§ 2.261	Transfer on Death Deed	2-58

§ 2.262	Transportation	2-58
§ 2.263	Trespass to Try Title	2-58
§ 2.264	Trust Code	2-58
§ 2.265	Truth in Lending	2-58
§ 2.266	Unauthorized Preparation of Real Estate Documents	2-60
§ 2.267	Unclaimed Property	2-60
§ 2.268	Underground and Aboveground Storage Tanks	2-60
§ 2.269	Underground Facility Damage Prevention and Safety Act	2-60
§ 2.270	Uniform Commercial Code	2-60
§ 2.271	Uniform Electronic Transactions Act	2-60
§ 2.272	Uniform Principal and Income Act	2-60
§ 2.273	Uniform Transfers to Minors Act	2-61
§ 2.274	Uniform Unincorporated Nonprofit Association Act	2-61
§ 2.275	Uniform Vendor and Purchaser Risk Act	2-61
§ 2.276	Usury	2-61
§ 2.277	Utility District Disclosures	2-61
§ 2.278	Utility Submetering and Nonmetering	2-61
§ 2.279	Variable Interest Rates	2-62
§ 2.280	Vendor and Purchaser Risk Act	2-62
§ 2.281	Venue	2-62
§ 2.282	Vested Land Use Rights	2-62
§ 2.283	Visual Arts	2-63
§ 2.284	Voluntary Cleanup Program	2-63
§ 2.285	Wage Liens	2-63
§ 2.286	Warehouseman's Liens	2-63
§ 2.287	Water	2-63
§ 2.288	Watercourse Forming County Boundary	2-63
§ 2.289	Water Service	2-63
§ 2.290	Water Wells	2-63
§ 2.291	Weeds	2-64
§ 2.292	Wetlands	2-64
§ 2.293	Wills and Estates	2-64
§ 2.294	Windstorm Inspection	2-64

CHAPTER CONTENTS

§ 2.295 Wood Shingles ..... 2-64

§ 2.296 Zoning..... 2-64

Additional Resources ..... 2-65

## Chapter 2

### Laws Affecting Real Estate

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The following statutes and regulations affecting real estate are organized alphabetically by topic, with cross-references to other relevant sections where appropriate.

#### § 2.1 Abandonment

The landlord's rights and obligations regarding personal property after a tenant abandons commercial leased premises are addressed in Tex. Prop. Code § 93.002(e). A landlord has a duty to mitigate damages if a tenant abandons leased premises. Tex. Prop. Code § 91.006. The general subject of unclaimed personal property and escheat is addressed in Tex. Prop. Code chs. 72–76. See also the section titled “Escheat” below.

#### § 2.2 Abstracts of Judgment

The Texas Property Code sets out the procedure for obtaining an abstract of judgment from the judge or justice of the peace who rendered the judgment or from the clerk of the court.

Abstracts of judgment are recorded in the county's real property records. Tex. Prop. Code §§ 52.002–.003. See also the sections titled “Judgment Liens” and “Release of Lien by Attorney or Others” below.

For special restrictions on the filing of abstracts of judgment by inmates or their representatives, refer to Tex. Civ. Prac. & Rem. Code §§ 12.001–.007.

#### § 2.3 Acceleration of Note

Tex. Civ. Prac. & Rem. Code § 16.038 provides that if the maturity date of a note is accelerated and subsequently rescinded or waived in accordance with the requirements of section 16.038 before the limitations period expires, then the acceleration is deemed rescinded and waived,

and the note is governed by Tex. Civ. Prac. & Rem. Code § 16.035 as if no acceleration had occurred. A notice served under section 16.038 does not affect a lienholder's right to accelerate the maturity date of the debt in the future or waive past defaults. Section 16.038 does not create an exclusive method for waiver and rescission of acceleration or affect the accrual of a cause of action and the running of the related limitations period under Tex. Civ. Prac. & Rem. Code § 16.035(e) on any subsequent maturity date, accelerated or otherwise, of the note.

#### § 2.4 Acknowledgments

Texas law provides one form of ordinary certificate of acknowledgment and five short-form certificates of acknowledgment. Tex. Civ. Prac. & Rem. Code §§ 121.007–.008. A notary may sign on behalf of a disabled person in certain circumstances. Tex. Gov't Code § 406.0165. There are specific requirements for proof of instruments. Tex. Civ. Prac. & Rem. Code §§ 121.005, 121.009–.011. Instruments may be recorded in Texas real property records if they contain an acknowledgment, a jurat, or a proof. Tex. Prop. Code § 12.001. On the law of acknowledgments generally, see Tex. Civ. Prac. & Rem. Code §§ 121.001–.016. Commencing July 1, 2018, instruments may be acknowledged utilizing online notarization procedures but only in strict compliance with rules to be adopted by the secretary of state. See Tex. Civ. Prac. & Rem. Code §§ 121.006, 121.016; Tex. Gov't Code ch. 406, subch. C. Forms of acknowledgments are included in chapter 3 in this manual. See also

the section titled "Notarial Seals, Out-of-State" below.

## § 2.5 Ad Valorem Taxes

Both real and personal property are subject to ad valorem taxes in Texas. Tex. Tax Code § 11.01. Provisions for special assessments or exemptions that may apply to real property include those for a residence homestead (Tex. Tax Code §§ 11.13, 11.131, 11.135); charitable organizations improving property for low-income housing (Tex. Tax Code §§ 11.181–1826); agricultural use (Tex. Const. art. VIII, §§ 1–d, 1–d–1; Tex. Tax Code §§ 23.41–60); timber production (Tex. Const. art. VIII, § 1–d–1; Tex. Tax Code §§ 23.59, 23.71–79); restricted timber use land (Tex. Tax Code §§ 23.9801–9807); open-space scenic, recreational, or park use (Tex. Const. art. VIII, § 1–d–1; Tex. Tax Code §§ 23.59, 23.81–87); mandatory school-tax home exemption (Tex. Const. art. VIII); and partially disabled and disabled veterans or their surviving spouses, surviving spouses of members of the armed services killed in action, and surviving spouses of first responders killed or fatally injured in the line of duty (Tex. Const. art. VIII, § 1–b). There is also a provision dealing with the separate taxation of tax parcels in condominium projects (Tex. Prop. Code § 82.005). The word *grant* or *convey* in a deed implies a covenant that the estate is free of encumbrances at the time of execution of the conveyance. Tex. Prop. Code § 5.023.

"Encumbrance" includes a tax, an assessment, and a lien on real property. Tex. Prop. Code § 5.024.

Owners taxed at a reduced rate under the agricultural-use amendment (Tex. Const. art. VIII, § 1–d), the open-space amendment (Tex. Const. art. VIII, § 1–d–1), or the special appraisal provisions of subchapters B–H of chapter 23 of the Tax Code should be alert to the potential tax liability that accrues if the land use changes or title is transferred and must disclose

the reduced rate to a potential buyer using the statutorily prescribed form. Tex. Prop. Code § 5.010. The county appraisal district office is required to maintain a list of properties potentially subject to this type of rollback of taxes. *See* Tex. Tax Code §§ 23.51–79. Lenders should be aware of the prohibitions against certain waivers and indemnities relating to the agricultural or open-space use exemption, described in more detail in the section titled "Loan Documents" below. In certain circumstances, taxing authorities may have the ability to waive penalties and interest on property erroneously omitted from taxation or granted improper tax exemptions. *See* Tex. Tax Code § 33.011.

Ad valorem tax liens take priority over most prior recorded liens. Tex. Tax Code §§ 32.01–.07. Certain redemption and possessory rights also apply to properties sold at tax foreclosures. *See* generally Tex. Tax Code ch. 34 and the section titled "Redemption Rights" below. A tax lien may also be transferred to a third party on payment of taxes authorized by the owner in accordance with Tex. Tax Code § 32.06. In some cases, property tax lenders will need to be licensed, are prohibited from lending to those eligible for the tax exemption for people over age sixty-five, will need to be cognizant of the regulations concerning advertising, and may be limited in selling a property tax loan in the secondary market. *See* Tex. Fin. Code ch. 351.

In counties having a population in excess of 250,000 and counties of less than 250,000 whose county commissioners opt to participate, an officer conducting a tax foreclosure sale of real property may not execute or deliver a deed to a purchaser who owes ad valorem taxes, whether on real or personal property. Tex. Tax Code § 34.015.

A tenant may contest a landlord's ad valorem tax assessment under certain circumstances. Tex. Tax Code §§ 41.413, 42.015.



When a governmental entity acquires the right to possession of taxable property by condemnation or acquires title to taxable property, taxes for the year of conveyance are prorated to the date of the order granting possession or the date of conveyance. If taxes for the year have not yet been determined, the assessor for each taxing unit may base the proration on taxes for the prior year. The collector must accept the tax payment, and the transferor is relieved of further payment for that year. Tex. Tax Code § 26.11.

### § 2.6 Adverse Possession

Texas has adverse possession periods of three, five, ten, and twenty-five years, depending on different factors. *See* Tex. Civ. Prac. & Rem. Code §§ 16.021–.034.

### § 2.7 Affidavits of Heirship

If an ownership interest in real property is in the estate of a decedent who dies intestate, inheritance of the property may be established by an affidavit recorded in the real property records of the county in which the property is located that details the family history and heirship of the decedent and identifies the heirs-at-law under sections 201.001–.003 of the Texas Estates Code. Tex. Est. Code ch. 205. The Estates Code includes a form of affidavit of heirship. Tex. Est. Code § 203.002. *See* also the section titled “Wills and Estates” below. A form of affidavit is furnished at form 26-1 in this manual. The practitioner may want to verify with a title insurance company that the affidavit will be sufficient evidence of inheritance for issuance of a title policy in the event of a future sale of the property interest.

### § 2.8 Affordable Housing Investments

The Internal Revenue Code provides for credits against federal income tax for owners of qualified low-income rental housing projects. *See* 26

U.S.C. § 42. In Texas that program is administered by the Texas Department of Housing and Community Affairs under Tex. Gov’t Code ch. 2306 and the rules found in 10 Tex. Admin. Code ch. 49. Under the National Affordable Housing Act of 1990, 42 U.S.C. §§ 12701–12898a, certain HUD funds are available for nonprofit and community development organizations to build or preserve low-income housing. Those projects must also satisfy the HUD program requirements found in 24 C.F.R. pts. 91, 92. Affordable housing constructed with federal or state funds must meet specified handicapped-accessible standards. Tex. Gov’t Code § 2306.514. Tex. Gov’t Code § 6711(g) provides for the allocation of housing tax credits in Fort Worth, Houston, Dallas, and San Antonio. A community land trust may be created to acquire and hold land for the benefit of developing and preserving long-term affordable housing in a municipality or county. Tex. Loc. Gov’t Code ch. 373B.

### § 2.9 Agricultural Development Districts

The creation of agricultural development districts is authorized by chapter 60 of the Agriculture Code. Tex. Agric. Code ch. 60. Districts have the power of eminent domain and may issue bonds (Tex. Agric. Code § 60.058) and levy taxes (Tex. Agric. Code ch. 60, subs. E, F). *See* also the section titled “Disclosures and Notices” below.

### § 2.10 Agricultural Liens

Persons securing loans with agricultural products should be aware that the perfection and priority of agricultural liens may be subject to rules outside of chapter 9 of the Texas Uniform Commercial Code. For example, an agricultural lien granted under subchapter E of Texas Property Code chapter 70 has priority over certain prior liens if certain conditions are met. *See* Tex. Prop. Code § 70.4045. Similarly, the statutory

trust created upon acceptance of commodities to which the Perishable Agricultural Commodities Act (PACA) applies may also have priority over certain previously filed UCC liens. *See* 7 U.S.C. § 499a-499s. The seller of commodities to which PACA applies may be in a position superior to all other creditors.

### § 2.11 Agricultural Use Exemption

See the sections titled “Ad Valorem Taxes” above and “Loan Documents” below.

### § 2.12 Aircraft Liens

Lien instruments covering aircraft should consider the aircraft registration requirements of the Federal Aviation Act of 1958 as amended (FAA), 49 U.S.C. §§ 44101-44113, and regulations found in 14 C.F.R. pt. 49. There are also provisions relating to aircraft storage, maintenance, and repair liens in Tex. Prop. Code §§ 70.301-.306.

### § 2.13 Alcoholic Beverages

There are a number of significant limitations on the transfer of and eligibility for alcoholic beverage permits under Texas law. *See* Tex. Alco. Bev. Code ch. 11. Businesses that sell alcohol are heavily regulated, and statutory control may extend to the physical structure of the business. *See, e.g.*, Tex. Alco. Bev. Code § 22.14. The Alcoholic Beverage Code also imposes location requirements applicable to the sale and consumption of alcoholic beverages. *See* Tex. Alco. Bev. Code §§ 101.75(a), 109.33.

### § 2.14 Alternative Dispute Resolution (ADR)

The Texas Alternate Methods of Dispute Resolution Act establishes alternative dispute resolution procedures, including mediation. Tex. Civ.

Prac. & Rem. Code ch. 154. See the section titled “Arbitration” below.

### § 2.15 Americans with Disabilities Act and Related Statutes

Title III of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12181-12189, creates minimum standards for accessibility in commercial and some types of residential buildings, including requirements relating to new construction; parking alterations; removing barriers from existing structures; installing telephone devices and other assistive listening devices for the deaf; providing auxiliary aids for conferences, seminars, and written materials offered to the public; and ensuring equivalent services and opportunities to disabled persons. Regulations under title III of the ADA pertaining to public accommodations, commercial facilities, and private entities are promulgated under 28 C.F.R. pt. 36. Architectural guidelines can be found in 36 C.F.R. pt. 1191.

Texas also has a state architectural-barriers statute that applies to certain commercial and residential facilities. Tex. Gov’t Code ch. 469. Regulations promulgated under the statute are found at 16 Tex. Admin. Code ch. 68. The Human Resources Code permits guide trainers reasonable access to public facilities to train assistance animals and prohibits the denial of access to public facilities, commercial properties, or housing for disabled persons, including those who use assistance animals. Tex. Hum. Res. Code § 121.003. Affordable housing constructed with federal or state funds must meet specified handicapped-accessible standards. Tex. Gov’t Code § 2306.514.

For current information on contractors and municipalities that are authorized to perform inspection functions, contact the Texas Department of Licensing and Regulation.

See also the section titled “Fair Housing” below for additional statutes relating to disability access for residential properties.

### § 2.16 Annexation

Annexation and disannexation of real property by municipalities are governed generally by Tex. Loc. Gov’t Code chs. 42, 43. A municipality may contract with an owner of land that is located in the municipality’s extraterritorial jurisdiction to guarantee the land’s immunity from annexation for a period not to exceed forty-five years, including renewals or extensions. Tex. Loc. Gov’t Code § 212.172.

### § 2.17 Antiquities

Chapter 191 of the Texas Natural Resources Code (the Antiquities Code) governs the location, protection, and preservation of “all sites, objects, buildings, pre-twentieth century shipwrecks, and locations of historical, archeological, educational, or scientific interest . . . in, on, or under any of the land in the State of Texas.” Tex. Nat. Res. Code § 191.002. The Antiquities Code provides landowners with certain rights. *See* Tex. Nat. Res. Code §§ 191.094, 191.133. There are civil and criminal penalties for violation of provisions of the statute. *See* Tex. Nat. Res. Code §§ 191.171–174.

### § 2.18 Appraisers

Appraisers are governed by Tex. Occ. Code ch. 1103, the Texas Appraiser Licensing and Certification Act. The Broker’s and Appraiser’s Lien on Commercial Real Estate Act provides for a lien and procedures to foreclose the lien for commissions and fees due and payable on the sale or lease of commercial real estate (as defined in the Act). *See* Tex. Prop. Code ch. 62. An appraiser or other person who intentionally or knowingly makes a materially false or misleading written statement in providing an appraisal of real property for compensation

commits a criminal offense punishable under Tex. Penal Code § 32.32(b–1).

Creditors approved as sellers and servicers to government-sponsored enterprises Federal National Mortgage Association (Fannie Mac) and Federal Home Loan Mortgage Corporation (Freddie Mac) must represent and warrant that appraisals for all covered loans for which application is made on or after October 15, 2010, comply with certain appraiser independence requirements as defined in their respective seller and servicing guides. *See* Fannie Mac, Announcement SEL-2010-14 (Oct. 15, 2010), and Freddie Mac, Bulletin 2010-23 (Oct. 15, 2010).

Title XIV of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 111-203, 124 Stat. 1376), enacted July 21, 2010, which may be cited by its short title as the “Mortgage Reform and Anti-Predatory Lending Act,” codified extensive appraisal reform measures that supersede the Home Valuation Code of Conduct (HVCC) and the appraiser independence requirements in favor of new, uniform appraisal independence standards. Regulation Z (Truth in Lending) was amended to implement these new standards effective April 1, 2011, by adding 12 C.F.R. § 226.42 (and removing old section 226.36(b)) to establish new requirements for appraisal independence for consumer credit transactions secured by a consumer’s principal residence. *See* 75 Fed. Reg. 66,554 (Oct. 28, 2010). The regulations are intended to ensure that real estate appraisals used to support creditors’ underwriting decisions are based on the appraisers’ independent professional judgment, free of any influence or pressure exerted by parties to the transactions.

### § 2.19 Arbitration

Arbitration is a dispute resolution process whereby one or more arbitrators make a decision, called an award, which is binding only if

the parties so agree. In Texas, arbitrations can be governed by common law, the Texas Arbitration Act (TAA), and the Federal Arbitration Act (FAA). See *L.H. Lacy v. City of Lubbock*, 559 S.W.2d 348, 351 (Tex. 1977); Tex. Civ. Prac. & Rem. Code chs. 171–172; 9 U.S.C. §§ 1–16. Some Texas statutes prohibit arbitration under certain circumstances. For example, in a contract for the construction or repair of improvements to real property in Texas, a provision requiring arbitration of disputes in another state is voidable. Tex. Bus. & Com. Code ch. 272. Also, in a contract for the sale or lease of goods worth \$50,000 or less, a provision requiring arbitration in another state is voidable unless the provision is in bold-faced, capitalized, underlined, or otherwise conspicuous type. Tex. Bus. & Com. Code ch. 273. When an arbitration agreement is not governed by or enforceable under the TAA, it may be governed by relevant Texas common-law arbitration rules. *L.H. Lacy*, 559 S.W.2d at 352. The FAA applies when the dispute concerns a contract evidencing a transaction involving interstate commerce. *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 269–70 (Tex. 1992). The FAA and TAA are not mutually exclusive and can both apply to an arbitration provision. *In re D. Wilson Construction Co.*, 196 S.W.3d 774, 779–80 (Tex. 2006). If the FAA applies, however, restrictions under Texas statutes, like the ones described above, can be preempted if the TAA would not allow enforcement of an arbitration agreement that the FAA would enforce. *In re D. Wilson Construction Co.*, 196 S.W.3d at 780.

### § 2.20 Architects

The Board of Architectural Examiners governs the activities of professional architects. Tex. Occ. Code ch. 1051.

An architect's lien against real estate is addressed in Tex. Prop. Code § 53.021(c).

### § 2.21 Asbestos

See the section titled “Environmental Laws” below.

### § 2.22 Assumed Names

The circumstances under which assumed names should be filed are addressed in the Assumed Business or Professional Name Act, Tex. Bus. & Com. Code ch. 71. The circumstances under which an entity is considered to have fraudulently filed an assumed name and the penalties for doing so are addressed in Tex. Bus. & Com. Code § 71.203. See also the section titled “Fraudulent Filings” below.

A financing statement that identifies a debtor by an assumed name or trade name may not be effective to perfect a security interest against the debtor unless the name used in the financing statement is so similar to the debtor's name that a search of the records of the filing office under the debtor's name, using the filing office's standard search logic, would disclose the financing statement that used a different assumed name or trade name. Tex. Bus. & Com. Code § 9.506(c). The Texas Business and Commerce Code provides rules for the name to be used in a financing statement for different types of debtors—for example, a debtor that is a decedent's estate, a trust or a trustee, an individual, or an organization. Tex. Bus. & Com. Code § 9.503.

### § 2.23 Astronomical Observatories

See the section titled “Outdoor Lighting” below.

### § 2.24 Automatic Teller Machines (ATMs)

Public safety requirements for the design of and layout surrounding an unmanned teller machine are found at Tex. Fin. Code ch. 59, subch. D.

### § 2.25 Bankruptcy

In addition to the federal Bankruptcy Code, title 11 of the United States Code, property subject to bankruptcy protection will also be affected by the homestead and personal property exemptions of the Texas Constitution and Property Code. Tex. Const. art. XVI, § 50; Tex. Prop. Code chs. 41, 42. Assignment for the benefit of creditors is addressed in Tex. Bus. & Com. Code §§ 23.01–.33. Texas has also adopted the Uniform Fraudulent Transfer Act, Tex. Bus. & Com. Code ch. 24. The circumstances under which a judgment lien is canceled after a bankruptcy discharge are addressed in Tex. Prop. Code §§ 52.041–.043.

### § 2.26 Beaches

See the section titled “Coastal Properties” below.

### § 2.27 Beauty Shop Leases

Lessors of premises used for beauty salons and parlors should be aware of the Texas Department of Licensing and Regulation regulations found in 16 Tex. Admin. Code § 83.114.

### § 2.28 Billboards

See the section titled “Outdoor Signs” below.

### § 2.29 Blind Trusts and Undisclosed Beneficiaries

A conveyance by a person designated as trustee is valid, even if the identity of the beneficiary has not been disclosed; the beneficiary may not set aside the conveyance of the property. Tex. Prop. Code § 101.001. A governmental entity may not purchase real property held in trust or sell real property to a trustee until the trustee submits a copy of the trust agreement and identifies the true owner of the property to the govern-

mental entity. Tex. Gov’t Code ch. 2252, subch. D.

### § 2.30 Brokers

Real estate brokers and salespersons are regulated by the Texas Real Estate Commission under the provisions of the Real Estate License Act, Tex. Occ. Code ch. 1101. The Broker’s and Appraiser’s Lien on Commercial Real Estate Act provides for a lien and procedures to foreclose the lien for commissions and fees due and payable on the sale or lease of commercial real estate (as defined in the Act). See Tex. Prop. Code ch. 62. See also the section titled “Disclosures and Notices” below.

### § 2.31 Brownfields Statute

See the section titled “Voluntary Cleanup Program” below.

### § 2.32 Building Codes

The Plumbing License Law adopts the Uniform Plumbing Code and the International Plumbing Code. See Tex. Occ. Code ch. 1301. The International Residential Code applies to all construction, alteration, remodeling, enlargement, and repair of residential structures inside municipalities except the installation and maintenance of electrical components. See Tex. Loc. Gov’t Code §§ 214.212–.213. The National Electrical Code regulates all residential electrical installation and maintenance. See Tex. Loc. Gov’t Code § 214.214. See also the section titled “Windstorm Inspection” below.

The National Electrical Code as it existed on May 1, 2001, was adopted by the Texas legislature as the municipal electrical construction code in Texas and applies to (1) all residential electrical construction applications and (2) commercial buildings in a municipality for which construction began after January 1, 2006. A municipality may establish procedures to

adopt local amendments and to administer and enforce the code. Tex. Loc. Gov't Code § 214.214.

The International Building Code as it existed on May 1, 2003, was adopted by the Texas legislature as the municipal commercial building code in Texas for commercial buildings in a municipality for which construction began after January 1, 2006. A municipality may establish procedures to adopt local amendments and to administer and enforce the code. Tex. Loc. Gov't Code § 214.216.

The International Residential Code as it existed on May 1, 2001, was adopted by the Texas legislature as the municipal residential building code in Texas. A municipality may establish procedures to adopt local amendments and to administer and enforce the code. Tex. Loc. Gov't Code § 214.212.

### § 2.33 Business Organizations Code

Corporations, partnerships, limited partnerships, limited liability companies, registered limited liability partnerships, nonprofit corporations, and cooperative associations organized or qualified to do business in Texas on or after January 1, 2006, must comply with the Texas Business Organizations Code. Entities organized or qualified to do business before January 1, 2006, had the option to be governed by the Code on or after January 1, 2006. Effective January 1, 2010, all entities organized or qualified to do business in Texas must comply with the Code. *See generally* Tex. Bus. Orgs. Code ch. 402.

### § 2.34 Camping Resorts

The Texas Membership Camping Resort Act is found at Tex. Prop. Code ch. 222. See also the section titled "Landowner Liability" below.

### § 2.35 Cash Proceeds

Those who receive in connection with their trade or business more than \$10,000 in cash in a transaction or in several related transactions must report to the Internal Revenue Service the amount of currency received; the payor's name, address, and tax identification number; the date and nature of the transaction; and other information as the United States Secretary of the Treasury may prescribe. 26 U.S.C. § 6050I(a), (b); 26 C.F.R. § 1.6050I-1.

### § 2.36 Cemeteries

The location and operation of cemeteries are regulated by Tex. Health & Safety Code §§ 711.001-.062. The platting of cemetery lands, mausoleums, crematories, and columbariums is governed by Tex. Health & Safety Code § 711.034.

### § 2.37 Certificates of Convenience and Necessity

See the sections titled "Sewer Service," "Telecommunications," and "Water Service" below.

### § 2.38 Certification of Trust

A person other than a beneficiary is not required to inquire into the extent of the trustee's powers or the propriety of the exercise of those powers if the person deals with the trustee in good faith and obtains a certification of trust. Tex. Prop. Code § 114.081(b). Tex. Prop. Code § 114.086 describes the contents of such a certification and describes the instances in which a party may rely on the representations about the power of the trustee to take actions on behalf of the trust described in the certification. See section 10.15 in this manual.

### § 2.39 Certified Mail

See the section titled "Registered Mail" below.

### § 2.40 Child Support Liens

A lien for all child support due and owing, including any accrued interest, attaches by operation of law to all nonhomestead property of an obligor. Tex. Fam. Code § 157.312. A child support lien against real property is perfected by filing or delivering an abstract of judgment or a child support lien notice as provided by Tex. Fam. Code § 157.314. Tex. Fam. Code § 157.316. The lien is subject to the general requirements addressed in Tex. Fam. Code §§ 157.311–.331. Foreclosure is governed by Tex. Fam. Code § 157.323. Tex. Fam. Code § 157.318 sets out the provisions regarding duration and effect of child support liens.

### § 2.41 Choice of Law

Choice-of-law provisions in contracts of \$1 million or more are enforceable under certain conditions. Tex. Bus. & Com. Code ch. 271. Tex. Bus. & Com. Code ch. 272 restricts the enforceability of choice-of-law provisions in contracts for the construction or repair of improvements to real property. For other types of contracts of \$50,000 or less, a conspicuous legend informing the parties of the choice-of-law provision must be in the contract (if another state's laws are chosen). Tex. Bus. & Com. Code ch. 273. Choice-of-law provisions for contracts made solely over the Internet are governed by Tex. Bus. & Com. Code ch. 274.

### § 2.42 Coastal Properties

Two types of notices relating to coastal properties are required for real property transactions in the vicinity of coastal waters. First, persons entering into an executory contract to convey an interest in property located seaward of the Gulf Intracoastal Waterway must make the disclosure required by Tex. Nat. Res. Code § 61.025, either in the contract itself or in a notice delivered not less than ten days before the closing of the sale. With some exceptions, the notice must be pro-

vided to the purchaser or transferee in all conveyancing transactions, including nonjudicial foreclosure sales. *See* Tex. Att'y Gen. Op. No. JM-834 (1987). Second, if real property adjoins and abuts the tidally influenced waters of the state, the notice prescribed in Tex. Nat. Res. Code § 33.135 must be given in all written executory contracts. The statutory disclosure form prescribed by section 5.008(b) of the Texas Property Code also includes language regarding such coastal properties.

Chapter 61 of the Natural Resources Code (Texas Open Beaches Act) declares the public policy of the state is that the public has free and unrestricted right of ingress and egress to and from state-owned beaches bordering on the seaward shore of the Gulf of Mexico and the larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico, to which the public has acquired a right of use or easement to or over by prescription or dedication or has established and retained a right by virtue of continuous right in the public under Texas common law. Chapter 61 contains provisions under which the commissioner of the General Land Office can (1) impose administrative penalties on persons constructing, maintaining, controlling, owning, or possessing improvements on public beaches; (2) order those improvements removed at the expense of the person constructing, maintaining, controlling, owning, or possessing them; (3) notify the State Board of Insurance that the improvements are not insurable; and (4) make determinations concerning the line of vegetation, including the ability to suspend a determination on the line of vegetation for up to three years. There are several provisions regarding public access to beaches, coastal erosion duties, erosion responses, and posting of private access in Tex. Nat. Res. Code chs. 33, 61.

See also the section titled "Windstorm Inspection" below.

The Texas Constitution was amended in 2009 to further protect the right of the public to access and use public beaches. Tex. Const. art. I, § 33, defines “public beach” and grants to the public a permanent easement and the unrestricted right to use, and a right of ingress to and egress from, a public beach. Section 33 further authorizes the legislature to enact laws to protect the public’s right to access and use a public beach and to protect the public beach easement from interference and encroachments, but it does not create a private right of enforcement. However, Texas law does not recognize the concept of a “rolling” public easement onto privately owned beachfront property, which would have the effect of allowing the public use easement to migrate onto previously unencumbered private property.

Easements for public use of private dry beach property change size and shape along with the gradual and imperceptible erosion or accretion in the coastal landscape. But, avulsive events such as storms and hurricanes that drastically alter pre-existing littoral boundaries do not have the effect of allowing a public use easement to migrate onto previously unencumbered property.

*Severance v. Patterson*, 370 S.W.3d 705, 724–25 (Tex. 2012).

### § 2.43 Colonias

Colonias are housing developments in low-income regions, typically near the border between Texas and Mexico. The Texas Local Government Code contains subdivision platting requirements in counties located (1) within fifty miles of the international border regardless of the population of any city within the county or (2) within one hundred miles of the international border if a city located within the county has a population of more than 250,000. Tex. Loc. Gov’t Code §§ 232.021–.043. See also Tex.

Loc. Gov’t Code §§ 232.071–.080 for alternate subdivision platting requirements applicable to certain other economically distressed areas. The Property Code contains restrictions on executory contracts (contracts for deed), a form of real estate transaction widely used in colonias. See Tex. Prop. Code §§ 5.061–.080. Colonia self-help centers are authorized in certain counties under Tex. Gov’t Code §§ 2306.581–.590. See also the section titled “Contracts for Deed” below.

### § 2.44 Community Homes; Group Homes

The Community Homes for Disabled Persons Location Act, Tex. Hum. Res. Code §§ 123.001–.010, restricts in some circumstances the enforceability of restrictive covenants and zoning excluding such homes and provides for registration, licensing, and other regulation of such facilities.

### § 2.45 Community Property with Right of Survivorship

Spouses may create a right of survivorship in community property by executing a written agreement. Tex. Est. Code §§ 111.001–.002. The Estates Code also addresses the rights of personal representatives, purchasers, and creditors in this type of property.

### § 2.46 Condemnation and Eminent Domain

Condemnation is the right to take private property for public use; property may not be taken, damaged, or destroyed for or applied to public use without just and adequate compensation and due process. See U.S. Const. amends. V, XIV, § 1; Tex. Const. art. I, §§ 17, 19. Condemnation actions are governed by chapter 21 of the Texas Property Code. Before a governmental entity with eminent domain authority begins negotiating with a property owner to acquire real prop-



erty, the entity must provide a landowner's bill of rights statement provided by Tex. Gov't Code § 402.031. The landowner's bill of rights provides that the property owner has a right to (1) notice of the proposed acquisition of the owner's property; (2) a bona fide good-faith effort to negotiate by the entity proposing to acquire the property; (3) an assessment of damages to the owner that will result from the taking of the property; (4) a hearing under chapter 21 of the Texas Property Code, including a hearing on the assessment of damages; and (5) an appeal of a judgment in a condemnation proceeding, including an appeal of an assessment of damages. The attorney general will prepare a written statement that includes a bill of rights for a property owner whose real property may be acquired by a governmental or private entity through the use of the entity's eminent domain authority under chapter 21 of the Texas Property Code. A copy of the Texas Landowner's Bill of Rights can be found at [https://www.texasattorneygeneral.gov/files/agency/landowners\\_bill\\_of\\_rights.pdf](https://www.texasattorneygeneral.gov/files/agency/landowners_bill_of_rights.pdf).

Some of the statutes authorizing condemnation are Tex. Transp. Code § 22.011 (airports and air-space), §§ 224.001–.008, 280.001, 314.011–.013 (highways and streets); Tex. Loc. Gov't Code §§ 251.001–.002 (public works or public use), §§ 331.001, 331.003 (parks and playgrounds), §§ 552.011, 552.013 (waterworks), § 571.004 (scawalls, levees, floodways, and the like); Tex. Nat. Res. Code § 111.019 (pipelines); Tex. Health & Safety Code § 711.033 (cemetery organizations); Tex. Educ. Code § 11.155 (school districts); Tex. Util. Code § 181.004 (utilities); Tex. Water Code § 49.222 (drainage districts); Tex. Gov't Code § 411.004 (providing eminent domain authority to counties for drainage); and Tex. Water Code ch. 54 (municipal utility districts (“MUDs”)).

See also the sections titled “Landowner’s Bill of Rights” and “Private Property Rights” below.

The comptroller is required to create an eminent domain database including the name, address, and representative of each entity authorized by the state to exercise the power of eminent domain. Tex. Gov't Code ch. 2206, subch. D (eff. September 1, 2015). The database must identify the scope of eminent domain granted to the entity, the entity's website address, and whether the entity exercised its eminent domain authority in the past year. Entities with the power of eminent domain are required to submit an annual report to the comptroller to update the database, including whether or not the entity exercised its eminent domain authority in the past year. Failure to file a report may result in a civil penalty.

## § 2.47 Condominiums

A condominium is a form of real property ownership in which portions of the real property are designated for separate ownership and the remainder is designated for common ownership solely by the separate owners. A condominium exists only if one or more of the common elements are directly owned in undivided interests by the unit owners. If an entity separate from the unit owners (e.g., an incorporated property owners association) owns all the common elements, the real property is not a condominium, even if the separate entity is owned by all the unit owners. Tex. Prop. Code § 82.003(a)(8).

The Texas Uniform Condominium Act (TUCA), Tex. Prop. Code ch. 82, governs the creation, operation, alteration, termination, and management of TUCA condominium projects created on or after January 1, 1994, but certain provisions of TUCA apply to those created before that date. Condominium projects created before January 1, 1994, are governed by portions of Tex. Prop. Code ch. 81 (the prior Condominium Act) and portions of TUCA, unless the owners of the project amend their declaration and submit it exclusively to the provisions of TUCA. See Tex. Prop. Code § 82.002. Tax certificates,

receipts, or other statements evidencing payment of taxes or that taxes have not yet been calculated must be attached to a plat, replat, or amended plat or replat of a condominium before recording in accordance with Tex. Prop. Code § 82.051(g). The separate taxation of individual units of a condominium is addressed in Tex. Prop. Code § 82.005 and Tex. Tax Code § 25.09. Certain disclosures are required in a contract for sale of a condominium. Tex. Prop. Code §§ 82.156–.157. See chapter 24 in this manual.

### § 2.48 Confessions of Judgment

Confession-of-judgment provisions in contracts executed before a lawsuit is brought are not enforceable. Tex. Civ. Prac. & Rem. Code § 30.001.

### § 2.49 Confidentiality Notice

See the section titled “Disclosures and Notices” below.

### § 2.50 Conspicuous Text

Several statutes require that certain notices and contractual provisions be set apart from and made more conspicuous than the surrounding text, either by using bold-faced type or some other method. A partial list of these provisions includes—

1. choice-of-law provisions designating another state and agreements to litigate or arbitrate in another state in contracts concerning goods valued at \$50,000 or less (Tex. Bus. & Com. Code ch. 273);
2. Deceptive Trade Practices Act waivers (Tex. Bus. & Com. Code § 17.42);
3. the statutory statute-of-frauds notice for loans greater than \$50,000 (Tex. Bus. & Com. Code § 26.02);

4. notices of cancellation for certain types of credit services agreements (Tex. Fin. Code § 393.202);
5. disclosures required in rental-purchase agreements (Tex. Bus. & Com. Code § 92.051(d));
6. certain language in homestead improvement contracts (Tex. Prop. Code § 41.007);
7. certain language in homestead lien affidavits (Tex. Prop. Code § 53.254);
8. certain notices relating to contracts for deed (Tex. Prop. Code §§ 5.062, 5.066, 5.074);
9. certain agreements between landlords and residential tenants concerning repairs (Tex. Prop. Code § 92.006);
10. certain notices in residential leases concerning the landlord’s obligations to install safety devices (Tex. Prop. Code § 92.164);
11. certain notices in residential leases concerning the disabling of smoke alarms by tenants (Tex. Prop. Code § 92.2611);
12. various provisions in retail installment contracts (Tex. Fin. Code §§ 345.052, 345.081, 345.304);
13. home solicitation transaction cancellation notices (Tex. Bus. & Com. Code §§ 601.052–.053);
14. the business opportunity contract disclosure statement (Tex. Bus. & Com. Code § 51.151) (note that “business opportunity” does not include real estate syndications and certain other transactions (Tex. Bus. & Com. Code § 51.003(b)));
15. certain provisions of residential service contracts (Tex. Occ. Code § 1303.254);

16. liability for rollback taxes (Tex. Prop. Code § 5.010(a)); and
17. the confidentiality notice required by the Property Code (Tex. Prop. Code § 11.008).

### § 2.51 Construction Accounts

Construction accounts are governed by Tex. Prop. Code ch. 162.

### § 2.52 Construction Contracts

Payment to contractors, subcontractors, and materialmen must be made within certain prescribed time periods. Tex. Prop. Code § 28.002. Waivers of this provision are generally void. Tex. Prop. Code § 28.006. Certain restrictions on indemnity agreements entered into with contractors are contained in Tex. Civ. Prac. & Rem. Code ch. 130. Restrictions on choice-of-law provisions and agreements to litigate or arbitrate in another state in some types of construction contracts are contained in Tex. Bus. & Com. Code ch. 272. Disclosures concerning home insulation are required of sellers of new homes by 16 C.F.R. § 460.16. Contractors are required to give owners a disclosure statement for residential construction contracts. Tex. Prop. Code § 53.255. See also the sections titled “Consumer Laws,” “Homesteads,” and “Mechanic’s Liens” below.

### § 2.53 Construction Payment Bond Claims

A surety company that has issued a construction payment bond is subject to requirements governing the claims process. See Tex. Ins. Code §§ 3503.051–.057.

### § 2.54 Consumer Laws

Many of the laws designed to protect consumers apply to real estate transactions, including—

1. the Deceptive Trade Practices–Consumer Protection Act (DTPA), Tex. Bus. & Com. Code §§ 17.41–.63 (including special provisions in section 17.42 limiting waivers of DTPA rights);
2. the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301–2312 (applies to consumer products used for personal, family, or household purposes, including property intended to be attached to or installed in real property);
3. the Home Solicitation Transactions Act, Tex. Bus. & Com. Code ch. 601 (gives consumers the right to cancel a transaction involving real property);
4. the Real Estate License Act, Tex. Occ. Code ch. 1102 (requires the licensing of persons who inspect real property);
5. the Residential Service Company Act, Tex. Occ. Code ch. 1303 (regulates persons who sell residential service or maintenance contracts);
6. the Manufactured Housing Standards Act, Tex. Occ. Code ch. 1201 (requires the licensing of persons who install manufactured housing), Tex. Occ. Code ch. 1202 (regulates “industrialized housing” or modular homes);
7. the Truth in Lending Act, 15 U.S.C. §§ 1601–1667f, and its accompanying Regulation Z, 12 C.F.R. pt. 226 (requires certain consumer disclosures by creditors of the costs and terms of consumer credit and provides certain remedies for consumers, including the right of rescission of certain credit transactions secured by a lien on the consumer’s principal dwelling); see also the section titled “Truth in Lending” below; and
8. the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601–2617, and its

accompanying Regulation X, 24 C.F.R. pt. 3500 (requires certain consumer disclosures for mortgage loan transactions secured by a lien on one-to-four family residential real property that otherwise meet the definition of a “federally related mortgage loan” set out in 24 C.F.R. § 3500.2 and also prohibits unlawful kickbacks, referral fees, and unearned fees in connection with federally related mortgage loans). See also the section titled “Real Estate Settlement Procedures Act (RESPA)” below.

### § 2.55 Contracts for Deed

The requirements for creating an enforceable residential contract for deed, the notice requirements to enforce a default, and numerous requirements imposed on sellers under such a contract are found in subchapter D of chapter 5 of the Texas Property Code. Tex. Prop. Code §§ 5.061–.086. See the section titled “Deceptive Trade Practices–Consumer Protection Act (DTPA)” below regarding DTPA actions for failure to deliver required disclosures.

Subchapter D applies to all contracts for deed statewide if the property is used or to be used as the buyer’s residence or as the residence of a person related to the buyer within the second degree by consanguinity or affinity. A residential lease with option to purchase the leased property is deemed a contract for deed with respect to certain of the provisions of subchapter D, although lease/purchase options of less than three years are subject to fewer provisions of subchapter D. Tex. Prop. Code § 5.062(a), (f).

A complete review of subchapter D is recommended before documenting a residential contract for deed. Breaches of certain requirements of subchapter D are violations of the Texas Deceptive Trade Practices–Consumer Protection

Act. See Tex. Prop. Code §§ 5.069, 5.070, 5.072, 5.078, 5.085.

The attorney who prepares the contract for deed, if deemed the person responsible for closing, may be required to satisfy Internal Revenue Service Form 1099-S reporting requirements. 26 U.S.C. § 6045(c). See chapter 4 in this manual for additional considerations in reviewing a contract for deed transaction. The practitioner should also carefully consider the applicability to the contract for deed transaction of the many disclosures required elsewhere in chapter 5 of the Property Code. See exhibit D to form 4-1 in this manual.

If chapter 601 of the Texas Business and Commerce Code (relating to the right of consumers to cancel certain transactions) applies to the contract for deed transaction, the seller must provide the buyer with the notice of right of rescission prescribed in section 601.052(a) and (b) and the form of cancellation notice prescribed in section 601.053(c), and the buyer may cancel the contract not later than midnight of the third business day after the buyer signs the contract for deed. Tex. Bus. & Com. Code §§ 601.051, 601.052(a), (b), 601.053. See forms 4-4 and 4-15. The attorney who prepares the contract for deed should also determine whether the contract for deed transaction is subject to the federal Truth in Lending Act and its accompanying Regulation Z. See chapter 12 in this manual.

Contracts for deed transferring an interest in real property to or from an individual are required to include the confidentiality notice set out in Tex. Prop. Code § 11.008. See section 3.16 in this manual.

### § 2.56 Copyrights

The U.S. copyright laws extend to visual arts and architectural works and prohibit modification or destruction of visual arts in certain circumstances. See 17 U.S.C. §§ 102, 106A.

Owners of buildings may alter or destroy a building embodying an architectural work. 17 U.S.C. § 120(b).

### § 2.57 Corporations

Corporations may buy, sell, and otherwise deal with real property. Tex. Bus. Orgs. Code § 2.101. They are prohibited, however, from engaging in specified combinations of businesses: owning land and raising cattle and operating stockyards and packing meat; and operating both a petroleum-producing business and an oil pipeline business in the state. Tex. Bus. Orgs. Code § 2.007. A corporation cannot be organized to operate a bank, trust company, savings association, insurance company, cemetery company (except as authorized by the Health and Safety Code), or abstract or title company. Tex. Bus. Orgs. Code § 2.003.

Unless otherwise provided in the governing documents, the governing entity may authorize by resolution a disposition of property without the approval of the members or owners of the entity. Tex. Bus. Orgs. Code § 10.252. If a corporation conveys land under authority of its governing documents, the deed must be signed by an officer or attorney-in-fact. Tex. Bus. Orgs. Code § 10.253. A corporation may convey or mortgage its property for any lawful purpose, except if prohibited by law or by the corporation's charter or bylaws. No corporate seal is required for a valid deed. Tex. Bus. Orgs. Code § 10.251.

Condominium owners associations for condominium regimes formed after December 31, 1993—and those formed before January 1, 1994, that opt to be governed exclusively by Texas Property Code chapter 82 under section 82.002(a)(1)—must be formed as for-profit or nonprofit corporations. Tex. Prop. Code § 82.101.

See also the sections titled “Business Organizations Code” above and “Foreign Entities,”

“Limited Liability Companies,” “Nonprofit Corporations,” and “Partnerships” below.

### § 2.58 Covenants Not to Compete

Covenants not to compete are governed by the provisions of Tex. Bus. & Com. Code § 15.50.

### § 2.59 Criminal Record Checks of Employees

Criminal record checks of employees of residential dwelling projects are permitted under the provisions of Tex. Health & Safety Code ch. 765.

### § 2.60 Deceptive Trade Practices—Consumer Protection Act (DTPA)

The Texas Deceptive Trade Practices—Consumer Protection Act (Tex. Bus. & Com. Code §§ 17.41–.63) applies to certain types of real estate transactions. Waivers of the Act's protection are permitted only if in compliance with Tex. Bus. & Com. Code § 17.42. See also the section titled “Residential Construction Liability” below. A violation of the provisions of the Texas Property Code pertaining to home improvement contracts may be brought as a DTPA action (Tex. Prop. Code § 41.007), as may a seller's failure to deliver a property disclosure statement before execution of some contracts for deed to convey residential property (Tex. Prop. Code § 5.069(d)). See also Tex. Prop. Code § 221.071 for a DTPA action under the Texas Timeshare Act (Tex. Prop. Code ch. 221).

### § 2.61 Deeds

The legal requirements for deeds are addressed in Tex. Prop. Code §§ 5.021–.023. See also chapter 5 in this manual.

Deeds transferring an interest in real property to or from an individual are required to include the confidentiality notice set out in Tex. Prop. Code § 11.008. See section 3.16 in this manual.

Instruments that correct a conveyance of real property should comply with Tex. Prop. Code §§ 5.027–.030. Whether the change to the instrument is material or nonmaterial will dictate the process needed to make the correction. See section 5.8 in this manual.

The Texas Real Property Transfer on Death Act authorizes an individual to execute and record a transfer on death deed to make a revocable transfer of the transferor's interest in real property to one or more designated beneficiaries, including alternate beneficiaries, effective at the transferor's death. *See* Tex. Est. Code ch. 114. See section 5.12 in this manual.

### § 2.62 Deeds of Trust

Foreclosure of liens is addressed in Tex. Prop. Code ch. 51. See also the separate discussion under “Foreclosure” below.

Deeds of trust transferring an interest in real property to or from an individual are required to include the confidentiality notice set out in Tex. Prop. Code § 11.008. See section 3.16 in this manual.

### § 2.63 Deficiency Litigation after Foreclosure

A suit for a deficiency following a foreclosure sale conducted under Tex. Prop. Code § 51.002 must be brought within two years and is governed by Tex. Prop. Code §§ 51.003–.005. See also the section titled “Foreclosure” below.

### § 2.64 Disclaimer of Interest in Decedent's Estate

A person desiring to disclaim an interest in a decedent's estate must comply with Tex. Est. Code ch. 122. A person disclaiming an interest in a decedent's property after January 1, 2014, is required to disclose any child support owed. Tex. Est. Code § 122.051. A disclaimer made by a beneficiary who is a child support obligor may not be effective to disclaim his interest in the estate. *See* Tex. Est. Code § 122.107.

### § 2.65 Disclosure of Interested Parties When Contracting with Governmental Entities

A governmental entity or state agency may not enter into a contract with a business entity if the contract requires a vote by the governing body of the governmental entity or state agency or the contract has a value of at least \$1 million unless the business entity submits a disclosure of interested parties to the governmental entity or state agency at the time the business entity submits the signed contract to the governmental entity or state agency. Tex. Gov. Code § 2252.908. The disclosure of interested parties must be submitted on an electronic form prescribed by the Texas Ethics Commission. *See* 1 Tex. Admin. Code ch. 46. The required Form 1295 and filing instructions can be found on the Texas Ethics Commission website at [https://www.ethics.state.tx.us/whatsnew/FAQ\\_Form1295.html](https://www.ethics.state.tx.us/whatsnew/FAQ_Form1295.html). See also the section titled “Sale of Trust Property to Governmental Entities” below.

### § 2.66 Disclosures and Notices

Numerous statutory disclosure and notice requirements affect real estate transactions.

1. A seller of residential real property comprising not more than one dwelling unit must give the purchaser of the property a signed, written notice, sub-

- stantially in statutory form, concerning the condition of the property, including known defects or malfunctions of building structural components and building materials; working condition of various systems, appliances, smoke detectors, and other enumerated items; and the existence of various undesirable conditions such as termite damage, lead-based paint, radon gas, and a single blockable main drain in a swimming pool or hot tub. The notice must be delivered on or before the effective date of any executory sales contract binding the purchaser and, if the seller fails to provide the notice by the effective date, the purchaser may rescind the contract for any reason within seven days after receiving the notice. Tex. Prop. Code § 5.008. See form 4-21 in this manual.
2. Real estate brokers have a number of disclosure obligations, including the nature of their principal-agent relationship, as well as any applicable intermediary status, to prospective buyers, sellers, landlords, and tenants; knowledge of latent defects; the advisability of obtaining a title policy; as well as nondisclosure requirements. Tex. Occ. Code §§ 1101.555–.559, 1101.651–.652; 22 Tex. Admin. Code chs. 535, 537.
  3. A seller is obligated to make certain disclosures if the property is located in a water or utility district. Tex. Water Code §§ 49.452, 54.016(h)(4)(A). See form 4-18.
  4. Sellers in certain municipalities must disclose the presence of restrictive covenants affecting the property. Tex. Loc. Gov't Code §§ 212.151–.157 (Enforcement of Land Use Restrictions Contained in Plats and Other Instruments). See form 4-11.
  5. The presence of underground storage tanks must be disclosed to purchasers in accordance with 30 Tex. Admin. Code § 334.9. See form 4-10.
  6. There are disclosure requirements in the Texas Timeshare Act, Tex. Prop. Code §§ 221.031–.036.
  7. The Texas Membership Camping Resort Act has disclosure requirements. See Tex. Prop. Code § 222.006.
  8. There are disclosures required by the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701–1720, and 24 C.F.R. pts. 1710–1720.
  9. Disclosures concerning home insulation are required by 16 C.F.R. § 460.16. See form 4-6.
  10. Disclosures concerning asbestos are required by 29 C.F.R. §§ 1910.1001 and 1926.1101. See the appropriate forms in chapters 25 and 26. See also form 4-8.
  11. A seller of vacant land must include in the contract a certain bold-faced notice about potential rollback taxes. A number of exemptions apply, including an exemption if a separate paragraph in the contract addresses rollback tax liability. Tex. Prop. Code § 5.010. See form 4-14.
  12. A seller of unimproved residential property must provide the buyer with a written disclosure of certain subsurface conditions, such as pipelines, in certain circumstances. This notice is not required if the seller is obligated under the contract to furnish a title insurance commitment and if the buyer is entitled to terminate if objections to the commitment are not cured before closing. Tex. Prop. Code § 5.013.

13. A seller of a single-family residence must give notice to a prospective buyer if the residence is subject to membership in a property owners association, restrictive covenants have been recorded, and an assessment lien may be foreclosed for failure to pay assessments. Tex. Prop. Code § 5.012. See form 23-9.
  14. A seller must disclose that the land may be included in the extraterritorial jurisdiction of a municipality and thereby subject to annexation. Tex. Prop. Code § 5.011. See form 4-15.
  15. Contractors are required to give the owner a disclosure statement before the owner executes a residential construction contract. Tex. Prop. Code § 53.255. See form 18-1.
  16. Residential mortgage loan originators have certain disclosure obligations to residential mortgage loan applicants, including the nature of the relationship between the residential mortgage loan originator and the applicant, the duties the residential mortgage loan originator has to the applicant, and how the residential mortgage loan originator will be compensated, as well as the terms under which an interest rate lock-in fee will be refundable. Tex. Fin. Code §§ 156.004, 156.304. The Savings and Mortgage Lending Commissioner by rule has promulgated a standard form entitled "Residential Mortgage Loan Originator Discloser." 7 Tex. Admin. Code § 80.9.
  17. A seller of unimproved real property located outside a municipality's jurisdiction must provide a statutory notice to a purchaser that the extension of water or sewer services may require additional expense and delay to obtain. Tex. Water Code § 13.257. See form 4-16.
  18. Sellers of real property within an agricultural development district must give the purchaser written notice to that effect. Tex. Agric. Code § 60.063. The district must file a copy of the form for notice required by section 60.063 with the county clerk in each county in which all or part of the district is located. Tex. Agric. Code § 60.0631. The statute charges each agricultural district with the responsibility to prepare its own form.
  19. Disclosures concerning home loans and high-cost home loans (loans with an interest rate of 12 percent or greater per year), including disclosures regarding individual or group credit life or disability insurance, are required by chapter 343 of the Finance Code. Tex. Fin. Code ch. 343. See also section 10.14 in this manual.
  20. Texas Property Code section 11.008 provides that an instrument executed after September 1, 2005, transferring an interest in real property to or from an individual must include a statutorily described notice that appears on the top of the first page of the instrument in twelve-point bold-faced type or twelve-point uppercase letters. Tex. Prop. Code § 11.008. The notice advises natural persons that Social Security numbers or driver's license numbers may be removed from the document before recording. The statute defines an "instrument" for purposes of this section as "a deed or deed of trust." See Tex. Prop. Code § 11.008(a). These terms are not defined.
- The validity of an instrument as between the parties to the instrument



and the notice provided by the instrument is not affected by a party's failure to include the notice required under section 11.008.

The county clerk may not under any circumstance reject an instrument presented for recording solely because the instrument fails to comply with this section. Tex. Prop. Code § 11.008(e).

21. A seller of residential property that is located in a public improvement district established under chapter 372 of the Local Government Code and that consists of not more than one dwelling unit must give notice to the purchaser that it will be obligated to pay assessments for an improvement project. The notice must be given before the effective date of the executory contract and must be substantially similar to the prescribed notice. If an executory contract is entered into without the notice having been given, the purchaser may, as its exclusive remedy, terminate the contract for any reason no later than the earlier of (1) the seventh day after the date the purchaser receives the notice or (2) the date the transfer occurs as provided by the executory contract. Tex. Prop. Code § 5.014. See form 4-5.
22. If all or part of a subdivision for which a plat is required under chapter 232 of the Local Government Code is located within a future transportation corridor identified in an agreement between the Texas Department of Transportation and a county under section 201.619 of the Transportation Code, each purchase contract or lease between the subdivider and a purchaser or lessee of land in the subdivision must contain a conspicuous statement that the land is located within the area of the alignment of a transportation project as shown in the final environmental decision document that is applicable to the future transportation corridor. Tex. Loc. Gov't Code § 232.0033. See form 4-19.
23. With a number of exceptions, a seller of property that will be conveyed subject to a lien must make required disclosures to the prospective purchaser at least seven days before the earlier of the effective date of the conveyance or the execution of the contract for the conveyance. The failure to give the notice does not invalidate a conveyance, but the purchaser may pursue other remedies available unless the person required to give notice reasonably believes and takes any necessary action to ensure that each lien for which notice was not provided will be released on or before the thirtieth day after the date on which title to the property is transferred. Among the excepted transactions for which the disclosure is not required are those in which the purchaser obtains a title policy and those in which the seller has sold, or the purchaser has purchased, interests in real property four or more times during the preceding twelve months. Tex. Prop. Code § 5.016.
24. A person registered under the Residential Mortgage Loan Servicer Registration Act (Tex. Fin. Code ch. 158) and acting as a servicer of loans secured by a lien on residential real estate located in Texas must provide a statutory notice informing the borrower of each such residential mortgage loan that complaints about servicing of the loan should be sent to the Department of Savings and Mortgage Lending. Tex. Fin. Code § 158.101.

25. A person who sells property for which a certificate of mold remediation has been issued pursuant to section 1958.154 of the Texas Occupations Code must deliver to the purchaser copies of each certificate of mold remediation issued for the property with the preceding five years. Tex. Occ. Code § 1958.154.
26. A seller of commercial or residential property adjoining an impoundment of water, including a reservoir or lake constructed and maintained under chapter 11 of the Texas Water Code that has storage capacity of at least 5,000 acre-feet at the impoundment's normal operating level, must give to the purchaser notice of fluctuations for various reasons, including an entity lawfully exercising its right to the water stored in the impoundment or drought or flood conditions. Tex. Prop. Code § 5.019. See form 4-27.

Other situations may require disclosures. See the sections titled “Ad Valorem Taxes,” “Choice of Law,” “Coastal Properties,” “Condominiums,” “Conspicuous Text,” and “Contracts for Deed” above and “Flood Insurance,” “Foreign Ownership of Real Property,” “FTC Anti-Holder-in-Due-Course Rule,” “Home Equity Lending,” “Home Improvement Contracts,” “Interstate Land Sales Full Disclosure Act,” “Landfills,” “Lead-Based Paint Disclosures,” “Mortgage Loan Originators,” “Securities Acts,” “Truth in Lending,” and “Utility District Disclosures” below.

### § 2.67 Discrimination

A restriction in a deed or other instrument affecting real property that prohibits the use, sale, lease, or transfer on account of race, color, religion, or national origin is void and unenforceable. Tex. Prop. Code § 5.026. Municipalities may also adopt fair housing ordinances,

which may have enforcement procedures and remedies that vary from state and federal law. Tex. Loc. Gov't Code § 214.903. The Texas Workforce Commission civil rights division has the authority to hear certain types of discrimination complaints. Tex. Lab. Code ch. 301. See also the sections titled “Americans with Disabilities Act and Related Statutes” above and “Equal Credit Opportunity” and “Fair Housing” below.

Cities and counties may not prohibit housing discrimination against a person “because the person’s lawful source of income to pay rent includes funding from a federal housing assistance program,” but ordinances or regulations protecting veterans from discrimination may not be invalidated by cities or counties. Tex. Loc. Gov't Code § 250.007.

### § 2.68 Divorce

See the section titled “Family Law” below.

### § 2.69 Dodd-Frank Wall Street Reform and Consumer Protection Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 111-203, 124 Stat. 1376) is sweeping financial reform legislation intended in pertinent part to “protect consumers from abusive financial services practices” thought by Congress to have significantly contributed to the 2007-2009 national financial crisis. The Act, comprising some sixteen titles, was signed into law on July 21, 2010.

The full text of the Act may be accessed at <https://legcounsel.house.gov/Comps/Dodd-Frank%20Wall%20Street%20Reform%20and%20Consumer%20Protection%20Act.pdf>. Titles IX, X, and XIV of the Act are particularly pertinent to residential real estate finance transactions.

Title IX, subtitle D, requires any “securitizer” of an asset-backed security, such as a mortgage-backed security or a collateralized mortgage obligation, to retain an economic interest in a portion of the credit risk that the securitizer sells or transfers to a third party through the issuance of an asset-backed security, unless all the assets that collateralize the asset-backed security are “qualified residential mortgages” that meet certain definitional standards. Title IX becomes effective with respect to securitizers and originators of asset-backed securities backed by residential mortgages one year after the date on which final regulations under the title are adopted and published in the Federal Register.

Title X, which may be cited by its short title as the Consumer Financial Protection Act of 2010, establishes within the Federal Reserve System an independent bureau to be known as the Bureau of Consumer Financial Protection (the “Bureau”), which shall regulate the offering and provision of all consumer financial products and services under federal consumer financial laws. The Bureau is empowered and has the exclusive authority to implement, interpret, and enforce the Real Estate Settlement Procedures Act, Truth in Lending Act, Equal Credit Opportunity Act, Fair Credit Reporting Act, Fair Debt Collection Practices Act, Home Mortgage Disclosure Act, S.A.F.E. Mortgage Licensing Act, and other enumerated federal statutes that currently regulate some aspect of consumer loan origination and servicing activities. The director of the Bureau, appointed by the President with the advice and consent of the Senate, has the authority to prescribe rules and issue orders and guidance as may be “necessary or appropriate” to enable the Bureau to administer and “carry out the purposes and objectives” of the federal consumer financial laws and to “prevent evasions” of such laws. The Bureau has unprecedented enforcement powers to grant relief for any violation of consumer financial law, including imposing civil money penalties for any violation of a law, rule, or final order imposed on a covered

person in amounts ranging from \$5,000 to \$1 million for each day in which such a violation continues. The Bureau assumed all “consumer financial protection functions” formerly delegated to other federal agencies on the designated transfer date of July 21, 2011.

Title XIV, which may be cited as the Mortgage Reform and Anti-Predatory Lending Act, contains extensive amendments to the Truth in Lending Act, Real Estate Settlement Procedures Act, and the Equal Credit Opportunity Act reforming residential mortgage origination, underwriting, appraisal, and servicing practices. See the discussion in chapter 12 in this manual.

### § 2.70 Dry Cleaners

Chapter 374 of the Health and Safety Code regulates performance standards for both existing and new dry cleaning facilities. Tex. Health & Safety Code ch. 374.

### § 2.71 Due-on-Sale Clauses

Due-on-sale provisions are addressed in the Garn-St. Germain Depository Institutions Act of 1982, 12 U.S.C. § 1701j-3, and the regulations promulgated thereunder at 12 C.F.R. § 34.5, including preemption of certain conflicting state laws.

### § 2.72 Durable Powers of Attorney

Durable powers of attorney are governed by Tex. Est. Code chs. 751–752. Unless a time limitation is specifically stated in the instrument creating it, the passage of time does not cause a durable power of attorney to lapse. Tex. Est. Code § 751.004. The durable power of attorney between spouses terminates on divorce or annulment except in certain situations. Tex. Est. Code § 751.053. A court’s appointment of a permanent guardian for the principal’s estate terminates the durable power of attorney on the guardian’s qualification. A court may suspend

the powers of an agent under a durable power of attorney during the term of a temporary guardianship. Tex. Est. Code § 751.052.

A durable power of attorney must be in writing, be signed by a principal who is an adult, be acknowledged, and contain the following phrase or words of similar import: "This power of attorney is not affected by subsequent disability or incapacity of the principal." Tex. Est. Code § 751.002. The attorney-in-fact or agent has a fiduciary duty to the principal to timely inform the principal of all actions taken, account for his actions, maintain appropriate records, and provide an accounting on demand by the principal. Tex. Est. Code § 751.101.

Durable powers of attorney used in real estate transactions must be recorded in the county or counties in which the real property is located not later than thirty days after the instrument signed by the agent is recorded. *See* Tex. Est. Code § 751.151. Several other important requirements for such powers of attorney are addressed in the statute. Tex. Est. Code § 751.051 sets forth a statutory form of durable power of attorney. When using the statutory form, the principal will need to initial each specific power to be granted or initial the line to grant all powers. A form of durable power of attorney for use in real estate transactions incorporating the statutory requirements is included in chapter 26 in this manual.

### § 2.73 Easements, Pipeline

Unless expressly provided otherwise, pipeline easements created by grant or power of eminent domain for the benefit of a single common carrier pipeline for which the power of eminent domain is available are presumed to create an easement in favor of the common carrier pipeline that extends a width of fifty feet as to each pipeline laid under the easement before January 1, 1994. Tex. Nat. Res. Code § 111.0194. The presumption is rebuttable. Persons who acquire pipeline easements and rights-of-way for others

must be registered, licensed, or exempt from licensing by the Real Estate License Act. A notice promulgated by the Texas Real Estate Commission must be delivered to the grantor of the easement before the easement is granted. Tex. Occ. Code § 1101.653.

### § 2.74 Economically Distressed Counties

See the section titled "Colonias" above.

### § 2.75 Economic Development

The Texas Economic Development Act provides certain ad valorem tax benefits to encourage economic development. Tex. Tax Code ch. 313.

### § 2.76 Elderly Housing

See the section titled "Fair Housing" below.

### § 2.77 Electronic Commerce

Texas has adopted the Uniform Electronic Transactions Act, which is intended to facilitate electronic commerce. Tex. Bus. & Com. Code ch. 322. The Uniform Electronic Transactions Act does not apply to transactions that are otherwise covered by the laws governing the execution of wills and testamentary trusts or by the Uniform Commercial Code. Tex. Bus. & Com. Code § 322.003(b). Electronic funds transfers are governed by chapter 4A of the Uniform Commercial Code. Tex. Bus. & Com. Code ch. 4A.

### § 2.78 Electronic Filing of Documents

Statutes authorizing and otherwise relating to the electronic filing of documents in the public records include Tex. Loc. Gov't Code § 191.009 and ch. 195. Chapter 9 of the Texas Business and Commerce Code, while no longer explicitly

authorizing electronic filing, is clearly written to accommodate it. For example, in most places the revision refers to “authenticating” rather than “signing” a record. The revised Code also provides that “communication of a record to a filing office . . . constitutes filing.” Tex. Bus. & Com. Code § 9.516(a). Filing by means other than in writing is contemplated by Tex. Bus. & Com. Code § 9.525(a)(3); *see also* Tex. Bus. & Com. Code § 9.526(b).

Texas has also adopted the Uniform Real Property Electronic Recording Act. Tex. Prop. Code §§ 15.001–.008. Under the Act, a “document” includes information stored in an electronic or other medium that is retrievable in perceivable form. Tex. Prop. Code § 15.002(1). A document received by a county clerk in electronic form is eligible to be recorded in the real property records. If another law requires as a condition of recording that a document be on paper or other tangible medium, the requirement is satisfied by an electronic document that complies with the Act. Tex. Prop. Code § 15.004. An electronic signature is an electronic sound, symbol, or process attached to or logically associated with a document executed or adopted by a person with the intent to sign the document. Tex. Prop. Code § 15.002(4). An acknowledgment may be similarly satisfied by an electronic signature. Tex. Prop. Code § 15.004. Licensed attorneys, lending institutions, title insurance companies, and state agencies may record electronically. County clerks are authorized (but not required) to implement the Act. Tex. Prop. Code § 15.005. The Act also amends provisions of the Local Government Code pertaining to electronic recording and directs the Texas State Library and Archives Commission to adopt rules to promote uniformity within the state and among other states that adopt similar laws. Tex. Prop. Code § 15.006.

The Electronic Government Task Force has launched an Internet portal to provide access to electronic government services in Texas. It is found at <https://www.texas.gov>; it provides

forms and applications from various agencies and access to filing and payment of sales tax. Authority for oversight by the TexasOnline Authority is provided in Tex. Gov’t Code ch. 2054.

### § 2.79 Eminent Domain

See the section titled “Condemnation and Eminent Domain” above.

### § 2.80 Endangered Species Act

The Endangered Species Act can be found at 16 U.S.C. §§ 1531–1544. The provisions of the statute may limit the development of real property in areas that include the habitats of endangered species.

### § 2.81 Engineer’s Liens against Real Estate

An engineer’s lien against real estate is addressed in Tex. Prop. Code § 53.021(c).

### § 2.82 Environmental Laws

Numerous federal and state environmental statutes affect real estate transactions. Among the most important federal laws are—

1. the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §§ 9601–9675, relating primarily to liability for cleanup of inactive hazardous waste sites (see also the sections titled “Hazardous Waste Liens” and “Landowner Liability” below);
2. the Resource Conservation and Recovery Act, as amended by the Hazardous and Solid Waste Amendments of 1984 and the Land Disposal

- Program Flexibility Act of 1996, 42 U.S.C. §§ 6901–6992k, relating primarily to active waste treatment, storage, or disposal facilities, including underground storage tanks (see also the section titled “Underground and Aboveground Storage Tanks” below);
3. the Federal Water Pollution Control Act, also known as the Clean Water Act, 33 U.S.C. §§ 1251–1387, governing, among other things, the regulation of wetlands, stormwater, and point-source water pollution (see also the sections titled “Stormwater Permits” and “Wetlands” below);
  4. the federal Clean Air Act, 42 U.S.C. §§ 7401–7671q, requiring permits for many types of operations, regulating certain asbestos materials and emissions, and prohibiting certain types of chemicals, such as chlorofluorocarbons (CFCs), that deplete the ozone layer. The regulations dealing with CFCs are in 40 C.F.R. pt. 82. Related regulations include the asbestos-based National Emission Standards for Hazardous Air Pollutants at 40 C.F.R. pt. 61;
  5. the Endangered Species Act, 16 U.S.C. §§ 1531–1544;
  6. the Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. §§ 2641–2656, and regulations, 40 C.F.R. pt. 763;
  7. asbestos regulations under the Occupational Safety and Health Act, 29 C.F.R. § 1910.1001 (general industry standard), and 29 C.F.R. § 1926.1101 (construction standard);
  8. the Residential Lead-Based Paint Hazard Reduction Act of 1992, also known as Title X of the Housing and Community Development Act (42 U.S.C. §§ 4851–4856) (see the section titled “Lead-Based Paint Disclosures” below);
  9. the Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j–26; and
  10. the Toxic Substances Control Act, 15 U.S.C. §§ 2601–2695d, regulating polychlorinated biphenyls and other substances.
- Important state environmental statutes and regulations include—
1. the Solid Waste Disposal Act, Tex. Health & Safety Code ch. 361 (concerns the disposal of hazardous and certain nonhazardous wastes), including the statute regulating developments over abandoned landfills, Tex. Health & Safety Code §§ 361.531–.539 (see the separate discussion of this statute under the section titled “Landfills” below), and the voluntary cleanup program (also known as a Brownfields statute), Tex. Health & Safety Code §§ 361.601–.613 (see the section titled “Voluntary Cleanup Program” below);
  2. the Texas Clean Air Act, Tex. Health & Safety Code ch. 382, requiring air permits for many types of industrial and construction operations and regulating air emissions and various other hazardous substances and activities;
  3. the Texas Hazardous Substances Spill Prevention and Control Act, Tex. Water Code §§ 26.261–.267;
  4. the Texas Underground and Aboveground Storage Act, as amended, Tex. Water Code §§ 26.341–.367 (see also the section titled “Underground and Aboveground Storage Tanks” below);
  5. the Coastal Public Lands Management Act of 1973, as amended, Tex. Nat.

- Res. Code ch. 33, and regulations at 31 Tex. Admin. Code chs. 501–506 (see also the section titled “Coastal Properties” above);
6. the Texas Environmental, Health, and Safety Audit Privilege Act, Tex. Rev. Civ. Stat. art. 4447cc;
  7. the Texas Asbestos Health Protection Act, Tex. Occ. Code ch. 1954;
  8. the Texas Railroad Commission’s Operator Cleanup Program and regulations at 16 Tex. Admin. Code § 3.91; and
  9. Tex. Agric. Code ch. 63, providing enhanced safety oversight and inspections of ammonium nitrate storage facilities by permitting entry by local or state fire authorities and providing enhanced storage requirements.

In addition, there are numerous environmental provisions that bear on the ownership, operation, and development of real estate properties in the Texas Health and Safety Code, the Texas Natural Resources Code, the Texas Parks and Wildlife Code, and the Texas Water Code.

### § 2.83 Equal Credit Opportunity

The Equal Credit Opportunity Act, implemented by Regulation B, 12 C.F.R. § 202.16, provides a cause of action against a creditor who discriminates against an applicant for credit (1) on the basis of the applicant’s race, color, religion, national origin, sex, marital status, or age (provided the applicant has the capacity to enter into a binding contract), (2) because all or part of the applicant’s income derives from any public assistance program, or (3) because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. See 15 U.S.C. §§ 1691–1691f. Regulation B also establishes rules for a creditor’s collection, evaluation, and use of information in connection with a credit application and requires a creditor to notify

applicants of action taken on their applications concerning the creditor’s approval of, counter-offer to, or denial of credit generally within thirty days after receiving a completed application. Proper use of sample notification forms set out in Appendix C of Regulation B constitutes full compliance with various requirements of the Act. Effective July 21, 2011, model forms C1 through C5 were revised to include a notice that a credit score was used to make an adverse credit decision and to include certain information about credit scores to comply with amended content requirements of the Fair Credit Reporting Act. Notifications must be in writing and contain a statement of specific reasons for any adverse action taken on the credit application and a statutory notice set forth in section 701(a) of the Act. Creditors furthermore must provide consumers with a copy of any property appraisal report used to evaluate an application for credit that is to be secured by a lien on a dwelling. See 12 C.F.R. § 202.14.

### § 2.84 Equal Housing Opportunity

See the sections titled “Affordable Housing Investments” above and “Fair Housing” below.

### § 2.85 Escheat

Escheat of real and personal property to the state is governed by Tex. Prop. Code ch. 71. See also the section titled “Abandonment” above.

### § 2.86 Estate Tax Liens

An unpaid federal estate tax becomes a lien on the gross estate of the decedent. 26 U.S.C. § 6324(a)(1).

### § 2.87 Eviction

Eviction actions (also known as forcible-entry-and-detainer actions) are governed by Tex. Prop. Code ch. 24 and Tex. R. Civ. P. 500–507, 510.1–

.13. Substantial changes were made to the Texas Rules of Civil Procedure in 2013, including changing references in the rules from forcible entry and detainer to eviction.

### § 2.88      **Excavators**

See the section titled “Underground Facility Damage Prevention and Safety Act” below.

### § 2.89      **Exempt Property and Liens**

See the section titled “Bankruptcy” above.

### § 2.90      **Extraterritorial Jurisdiction**

The extraterritorial jurisdiction of municipalities is governed by Tex. Loc. Gov’t Code ch. 42. See also the section titled “Disclosures and Notices” above.

### § 2.91      **Failed Depository Institutions**

If a bank, savings and loan association, or other depository institution is placed in receivership or conservatorship, one may record at any time an affidavit or memorandum of a sale, transfer, purchase, or acquisition agreement between the receiver or conservator and another depository institution. If the transfer involves an interest in land or in a mortgage vested according to the real property records in the failed depository institution, a recorded affidavit or memorandum is constructive notice of the transfer. Tex. Prop. Code § 12.018.

### § 2.92      **Fair Credit Reporting Act**

The federal Fair Credit Reporting Act has been amended to require any financial institution that (1) extends credit to an individual and (2) regularly and in the ordinary course of business reports negative information to a credit bureau to give a clear and conspicuous written notice to

its individual customers about reporting negative information.

The term *financial institution* is broadly defined to include “any institution the business of which is engaging in financial activities as described in section 4(k)” of the Bank Holding Company Act of 1956, whether affiliated with a bank or not. 15 U.S.C. § 6809(3)(a). Thus the term *financial institution* includes not only institutions regulated by federal banking agencies but also other entities, such as merchant creditors and debt collectors, that extend credit to individuals and report negative information. See 16 C.F.R. § 313.3(k).

A financial institution must give the required notice to an individual customer before, or no later than thirty days after, reporting the negative information to a credit bureau. After giving the notice, the institution may report additional negative information to a credit bureau for the same transaction, extension of credit, account, or customer without giving additional notice. If a financial institution gives a customer a notice before reporting negative information, the institution is not required to actually report negative information about the customer to a credit bureau. A financial institution generally may give the notice about reporting negative information on or with any notice of default, billing statement, or other material provided to an individual customer as long as the notice is clear and conspicuous. The notice may not be included in the initial disclosures required to be given by section 127(a) of the federal Truth in Lending Act (15 U.S.C. § 1637(a)).

A financial institution complies with the notice requirement if the institution uses a model notice promulgated by the Board of Governors of the Federal Reserve System. The format of a model notice may be rearranged. For model notices, see clauses 14-7-2 and 14-7-3 in this manual.



Creditors also are required to give a “risk-based pricing” notice when, based on the consumer’s credit report, the creditor provides credit to the consumer on materially less favorable terms than terms available to a substantial proportion of consumers through that creditor. Creditors who conduct periodic reviews of existing accounts and increase the annual percentage rate of interest charged consumers based on findings of a deteriorated consumer credit report must also provide the consumer with an account review risk-based pricing notice. Effective July 21, 2011, the notices must contain the credit score of the consumer and certain information about credit scores if a credit score of the consumer is used in setting the material terms of the credit. Model forms in appendix H to 12 C.F.R. pt. 222 may be used for compliance with risk-based pricing and credit score disclosure requirements. Consumers who receive a risk-based pricing notice must be informed that they are entitled to a free consumer credit report to confirm the report’s accuracy or to dispute the accuracy or completeness of any information in the report. As an alternative to providing a risk-based pricing notice, creditors instead may provide all credit applicants with a free credit score and certain required information about credit scores.

### § 2.93 Fair Debt Collection Practices

The federal Fair Debt Collection Practices Act (15 U.S.C. §§ 1692–1692p) and the Texas Debt Collection Practices Act (Tex. Fin. Code §§ 392.001–.404) regulate efforts to collect debts from consumers. Each act requires collection notices to contain information about the debt and how to dispute it. Attorneys are subject to most provisions of each act. However, an attorney collecting a debt on behalf of a client is not considered a “third-party debt collector” under the Texas Debt Collection Practices Act unless the attorney employs nonattorneys who regularly solicit debts for collection or make fre-

quent contact with debtors to collect or adjust debts. Tex. Fin. Code § 392.001(7). Each act also prohibits types of communications that might be considered harassment. Creditors and debt collectors usually have the right to collect on a debt from the assets of a decedent’s estate but, effective August 29, 2011, are prohibited from contacting relatives of a deceased debtor, other than a spouse or legal representative of the estate, who may lack either the authority to pay the debt from the decedent’s estate or the legal obligation to pay the debt. *See* 76 Fed. Reg. 44,915 (July 27, 2011). Trustees and substitute trustees are not considered debt collectors. Tex. Prop. Code § 51.0075(b).

### § 2.94 Fair Housing

The federal Fair Housing Act (42 U.S.C. §§ 3601–3631) and the Texas Fair Housing Act (Tex. Prop. Code §§ 301.001–.171) forbid (1) discrimination in the sale, rental, or financing of housing on the basis of race, color, religion, national origin, sex, handicap, or familial status; (2) the refusal to permit modifications of existing premises at the expense of the handicapped person or reasonable accommodations in rules, policies, practices, or services, if necessary to afford handicapped persons equal opportunity for, or full enjoyment of, the use of the premises; and (3) the failure to make special accommodations for handicapped persons in certain multifamily dwellings designed and constructed for first occupancy after March 13, 1991. Regulations setting out the particular handicapped access requirements for new multifamily housing structures can be found at 24 C.F.R. § 100.205. Municipalities may also adopt fair housing ordinances, which may have enforcement procedures and remedies that vary from state and federal law. Tex. Loc. Gov’t Code § 214.903.

The Texas Fair Housing Act and the federal Fair Housing Act both prohibit housing that is limited specifically to the elderly and that excludes

families and young children, unless certain minimum design and eligibility requirements are met. The state requirements can be found in 40 Tex. Admin. Code §§ 819.121–.135. The federal requirements can be found at 24 C.F.R. §§ 100.300–.308 and 42 U.S.C. § 3607(b)(2).

### § 2.95 Family Law

The Texas Family Code has several provisions that relate to real property transfers, including enforcement of a division of property (Tex. Fam. Code §§ 9.006–.014); right to future property (Tex. Fam. Code § 9.011); division of property following a decree of divorce (Tex. Fam. Code §§ 9.201–.205); the Uniform Premarital Agreement Act (Tex. Fam. Code §§ 4.001–.010); partition or exchange of community property (Tex. Fam. Code §§ 4.101–.106); rules of marital property liability (Tex. Fam. Code §§ 3.201–.203); homestead rights (Tex. Fam. Code §§ 5.001–.108); child support liens (Tex. Fam. Code §§ 157.311–.331); and prohibition by a temporary restraining order of the transfer, assignment, mortgage, encumbrance, or alienation of any real property of the parties to a dissolution of marriage without the prior authorization of the court (Tex. Fam. Code § 6.501(a)). The Texas Constitution also addresses the issue of separate and community property between spouses. Tex. Const. art. XVI, § 15.

### § 2.96 Federal Lien Registration Act

Texas has adopted the Uniform Federal Lien Registration Act, Tex. Prop. Code §§ 14.001–.007, which governs the procedures for filing notices of federal liens, including tax liens, against real property. See also the section titled “Federal Tax Liens” below.

### § 2.97 Federal Tax Liens

If notice of a junior federal tax lien has been filed at least thirty days before a scheduled foreclosure sale, written notice of the sale under a deed of trust, forfeiture under a contract for deed, or receipt of a deed in lieu of foreclosure must be given, by registered or certified mail or by personal service, to the Internal Revenue Service at least twenty-five days before the transfer. Without this notice, the transfer will be made subject to the federal tax lien. If proper notice is given, the United States is limited to a right to redeem the property within 120 days after the date of sale. See 26 U.S.C. § 7425(d)(1); 26 C.F.R. §§ 301.7425–1 to –4. See the form of notice to the IRS of nonjudicial sale in chapter 14 in this manual.

### § 2.98 Fences and Gates

The Texas Agriculture Code sets out certain requirements for cleared and cultivated lands, including the maintenance of fences of adequate substance and size, the minimum interspersing and sizes of gates located in such fence lines, and the removal of boundary line fences or damages to them. Tex. Agric. Code ch. 143.

The Texas Transportation Code regulates fence setback, height, and visibility requirements for fences located on land adjacent to a road or highway in the state highway system and in certain municipalities. Tex. Transp. Code § 250.001.

The Texas Local Government Code requires emergency gate access in multiunit housing complexes located outside municipal boundaries. Tex. Loc. Gov’t Code §§ 352.1145–.115. A county may also require a multiunit housing project within its jurisdiction to have easily identifiable addresses on each building. Tex. Loc. Gov’t Code § 352.116.

### § 2.99      **Financing Statement, Fraudulent Filing**

The circumstances under which a party is considered to have fraudulently filed a financing statement and the penalties for doing so are addressed in Tex. Bus. & Com. Code § 9.5185. See also the section titled "Fraudulent Filings" below.

Certain financing statements filed by an inmate or inmate's representative are presumptively fraudulent. For restrictions on filing financing statements by such parties, refer to Tex. Civ. Prac. & Rem. Code §§ 12.001-.007 and Tex. Gov't Code §§ 51.901, 405.021.

### § 2.100      **Fixtures**

A record of a mortgage or other interest in real property is effective as a financing statement against fixtures if the requirements of Tex. Bus. & Com. Code § 9.502(c) are met. The priority of fixture filings is addressed in Tex. Bus. & Com. Code § 9.334. There is also an interaction between personal property leases and fixtures that should be noted. See Tex. Bus. & Com. Code § 2A.309. Mechanic's and materialman's liens on removable improvements, including fixtures, take priority over a deed-of-trust lien even if the deed of trust was recorded before the inception of such liens. See Tex. Prop. Code § 53.123; see also *First National Bank v. Whirlpool Corp.*, 517 S.W.2d 262, 269 (Tex. 1974).

### § 2.101      **Flood Insurance**

The National Flood Insurance Act of 1968, the Flood Disaster Protection Act of 1973, and the National Flood Insurance Reform Act of 1994, 42 U.S.C. §§ 4001-4129, provide flood, mudslide, and flood-related erosion insurance protection to property owners. In specified flood-prone areas, local governments are required to enforce special land use and building restrictions to minimize flood damage. If a loan

secured by improved real estate in such an area is made, increased, extended, or renewed by a federally insured or federally regulated lender, the buyer must be notified in writing of the flood hazards a reasonable time before closing. 42 U.S.C. § 4104a. Regulations implementing the flood insurance program are found at 44 C.F.R. pts. 59-78. See also Tex. Loc. Gov't Code § 561.001 (county's power affecting flood control); Tex. Loc. Gov't Code § 240.901 (participation in federal flood insurance policy); Tex. Water Code ch. 16, subch. I (Flood Control and Insurance Act).

### § 2.102      **Forced Sale of Co-Owner's Interest**

The forced sale of a co-owner's interest in real property for reimbursement of property taxes is subject to the provisions of Tex. Prop. Code ch. 29.

### § 2.103      **Forcible Entry and Detainer**

See the section titled "Eviction" above.

### § 2.104      **Foreclosure**

Nonjudicial foreclosure sales of real property are governed by Tex. Prop. Code §§ 51.001-.002, 51.0021, 51.0025, 51.0075, 51.009. If a security agreement covers both real and personal property, the personal property may be foreclosed under the Uniform Commercial Code, or both the real and personal property may be foreclosed in accordance with the procedures applicable to the real property. Tex. Bus. & Com. Code § 9.604(a). Certain redemption rights apply to the foreclosure of a condominium unit for failure to pay assessments (see Tex. Prop. Code § 82.113(g)), to foreclosures by a property owners association (Tex. Prop. Code ch. 209), to tax foreclosures (Tex. Tax Code §§ 32.06, 34.21), and to foreclosures of property subject to a federal tax lien (26 U.S.C. § 7425(d)). See the section titled "Federal Tax

Liens” above.

Deficiency litigation brought after a nonjudicial foreclosure sale must be filed within two years and is governed by the provisions of Tex. Prop. Code § 51.003. Deficiency litigation brought after a judicial foreclosure sale must be filed within ninety days and is governed by the provisions of Tex. Prop. Code § 51.004. A guarantor may institute litigation to contest the deficiency amount remaining after a judicial or nonjudicial foreclosure sale within ninety days after the later of the date of the foreclosure sale or receipt of actual notice of the foreclosure sale. Tex. Prop. Code § 51.005. Evictions after a foreclosure sale should be instituted in accordance with Tex. Prop. Code §§ 24.005, 24.0051 and Tex. R. Civ. P. 500–507, 510.1–13.

A deed-of-trust foreclosure may also be permitted under limited circumstances after a deed in lieu of foreclosure has been accepted by the lienholder. Tex. Prop. Code § 51.006.

Litigation against the trustee named in a deed of trust, contract lien, or security instrument is subject to the procedures and defenses in Tex. Prop. Code § 51.007.

Home equity loan foreclosures are governed by Tex. R. Civ. P. 735, 736. The Texas Supreme Court has issued model forms for these foreclosures. See section 14.2:9 in this manual. Expedited foreclosure proceedings may be available to allow the foreclosure of a contract lien under Tex. R. Civ. P. 736. See Tex. Civ. Prac. & Rem. Code § 17.031. In these expedited proceedings, the court has the ability to order mediation before foreclosure. See Tex. Civ. Prac. & Rem. Code § 154.028.

A foreclosure may be subject to the preference provisions of federal bankruptcy law. See 11 U.S.C. § 547(b).

See also the sections titled “Child Support Liens,” “Coastal Properties,” “Deficiency Liti-

gation after Foreclosure,” “Federal Lien Registration Act,” and “Federal Tax Liens” above and “Hazardous Waste Liens” and “IRS Information Return (Foreclosures)” below.

### § 2.105 Foreclosure Limitations Concerning FDIC Interests

If the Federal Deposit Insurance Corporation (FDIC) has a property interest, including a security interest, lien, or mortgage interest, in property that would be extinguished through foreclosure, condemnation, partition, or suit to quiet title, foreclosure must be by judicial sale if the United States is to be a named party or, if the sale is under a junior lien, the government’s consent is required to eliminate that interest, with the government having a one-year right of redemption for certain liens eliminated by foreclosure of a superior lien. See 12 U.S.C. § 1825(b)(2); 28 U.S.C. § 2410(c). The holder of a superior lien may make a written request to have a junior lien, other than a tax lien, in favor of the United States extinguished if it appears that the sale proceeds will be insufficient to satisfy the government’s lien or that the lien has been satisfied by lapse of time or has otherwise become unenforceable. 28 U.S.C. § 2410(e).

### § 2.106 Foreign Entities

Foreign entities are governed by the Texas Business Organizations Code.

### § 2.107 Foreign Ownership of Real Property

Numerous federal and state laws affect real estate conveyances involving foreigners. Tex. Prop. Code § 5.005 provides that aliens have the same real and personal property rights as United States citizens. Land owned by nonresident aliens or foreign governments may not be eligible under some circumstances for appraisal as open-space land or qualified timberland. Tex. Tax Code §§ 23.56, 23.77. The International

Investment and Trade in Services Survey Act (22 U.S.C. §§ 3101–3108) and the Agricultural Foreign Investment Disclosure Act of 1978 (7 U.S.C. §§ 3501–3508) also affect these types of transactions. Statutes requiring financial institutions to keep records and reports on monetary transactions are at 31 U.S.C. §§ 5311–5332. Internal Revenue Service requirements for submitting returns, as applied to foreigners with “direct investments” in real property interests in the United States, are at 26 U.S.C. § 6039C. Anyone purchasing realty in the United States from a foreign individual or entity must, with few exceptions, withhold 10 percent of the sales price and report and pay it over to the IRS within twenty days of the date of transfer. *See* 26 U.S.C. § 1445; 26 C.F.R. §§ 1.1445–1 to –11T. A form of nonforeign affidavit addressing the requirements of section 1445 is included in chapter 26 of this manual. *See* also the section titled “North American Free Trade Agreement (NAFTA)” below.

### § 2.108 Forfeiture Laws

Real property may be subject to forfeiture if associated with criminal activities under the Controlled Substances Act. *See* 21 U.S.C. § 881(7). The Texas Controlled Substances Act (Tex. Health & Safety Code §§ 481.001–.205) and the Code of Criminal Procedure provisions relating to forfeiture of contraband (Tex. Code Crim. Proc. arts. 59.01–.14) may also apply to such cases. Real property is also subject to forfeiture under the Racketeer Influenced and Corrupt Organizations Act. *See* 18 U.S.C. § 1963(b)(1).

### § 2.109 Franchising

The Business Opportunity Act applies to the sale of franchises. Tex. Bus. & Com. Code ch. 51.

### § 2.110 Fraudulent Filings

A person commits a criminal offense if, with intent to harm or defraud, he holds a purported lien against real or personal property that is fraudulent and fails to release the lien. Tex. Penal Code § 32.49. Knowingly presenting for filing a financing statement that is forged, contains a material false statement, or is groundless is also a criminal offense. Tex. Penal Code § 37.101. Actions on fraudulent liens can be found in Tex. Gov’t Code §§ 51.902, 51.903. Liability and causes of action for fraudulent liens can be found in Tex. Civ. Prac. & Rem. Code ch. 12. Tex. Civ. Prac. & Rem. Code § 12.002(c) provides that mechanic’s lien claimants under chapter 53 of the Texas Property Code are not liable under this section unless they act with intent to defraud.

A person commits a criminal offense if he knowingly or intentionally signs and presents for filing or causes to be presented for filing an assumed name certificate if the document indicates that the person signing the document has the authority to act on behalf of the entity for which the document is presented and the person does not have that authority, if the document contains a materially false statement, or if the document is forged. Tex. Bus. & Com. Code § 71.203. *See* also the section titled “Assumed Names” above.

Certain filings by inmates and their representatives are presumptively fraudulent. For restrictions on filings by such parties, refer to Tex. Civ. Prac. & Rem. Code §§ 12.001–.007 and Tex. Gov’t Code §§ 51.901, 405.022.

### § 2.111 Fraudulent Representations and Promises

A person who makes a material false representation or false promise in a transaction involving real property is liable to the person defrauded for actual (and perhaps punitive) damages, attor-

ney's fees, and court and other costs. Tex. Bus. & Com. Code § 27.01. A violation of section 27.01 that relates to the transfer of title to real estate is a false, misleading, or deceptive act or practice as defined by Tex. Bus. & Com. Code § 17.46(b), and any public remedy under Tex. Bus. & Com. Code ch. 17, subch. E, is available for a violation of that section.

### § 2.112 Fraudulent Transfers

Texas has adopted the Uniform Fraudulent Transfer Act in Tex. Bus. & Com. Code ch. 24. The fraudulent conveyance section of federal bankruptcy law is found at 11 U.S.C. § 548.

### § 2.113 FTC Anti-Holder-in-Due-Course Rule

Certain consumer credit contracts must comply with the notice requirements of 16 C.F.R. pt. 433. A copy of the relevant notice is included in chapter 20 in this manual.

### § 2.114 Future Estates

Future estates are governed by Tex. Prop. Code §§ 5.041-.043.

### § 2.115 Gifts to Minors Act

See the section titled "Uniform Transfers to Minors Act" below.

### § 2.116 Good Faith and Fair Dealing

No statute or common law imposes a duty of good faith and fair dealing in contracts in Texas, *English v. Fischer*, 660 S.W.2d 521 (Tex. 1983), but contracts governed by the Uniform Commercial Code (UCC) must comply with the good-faith obligation of Tex. Bus. & Com. Code § 1.304. In addition, the obligation of good faith under the UCC cannot be disclaimed by agree-

ment, but contracting parties can define the standards by which the performance of good faith is to be measured, as long as the standards are not manifestly unreasonable. Tex. Bus. & Com. Code § 1.302(b).

### § 2.117 Grantee's Address

No instrument may be recorded unless it contains the mailing address of each grantee or a penalty is paid. Tex. Prop. Code § 11.003(a). However, the failure to comply with this provision will not invalidate the instrument as between the parties, and acceptance by the clerk creates a presumption that the law was satisfied. Tex. Prop. Code § 11.003(b), (c). See the section titled "Recording" below.

### § 2.118 Group Homes

See the section titled "Community Homes; Group Homes" above.

### § 2.119 Guarantors

A guarantor of a debt has certain rights if a deficiency judgment is obtained after a foreclosure under Tex. Prop. Code § 51.005. Subrogation rights of a surety, including a guarantor, are addressed in Tex. Civ. Prac. & Rem. Code § 43.004.

### § 2.120 Handicapped Parking

See the section titled "Americans with Disabilities Act and Related Statutes" above.

### § 2.121 Hart-Scott-Rodino Antitrust Improvements Act

Certain large transactions may require advance approval from the Federal Trade Commission under the terms of the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a.

### § 2.122 Hazardous Waste Liens

A lien is created in favor of the state under Tex. Health & Safety Code § 361.194 on real property that is the subject of hazardous waste cleanup actions by the state. A federal lien also arises under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. *See* 42 U.S.C. § 9607(l).

### § 2.123 Historic Structures

The Texas Historical Commission regulates the listing and preservation of historic structures in the state under the provisions of Tex. Gov't Code ch. 442. Counties also have certain rights and responsibilities regarding historic structures, sites, and resources. Tex. Loc. Gov't Code ch. 318. Liability for adversely affecting historic structures is addressed in Tex. Gov't Code § 442.016. Many counties and local municipalities also have historic or landmark commissions that regulate historic structures in their jurisdiction.

### § 2.124 Home Equity Lending

The homestead may be used to secure "equity" loans, including equity loans with line of credit terms, reverse mortgages, and the conversion and refinancing of a personal property lien on a manufactured home. Tex. Const. art. XVI, § 50. Section 50(f) permits the refinancing of a home equity loan only with another equity loan or a reverse mortgage. Section 50(a)(6)(F) allows for a home equity line of credit with certain limitations. Equity loans may be made for any purpose and must meet a number of constitutional and statutory requirements. Reverse mortgages must also satisfy the constitutional definition. A lien that does not satisfy a definition under section 50 is not valid against the homestead. Home equity documents for secondary mortgage loans are regulated by the Office of Consumer Credit Commissioner and must be in plain language.

Tex. Fin. Code § 341.502. *See* also the section titled "Loan Documents" below.

For a more extensive discussion of the issues in home equity lending, see chapter 11 in this manual.

### § 2.125 Home Improvement Contracts

There are notice requirements for home improvement contracts on homestead property (Tex. Prop. Code §§ 53.255, 53.256) and for liens claimed under these contracts (Tex. Prop. Code § 53.254). *See* the sections titled "Mechanic's Liens" and "Residential Construction Liability" below.

### § 2.126 Home Mortgage Disclosure Act of 1975

Financial institutions that make federally related home mortgage loans must compile and make available information to enable citizens and government agencies to determine whether the institutions are fulfilling their obligations to serve the housing needs of the communities and neighborhoods in which they are located. *See* 12 U.S.C. §§ 2801–2810; 12 C.F.R. pt. 203.

### § 2.127 Home Solicitations

The Texas Home Solicitations Transaction Act may apply if the consumer's obligation is entered into at a location other than the contractor's place of business. If the Act applies, certain notices are required. Tex. Bus. & Com. Code ch. 601. *See* form 4-4 in this manual.

### § 2.128 Homesteads

Homestead rights are generally addressed in Tex. Prop. Code ch. 41, § 53.254, and Tex. Const. art. XVI, §§ 50, 51. A homestead can be encumbered only by a purchase-money lien, a lien for improvements (mechanic's lien con-

erty taxes, owelty rights, the conversion and refinancing of a personal property lien on a manufactured home, and the refinance of a homestead lien, including a federal tax lien. The amount of land that may be claimed as homestead depends on whether it is urban or rural and, if rural, whether it is claimed by a family or a single person. *See* Tex. Prop. Code § 41.002. Absent unusual circumstances or a judicial declaration that one spouse is incapacitated, the consent of both spouses is required if a homestead is sold or encumbered, regardless of whether it is characterized as community or separate property. Tex. Fam. Code §§ 5.001–.102.

Tex. Prop. Code § 41.005 provides for the voluntary designation of a homestead. This section and Tex. Tax Code §§ 11.13, 11.131, 11.135, 11.41, 11.43(j) set forth the requirements for making such a designation.

Under certain circumstances a lien to recover remediation costs may attach to a homestead. Tex. Health & Safety Code §§ 361.194, 361.197.

The state may be able to recover the costs of nursing home care paid by Medicaid from the homestead of the patient unless certain criteria are met. Tex. Gov't Code § 531.077.

Federal laws may preempt these statutes.

See also the section titled “Home Equity Lending” above, chapter 11 in this manual, and section 20.1:2.

### § 2.129 Hotel Occupancy Taxes

The requirements and parameters of hotel occupancy taxes in the state are described in Tex. Tax Code chs. 156, 351, 352 and Tex. Loc. Gov't Code chs. 334, 335.

### § 2.130 House Trailers

See the section titled “Manufactured Housing” below.

### § 2.131 Impact Fees

The imposition of impact fees is governed by Tex. Loc. Gov't Code ch. 395.

### § 2.132 Implied Title Covenants

Use of the word *grant* or *convey* in a deed creates certain implied warranties unless the deed expressly provides otherwise. Tex. Prop. Code § 5.023.

### § 2.133 Indemnity Agreements

Texas law limits the validity of indemnity agreements in certain situations, including in construction contracts and certain indemnities by a contractor with respect to an architect's negligence and by an architect with respect to an owner's negligence. See section 17.2:4 in this manual.

### § 2.134 Innocent-Purchaser Defense

The federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 establishes an innocent-landowner defense to environmental liability under certain circumstances, provided a purchaser has exercised “all appropriate inquiry” in its investigation of the property. *See* 42 U.S.C. §§ 9601(35), 9607(b).

### § 2.135 Insurance Claims

A lender must either endorse an insurance claim payment concerning personal property or provide a written statement of the reason it refuses to endorse within fourteen business days after receiving a request for the endorsement. Tex. Ins. Code ch. 557.



### § 2.136 Interstate Land Sales Full Disclosure Act

The Interstate Land Sales Full Disclosure Act requires filings and disclosures in some circumstances if there are sales or leases of twenty-five or more lots as part of a common promotional plan in interstate commerce or by use of the mail. *See* 15 U.S.C. §§ 1701–1720. Regulations promulgated under the Act can be found at 24 C.F.R. pts. 1710–1720.

### § 2.137 IRS Information Return (Foreclosures)

Under certain circumstances persons who lend money secured by property and who later acquire an interest in the property in satisfaction of the debt or have reason to know that the property has been abandoned must file an information return with the Internal Revenue Service and send a statement to the debtor. The information return must be filed by February 28, and the statement to the debtor provided by January 31, of the year following the calendar year in which the lender acquires the property or knows or has reason to know of the abandonment. *See* 26 U.S.C. § 6050J; 26 C.F.R. § 1.6050J-1T.

### § 2.138 Joint Tenancy with Right of Survivorship

A joint tenancy with the right of survivorship may be created by written agreement of property owners. Tex. Est. Code § 111.001. However, a joint tenancy between spouses concerning community property is governed by different statutory requirements. See the section titled “Community Property with Right of Survivorship” above. For both types of property on the death of any cotenant, the practitioner should determine if title companies will accept the result of the joint tenancy agreement or if court adjudication and confirmation of the result is necessary. Adjudication or confirmation of joint tenancy with right of survivorship in community

property is discussed at Tex. Est. Code §§ 112.101–.106.

### § 2.139 Judgment Liens

A recorded and properly indexed abstract of judgment constitutes a lien on the defendant’s real property (including after-acquired property) located in the county in which the abstract is recorded and indexed. Tex. Prop. Code § 52.001. The lien continues for ten years after the abstract is recorded and indexed, but if the judgment becomes dormant during that period for lack of a writ of execution, the lien ceases to exist. Tex. Prop. Code § 52.006. Dormancy and revival of judgments are controlled by Tex. Civ. Prac. & Rem. Code § 34.001. But see the special provisions for the duration and revival of judgment liens in favor of the state or a state agency at Tex. Prop. Code § 52.006.

Texas has adopted the Uniform Enforcement of Foreign Judgments Act (Tex. Civ. Prac. & Rem. Code ch. 35) and the Uniform Federal Lien Registration Act (Tex. Prop. Code ch. 14). Generally, federal judgments and those of other states are treated like Texas judgments. *See* Tex. Civ. Prac. & Rem. Code ch. 35; Tex. Prop. Code §§ 14.002, 52.007; 28 U.S.C. § 1962. Texas has also adopted the Uniform Foreign Country Money-Judgment Recognition Act, Tex. Civ. Prac. & Rem. Code ch. 36.

An abstract of judgment generally does not constitute a lien against a homestead at the time the abstract is recorded and indexed. Tex. Const. art. XVI, § 50. For special procedures for effecting a release of a judgment lien against the homestead by statutory affidavit by the judgment debtor, refer to Tex. Prop. Code § 52.0012.

For special restrictions on the filing of abstracts of judgment by inmates or their representatives, refer to Tex. Civ. Prac. & Rem. Code §§ 12.001–.007.

## § 2.140 Landfills

An owner or lessee must obtain a permit before development of a tract located over a closed municipal solid waste landfill, file a notice of the former use in the real property records, and give notice to prospective buyers or lessees. Tex. Health & Safety Code §§ 361.531–.539. The statute also requires that certain soil testing be conducted of any tract of one acre or more to determine whether it is located over a closed landfill. Tex. Health & Safety Code § 361.538.

## § 2.141 Landlord-Tenant Liens

There are two types of commercial landlord's liens. One is statutory, arising by operation of law. The other is contractual, created by agreement of the parties as a provision of the lease. The contractual landlord's lien constitutes a security agreement under article 9 of the Uniform Commercial Code. Tex. Bus. & Com. Code § 9.109(a)(1). The statutory landlord's lien gives the landlord a preference lien on the property of the tenant or subtenant in the building for rent that is due and for rent that is to become due during the current twelve-month period succeeding the date of the beginning of the rental agreement or an anniversary of that date. Tex. Prop. Code § 54.021. The lien is unenforceable for rent on a commercial building that is more than six months past due unless a lien statement is filed with the county clerk. Tex. Prop. Code § 54.022. The statutory lien can be foreclosed only through judicial proceedings; the contractual lien, depending on its terms, may be foreclosed through either judicial or nonjudicial proceedings.

A residential landlord's lien against a tenant's nonexempt personal property is provided in Tex. Prop. Code §§ 54.041–.048. An agricultural landlord's lien is available in Tex. Prop. Code §§ 54.001–.007.

## § 2.142 Landlord-Tenant Relationship

The landlord-tenant relationship is subject to the Texas Property Code. Chapter 91 contains provisions generally applicable to landlords and tenants. Chapter 92 covers residential tenancies. Chapter 93 covers commercial tenancies. Chapter 94 covers manufactured home community tenancies. If a tenant holds over after termination of a lease, the landlord's remedies include, among others, filing a forcible detainer action (Tex. Prop. Code ch. 24) and enforcing a lien against the tenant's property (Tex. Prop. Code chs. 54, 59). Other landlord-tenant related provisions to note are the prohibition against subletting and assignment (Tex. Prop. Code §§ 91.005, 94.057); landlord's duty to mitigate damages (Tex. Prop. Code §§ 91.006, 94.202); repair provisions (Tex. Prop. Code §§ 92.051–.061, 94.153–.154); landlord's duty to provide a complete copy of the lease (Tex. Prop. Code §§ 92.024, 94.053(b)); security deposits (Tex. Prop. Code §§ 92.101–.110, 93.004–.009, 94.101–.107); late fees (Tex. Prop. Code §§ 92.019, 94.054); rental applications (Tex. Prop. Code §§ 92.351–.355); lockout (Tex. Prop. Code §§ 92.0081, 92.009, 93.002–.003); and utility interruptions (Tex. Prop. Code §§ 92.008, 92.0091, 93.002).

The Texas Property Code addresses the liability of a residential landlord for failure to install smoke alarms (Tex. Prop. Code §§ 92.251–.262) and security devices (Tex. Prop. Code §§ 92.151–.170).

See the sections titled “Abandonment,” “Ad Valorem Taxes,” “Criminal Record Checks of Employees,” and “Landlord-Tenant Liens” above and “Lockouts” and “State of Texas Leases” below. See also chapter 25 in this manual.

### § 2.143 Landowner Liability

Several statutory provisions address landowner liability in different contexts. The Comprehensive Environmental Response, Compensation, and Liability Act governs owner liability for hazardous substances. *See* 42 U.S.C. § 9607. Other state and federal statutes have similar provisions. Statutes concerning limitations on a landowner's liability include Tex. Civ. Prac. & Rem. Code ch. 75 (liability for recreational use, such as hunting and community gardens); Tex. Civ. Prac. & Rem. Code ch. 95 (liability to a contractor); and Tex. Civ. Prac. & Rem. Code § 101.022 (liability of governmental units).

### § 2.144 Landowner's Bill of Rights

The Landowner's Bill of Rights, prepared by the Office of the Attorney General of Texas, is a statement of the rights a real property owner has if condemnation of his real property is sought. The statement may be viewed at the Attorney General's website at [https://www.texasattorneygeneral.gov/files/agency/landowners\\_billofrights.pdf](https://www.texasattorneygeneral.gov/files/agency/landowners_billofrights.pdf). The Texas Property Code requires a governmental or private entity with eminent domain authority to provide the Landowner's Bill of Rights statement to the property owner as part of the condemnation process. Tex. Prop. Code § 21.0112. See also the section titled "Condemnation and Eminent Domain" above.

### § 2.145 Landscape Architecture

The business of landscape architecture is regulated under Tex. Occ. Code ch. 1052. The lien of a person who provides landscaping services is addressed in Tex. Prop. Code § 53.021(d).

### § 2.146 Lead-Based Paint Disclosures

In 1992, Congress adopted the Residential Lead-Based Paint Hazard Reduction Act, also known as Title X of the Housing and Community

Development Act. The lead-based paint provisions are codified at 42 U.S.C. §§ 4851–4856 (the regulations are published in 40 C.F.R. pt. 745). Sellers and landlords must provide purchasers and tenants of residential properties constructed before 1978 with a "Lead Warning Statement," in the form provided in 42 U.S.C. § 4852d, in large type and on a separate sheet of paper from the contract. The required warning statements, prescribed in 40 C.F.R. § 745.113, are included in chapters 4 (for sales) and 25 (for leases) in this manual. The related state statute is found at Tex. Occ. Code ch. 1955. This law applies to all "child-occupied facilities," including day-care centers and preschool and kindergarten classrooms, occupied by the same child, six years of age or younger, for three hours or more, twice a week.

### § 2.147 Legal Incapacity

A person may lack legal capacity to contract for and deal with real property without the supervision of a guardian appointed under the Texas guardianship statutes, Texas Estates Code title 3, sections 1001.001 to 1356.056. In dealing with a guardian in a real estate transaction, the attorney should carefully review the guardianship order. "An incapacitated person for whom a guardian is appointed retains all legal and civil rights and powers except those designated by court order as legal disabilities by virtue of having been specifically granted to the guardian." Tex. Est. Code § 1151.001. Additionally, there must be an annual determination whether the guardianship should be continued, modified, or terminated. Tex. Est. Code §§ 1201.051–.054. Tex. Prop. Code ch. 142 addresses the management of property recovered on behalf of a minor or incapacitated person through a suit by a next friend. See also the section titled "Minors" below.

### § 2.148 Letters of Credit

Letters of credit are governed by the provisions of Tex. Bus. & Com. Code ch. 5.

### § 2.149 Libraries

Public libraries are exempt from attachment, execution, or forced sale. Tex. Prop. Code § 43.001.

### § 2.150 License to Carry Handguns

Individuals may obtain a license to carry a handgun. Tex. Gov't Code ch. 411, subch. H. Signs indicating that handguns are prohibited on site are required for certain alcoholic beverage establishments, hospitals, and nursing homes. Tex. Gov't Code § 411.204. Handguns are prohibited as a matter of law for certain other types of private and public properties, including schools, polling places, government offices, racetracks, and secured areas of airports. Tex. Penal Code § 46.03. The statute does not affect the right of an employer to prohibit handguns on the premises of the business (Tex. Gov't Code § 411.203).

### § 2.151 Life Tenants

The duties of a life tenant of real property are set out in Tex. Prop. Code § 5.009.

### § 2.152 Limitations

An action to recover real property conveyed by an instrument containing certain technical defects must be brought within two years of the recordation of the instrument. Tex. Civ. Prac. & Rem. Code § 16.033(a). An action to foreclose a real property vendor's lien or deed-of-trust lien must be brought and a nonjudicial sale must be completed within four years after the cause of action accrues. Tex. Civ. Prac. & Rem. Code § 16.035. A suit to foreclose a mechanic's lien must be commenced within two years after the last day for filing the affidavit or one year after completion, termination, or abandonment of the work under the original contract, whichever is later. For a claim arising from a residential construction project, suit must be commenced

within one year after the last day for filing the lien affidavit or within one year after completion, termination, or abandonment of the work under the original contract, whichever is later. Tex. Prop. Code § 53.158. A suit on a deficiency judgment after a real property foreclosure must be brought within two years of the foreclosure sale. Tex. Prop. Code § 51.003.

The limitations periods on actions on negotiable instruments are governed by Tex. Bus. & Com. Code § 3.118. The limitations periods on actions on nonnegotiable instruments are governed by Tex. Civ. Prac. & Rem. Code §§ 16.003(a), 16.004(a)(3).

See also the section titled "Adverse Possession" above.

### § 2.153 Limited Liability Companies

Limited liability companies are governed by the Texas Business Organizations Code generally and by title 3 more specifically. Tex. Bus. Orgs. Code §§ 101.001–.622. See also the sections titled "Business Organizations Code," "Corporations," and "Foreign Entities" above and "Nonprofit Corporations" and "Partnerships" below.

### § 2.154 Limited Liability Partnerships

Limited liability partnerships are governed by the Texas Business Organizations Code generally and by title 4 more specifically. *See* Tex. Bus. Orgs. Code §§ 152.801, 153.351. In Texas, a limited liability partnership is either a preexisting general partnership or a preexisting limited partnership that registers with the secretary of state as a limited liability partnership and complies with other statutory requirements.

Foreign limited liability partnerships are governed by Tex. Bus. Orgs. Code § 152.901 and are subject to Tex. Bus. Orgs. Code § 2.101.

Texas law does not define what constitutes “transacting business in Texas” for the purposes of the requirement of Tex. Bus. Orgs. Code § 152.905 that “[b]efore transacting business in this state, a foreign limited liability partnership must file an application for registration in accordance with this section and Chapters 4 and 9.” Tex. Bus. Orgs. Code § 9.251, however, does contain a list of activities not constituting transacting business in Texas. *See also* Tex. Bus. Orgs. Code § 153.103. See the section titled “Foreign Entities” above.

### § 2.155 Liquidated Damages Clauses

Liquidated damages provisions regarding the sale of goods must comply with the requirements of Tex. Bus. & Com. Code § 2.718.

### § 2.156 Lis Pendens

A party seeking affirmative relief in an action involving title to real property, the establishment of an interest in real property, or the enforcement of an encumbrance against real property may file notice of the pending action with the clerk of the county in which the land is located.

A form of lis pendens is available as form 26-35 in this manual. The person filing such a notice must serve a copy of the notice on each party to the action who has an interest in the real property affected by the notice no later than three days after the notice is filed. Tex. Prop. Code § 12.007(d). Under certain conditions and on motion of a party, the court may cancel the lis pendens anytime during the proceeding. Tex. Prop. Code § 12.008. Under certain other conditions for lis pendens filed after September 1, 2009, and on motion of a party, the court must expunge the notice of lis pendens. Tex. Prop. Code § 12.0071. A recorded lis pendens for which no certified copy of an order expunging the notice of lis pendens has been recorded constitutes notice of the litigation. Tex. Prop. Code § 13.004.

For a certified copy of an order expunging a notice of lis pendens that is recorded on or after September 1, 2017, after such certified copy of the order has been recorded, an interest in the real property covered by the notice of lis pendens may be transferred or encumbered free of all matters asserted or disclosed in the notice and all claims or other matters asserted or disclosed in the action in connection with which the notice was filed. Tex. Prop. Code § 12.0071(f).

### § 2.157 Loan Documents

Tex. Bus. & Com. Code § 26.02 requires a financial institution to give a statute-of-frauds type of notice for loans exceeding \$50,000 and to post notices informing borrowers of the provisions of section 26.02. Construction mortgages should clearly identify that they are securing a construction loan to take advantage of the priority provisions of Tex. Bus. & Com. Code § 9.334(h). See also Tex. Gov’t Code ch. 83, which prohibits the preparation of deeds, deeds of trust, notes, mortgages, and other documents affecting title to real property for compensation unless the preparer is an attorney licensed in Texas or is qualified under one of the other listed exemptions. See also the section titled “Unauthorized Preparation of Real Estate Documents” below.

The Texas Finance Code provides rules relating to loan documents used in home equity loans, which are administered by the Office of Consumer Credit Commissioner. Tex. Fin. Code § 341.502. For a more extensive discussion of the issues in home equity lending, see chapter 11 in this manual.

The Texas Tax Code prohibits a lender from requiring a borrower to waive its right to an agricultural or open-space tax exemption as a condition to a loan or to agree to pay the lender for any losses suffered by the lender due to change of use and loss of this exemption. Tex. Tax Code §§ 23.47, 23.58.

Certain loan documents transferring an interest in real property to or from an individual are required to include the confidentiality notice set out in Tex. Prop. Code § 11.008. See section 3.16 in this manual.

Several other sections also address the preparation of loan documents, including “Deeds of Trust” and “Foreclosure” above and “Master Form Mortgage,” “Mechanic’s Liens,” “Truth in Lending,” and “Usury” below.

### § 2.158 Lockouts

Lockouts of residential tenants are governed by Tex. Prop. Code §§ 92.0081, 92.009. Commercial tenant lockouts are governed by Tex. Prop. Code §§ 93.002–.003.

### § 2.159 Lost or Found Property

See the sections titled “Abandonment” and “Escheat” above.

### § 2.160 Low-Income Affordable Housing Tax Credits

See the section titled “Affordable Housing Investments” above.

### § 2.161 Manufactured Housing

The Texas Manufactured Housing Standards Act (TMHSA) regulates manufactured housing through the Texas Department of Housing and Community Affairs. Tex. Occ. Code ch. 1201. Title to manufactured homes, the perfection and release of manufactured housing liens, and the cancellation of manufactured housing titles are governed by the TMHSA. Both the TMHSA and the Texas Property Code address the question of when a manufactured home is personal property and when it is real property. Tex. Prop. Code § 2.001; Tex. Occ. Code §§ 1201.2055, 1201.2075, 1201.222. For a more extensive dis-

ussion of manufactured housing, see section 5.15:6 in this manual.

Property Code chapter 63 clarifies the status of a lien on a manufactured home when the manufactured home is converted to real property. Tex. Prop. Code ch. 63. Property Code chapter 94 regulates lease agreements in manufactured-home communities entered into on or after April 1, 2002. Tex. Prop. Code ch. 94.

### § 2.162 Master Form Mortgage

Texas permits the filing of a master form mortgage under Tex. Prop. Code § 12.009. A master assignment of financing statements is permitted under the terms of Tex. Bus. & Com. Code § 9.514(d).

### § 2.163 Mechanic’s Liens

Mechanic’s liens, which may arise in favor of a variety of contractors, workers, and those providing material for construction or for improvements to property, may be either constitutional or statutory. The constitutional lien derives from Tex. Const. art. XVI, § 37. Statutory liens derive from Tex. Prop. Code ch. 53. See chapters 20 and 21 in this manual.

The mechanic’s lien procedures and rights may also apply to persons who perform labor or materials for the demolition of a structure under a written contract. Tex. Prop. Code § 53.021(e).

On public construction projects, a mechanic’s lien cannot be established against public buildings, structures, or grounds, but subcontractors may have a lien on money, bonds, or warrants due the contractor for the improvements if the prime contract does not exceed \$25,000 if with a governmental entity other than a municipality or joint board created under the Transportation Code or \$50,000 if with a municipality or joint board. Tex. Prop. Code § 53.231. The McGregor Act, Tex. Gov’t Code ch. 2253, establishes pro-

payment-bond beneficiaries who have a direct contractual relationship with the prime contractor or a subcontractor on a public construction project. The Miller Act, as amended by the Construction Industry Payment Act of 1999, pertains to bonding requirements for construction, alteration, or repair of federal works. 40 U.S.C. §§ 3131–3134.

Certain mechanic's lien documents transferring an interest in real property to or from an individual may be required to include the confidentiality notice set out in Tex. Prop. Code § 11.008. See section 3.16 in this manual.

### § 2.164 Military Installations

See the section titled "Outdoor Lighting" below.

### § 2.165 Military Personnel

The Servicemembers Civil Relief Act (formerly the Soldiers' and Sailors' Civil Relief Act) requires that, under some circumstances, enforcement of certain civil liabilities and legal proceedings, including foreclosures, be suspended while armed forces personnel are on active duty. 50 U.S.C. §§ 3901–4043. Delinquency dates for property taxes may also be extended. Tex. Tax Code § 31.02.

Texas Property Code section 51.015 also affords certain protections to military servicemembers—during active duty military service and during the nine months thereafter—against collection actions for enforcement of real estate loans secured by the servicemember's dwelling and made to that servicemember before his or her active duty military service commenced. Tex. Prop. Code § 51.015.

Notices of special rights afforded servicemembers are required in suits to evict (Tex. Prop. Code § 24.0051(d)), in the sale of real property under a power of sale or other contractual lien (Tex. Prop. Code § 51.002(i)), and in the notice

that must be provided before certain enforcement actions by property owners associations (Tex. Prop. Code § 209.006(b)). Leases that do not contain notice of a servicemember's right to terminate may lead to the release of liability for unpaid rent. Tex. Prop. Code § 92.017(g).

### § 2.166 Mineral Rights

Chapter 92 of the Texas Natural Resources Code provides procedures to designate drill sites on land proposed to be subdivided. Tex. Nat. Res. Code §§ 92.001–.007. Tex. Nat. Res. Code § 81.0523 preempts the regulation of oil and gas operations by municipalities and other political subdivisions. A municipality or other political subdivision may not enact or enforce an ordinance that bans, limits, or otherwise regulates oil and gas operations within the boundaries or extraterritorial jurisdiction of the municipality or other political subdivision, except for an ordinance that (1) regulates only aboveground activities, (2) is commercially reasonable, (3) does not effectively prohibit an oil and gas operation conducted by a reasonably prudent operator, and (4) is not otherwise preempted by state or federal law. Tex. Nat. Res. Code § 81.0523(b), (c). An ordinance is considered prima facie to be commercially reasonable if the ordinance has been in effect for at least five years and has allowed oil and gas operations to continue during that time period. Tex. Nat. Res. Code § 81.0523(d).

### § 2.167 Mini-Storage Warehouses

See the section titled "Self-Service Storage Facilities" below.

### § 2.168 Minors

Minors do not have the legal capacity to enter into contracts. The age of majority is eighteen years. Tex. Civ. Prac. & Rem. Code §§ 129.001, 129.002. Marriage removes the disabilities of minority. Tex. Fam. Code § 1.104. Under certain

circumstances, the disabilities can be judicially removed. Tex. Fam. Code ch. 31. Unless the disability is removed by marriage or by court decree, a guardian must be appointed under terms of the Texas Estates Code to administer real property owned by the minor. Tex. Est. Code §§ 1001.001–.056. Under certain conditions, a parent may petition the court for an order to sell the minor's property instead of having a guardian appointed. Tex. Est. Code § 1351.001. A next friend may also manage property of a minor recovered in a lawsuit if the minor has no guardian. Tex. Prop. Code § 142.001. See also the sections titled "Legal Incapacity" above and "Uniform Transfers to Minors Act" below.

### § 2.169      **Mobile Homes**

See the section titled "Manufactured Housing" above.

### § 2.170      **Mold Assessors and Remediators**

Mold remediation and other activities that affect indoor air quality, such as mold assessments, are governed by chapter 1958 of the Texas Occupations Code. Tex. Occ. Code ch. 1958.

Sections 544.301–.305 of the Insurance Code prohibit certain underwriting decisions based on previous mold claims or damages and applies to any insurer that writes residential property insurance in Texas. Tex. Ins. Code §§ 544.301–.305. An insurer may not make an underwriting decision based on previous mold claims or damages if mold remediation was performed on the property and either a certificate of mold remediation was issued or a subsequent inspection by an independent assessor or adjustor revealed no evidence of mold damage. Tex. Ins. Code § 544.303.

### § 2.171      **Money Laundering**

See the section titled "Cash Proceeds" above.

### § 2.172      **Mortgage Electronic Registration Systems (MERS)**

For all practical purposes, Mortgage Electronic Registration Systems, Inc. (MERS) is nothing more than a "book entry system" or "utility" for the real estate finance industry that is intended to eliminate the need for executing and recording assignments when mortgage loans and related servicing rights are sold in the secondary market. MERS is an electronic registration system that tracks the bundle of rights that are transferred when the various beneficial interests associated with real estate loans are bought and sold on the secondary market like stocks and bonds and commodities like coffee, gold, and oil futures.

To invoke the protections of the real property recording statutes in the official land title records, MERS acts as the mortgagee of record for each security instrument that secures a loan registered on the MERS System. Security instruments must contain particular language naming MERS as original mortgagee. MERS maintains a web-based, electronic book entry registration system that tracks the beneficial ownership and servicing rights associated with any registered real estate loan. The mortgage servicer, who is responsible for all the daily administrative details required to service a borrower's loan, inputs all loan level data and changes into MERS.

MERS does not buy, sell, transfer, or assign real estate loans and is not the owner, holder, or servicer of the beneficial ownership and servicing rights associated with loans registered on MERS. As long as a loan is registered on the MERS System, MERS is the mortgagee of record in the real property records, and no



assignment or transfer of lien is necessary, regardless of the number of times a registered loan is bought or sold.

MERSCORP, Inc., is a private corporation owned and sponsored by the Mortgage Bankers Association of America; the American Land Title Association; the Federal National Mortgage Association; the Federal Home Loan Mortgage Corporation; the Department of Veterans Affairs; the U.S. Department of Housing and Urban Development; nearly every Tier-1 lender; the major title insurance underwriters; and the three major rating agencies for mortgage-backed securities, Standard & Poor's, Moody's Investors Service, and Fitch Ratings.

### § 2.173 Mortgage Fraud

Intentionally or knowingly making a materially false or misleading written statement to obtain a mortgage loan is a violation of section 32.32 of the Texas Penal Code. Punishment ranges from a class C misdemeanor to a first-degree felony. Intentionally or knowingly making a materially false or misleading written statement in providing an appraisal of real property for compensation also violates section 32.32 of the Texas Penal Code and is subject to the same range of punishment. Tex. Penal Code § 32.32(b-1). Venue for prosecution for mortgage fraud is governed by Tex. Code Crim. Proc. art. 13.271.

Lenders, mortgage bankers, and licensed mortgage brokers must provide all applicants for a home loan a written notice of penalties for making false or misleading written statements containing the promulgated language set out in section 343.105 of the Texas Finance Code, or substantially similar language, at the time of loan closing. See form 10-19 in this manual. The notice must be a separate document in at least a fourteen-point typeface. Borrowers must sign the notice and verify that all statements and representations contained in their written loan applications regarding their identity, employ-

ment, annual income, and intent to occupy the residential real property securing the home loan are true and correct as of the date of loan closing. The failure to provide the notice in compliance with the statute expressly does not affect the validity of the home loan or its enforceability by any holder.

### § 2.174 Mortgage Loan Originators

Use of the term *mortgage broker* has been discontinued for purposes of state licensing and registration of mortgage loan originators to conform to terminology established by the Texas Secure and Fair Enforcement for Mortgage Licensing Act of 2009. Tex. Fin. Code ch. 180. Companies engaged in or conducting the business of originating residential mortgage loans (mortgage companies) must be licensed under and comply with the Residential Mortgage Loan Company Licensing and Registration Act while individuals must be licensed under and comply with the Mortgage Banker Registration and Residential Mortgage Loan Originator License Act, administered by the Department of Savings and Mortgage Lending. Tex. Fin. Code chs. 156, 157. An applicant must designate an individual licensed as a residential mortgage loan originator under chapter 157 of the Texas Finance Code as the company's qualifying individual as required by sections 156.2041 through 156.2044 of the Texas Finance Code.

An individual licensed under chapter 157 may not be licensed or act as a residential loan originator unless the individual enrolls in the Nationwide Mortgage Licensing System and Registry (or is sponsored by an appropriate entity), obtains a valid unique identifier under that system, and otherwise complies with the applicable requirements of chapter 180 of the Texas Finance Code and rules adopted thereunder by the Texas Finance Commission to carry out the intent of the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008, 12 U.S.C. §§ 5101-5116.

A licensed residential mortgage loan originator is not required to obtain a regulated loan license under chapter 342 of the Texas Finance Code to make, negotiate, or transact a secondary mortgage loan subject to that chapter. Tex. Fin. Code § 342.051. Mortgage bankers, as defined in section 156.002(8) of the Texas Finance Code, are exempt from chapter 156 if registered under chapter 157. Depository institutions, their regulated subsidiaries, and entities regulated by the Farm Credit Administration are exempt from chapter 156. Tex. Fin. Code § 156.202.

Residential mortgage loan originator compensation, including the practice by creditors of paying mortgage loan originators a yield-spread premium based on the interest rate of a residential mortgage loan or paying compensation based on loan terms other than the principal loan amount, is restricted under amendments to Regulation Z, 12 C.F.R. § 226.36 (Truth in Lending).

Entities and individuals exempt from the licensing requirement are listed in Tex. Fin. Code §§ 156.202(a-1), 157.0121, 180.003(a).

Residential mortgage companies and loan originators must comply with rules and regulations adopted by the Finance Commission. 7 Tex. Admin. Code ch. 80. The commissioner is authorized to enforce compliance with the subject licensing regulations through powers granted under chapters 156 and 157 of the Texas Finance Code. Unlicensed activity is punishable as a class B misdemeanor.

### **§ 2.175      Municipal Utility Districts (MUDs)**

Municipal utility districts are governed by the provisions of Tex. Water Code chs. 49, 54, 59. See also the section titled "Utility District Disclosures" below.

### **§ 2.176      Naturally Occurring Radioactive Materials (NORM)**

The Texas Railroad Commission regulates NORM waste resulting from oil and gas operations. Tex. Health & Safety Code § 401.415.

### **§ 2.177      Navigable Streams**

Survey lines may not cross navigable streams, which are defined as those retaining "an average width of 30 feet from the mouth up." Tex. Nat. Res. Code §§ 21.001(3), 21.012(b). See also Tex. Rev. Civ. Stat. art. 5414a, which controls the validity of patents to and awards of land lying across or partly across watercourses, navigable streams, beds, and abandoned beds of watercourses. See also the section titled "Watercourse Forming County Boundary" below.

### **§ 2.178      Nonprofit Corporations**

Nonprofit corporations are governed by the Texas Business Organizations Code generally and by chapter 22 more specifically. Tex. Bus. Orgs. Code §§ 22.001-409. The sale, lease, exchange, or mortgage of property belonging to a domestic entity is controlled by Tex. Bus. Orgs. Code § 10.251. Most property owners associations that are incorporated are organized as nonprofit organizations. See Tex. Prop. Code chs. 81, 82. See also the sections titled "Business Organizations Code," "Corporations," "Foreign Entities," and "Limited Liability Companies" above and "Partnerships" and "Uniform Unincorporated Nonprofit Association Act" below.

### **§ 2.179      Non-Real Estate Taxes Affecting Real Estate**

The purchaser of a business or stock of goods must withhold from the purchase price adequate funds to pay taxes that may be owed by the seller (for example, unpaid hotel, parking reve-

nue, sales, and corporate franchise taxes of the seller) until the seller provides a receipt of payment from the comptroller. Tex. Tax Code § 111.020. See also the section titled "Hotel Occupancy Taxes" above.

### § 2.180 North American Free Trade Agreement (NAFTA)

Certain provisions of the North American Free Trade Agreement (NAFTA) may affect real property and finance transactions. The text of NAFTA is available on the NAFTA Secretariat's website at <https://www.nafta-sec-alena.org>. Article 1105 of NAFTA requires that each treaty party provide "fair and equitable treatment and full protection and security" to investments of investors from the other party countries. See also the North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified in scattered sections of U.S.C.). See also the section titled "Foreign Ownership of Real Property" above.

### § 2.181 Notarial Seals, Out-of-State

The failure of a non-Texas notary public to attach an official seal to a document will not render the document invalid if a seal is not required in the jurisdiction in which the document is acknowledged. Tex. Prop. Code § 12.001; Tex. Civ. Prac. & Rem. Code § 121.004. The secretary of state annually compiles a list of states that require notarial seals to validate the certificate of acknowledgment and will make the list available to all county clerks by January 1 of each year. Tex. Gov't Code § 405.019. See also the section titled "Acknowledgments" above.

### § 2.182 Notaries Public

Notary qualifications and requirements are found in Tex. Gov't Code ch. 406. Notaries may not represent or imply that they are attorneys. Tex. Gov't Code § 406.017. The notary's book

is public information and must be available for inspection at reasonable times. Tex. Gov't Code § 406.014(b). By administrative rule, however, notaries public may not record in the public record the identification number on the signer's identification card used. 1 Tex. Admin. Code § 87.40. Notaries may certify copies of documents not recordable in the public records and may take depositions. Tex. Gov't Code § 406.016. Application of a printed seal by a notary public is not required on an electronically transmitted certificate of acknowledgment if the same information as contained in the seal is set forth. Tex. Civ. Prac. & Rem. Code § 121.004(d); Tex. Gov't Code § 406.013(d). See the section titled "Acknowledgments" above.

### § 2.183 Nuisance

Statutory provisions relating to common and public nuisances are in Tex. Civ. Prac. & Rem. Code ch. 125, Tex. Loc. Gov't Code ch. 214, and Tex. Health & Safety Code chs. 342, 343. Many municipalities have local ordinances relating to nuisances.

### § 2.184 Open-Space Exemption

The law governing the appraisal of "qualified open-space land" for ad valorem taxes is found in Tex. Tax Code §§ 23.51–.59. The Texas Tax Code prohibits a lender from requiring a borrower to waive its right to an agricultural or open-space tax exemption as a condition to a loan or, to agree to pay the lender for any losses suffered by the lender due to change of use and loss of this exemption. Tex. Tax Code §§ 23.47, 23.58. See also the section titled "Ad Valorem Taxes" above.

### § 2.185 Outdoor Lighting

**Astronomical Observatories:** The commissioners court of a county within fifty-seven miles of the McDonald Observatory must adopt

orders regulating the installation and use of outdoor lighting in any unincorporated territory and adopt orders establishing standards relating to outdoor lighting in proposed subdivisions to minimize the interference with observatory activities. The commissioners court of a county within five miles of the George Observatory or the Stephen F. Austin Observatory may restrict artificial outdoor lighting in any unincorporated territory of the county and establish standards relating to artificial outdoor lighting in proposed subdivisions to minimize the interference with observatory activities. Tex. Loc. Gov't Code §§ 240.031–.035. A municipality must regulate by ordinance the installation and use of outdoor lighting to protect against its use in a way that interferes with scientific astronomical research of an observatory. Tex. Loc. Gov't Code §§ 229.051–.053. A municipality must by ordinance establish standards relating to proposed subdivisions to minimize interference with observatory activities. Tex. Loc. Gov't Code §§ 229.054–.055.

**Military Installations:** Sections 240.032 and 240.0325 of the Texas Local Government Code authorize the commissioners court of a county with a population of more than one million that has at least five United States military bases and any county adjacent to that county that is within five miles of a United States Army installation, base, or camp, on request of the commanding officer, to adopt orders regulating the installation and use of outdoor lighting within five miles of the installation, base, or camp in unincorporated territory of the county. There are exceptions for installations in place before the effective date of the order for electric utilities, electric cooperatives, gas utilities, surface coal mining, telecommunications providers, and manufacturing facilities required by the Texas Commission on Environmental Quality to hold a permit and for tracts of land used as a single residence outside the boundaries of a private subdivision, tracts of land maintained for agricultural use, activity that takes place on a tract of land

maintained for agricultural use, structures or related improvements located on a tract of land maintained for agricultural use, or a correctional facility operated by or under a contract with the Texas Department of Criminal Justice. Tex. Loc. Gov't Code §§ 240.032, 240.0325.

### § 2.186 Outdoor Signs

The Civil Practice and Remedies Code addresses the subject of trespass by outdoor signs in Tex. Civ. Prac. & Rem. Code §§ 80.001–.003. Municipalities are authorized to relocate, reconstruct, and remove signs under Tex. Loc. Gov't Code ch. 216. The owner of a sign may be entitled to be compensated for the costs associated with the relocation, reconstruction, or removal. Tex. Loc. Gov't Code § 216.003. However, a municipality cannot regulate a private landowner's right to put political signage on the landowner's property. Tex. Loc. Gov't Code § 216.903. The Texas Highway Commission regulates highway signs under Tex. Transp. Code chs. 391–395, while recognizing the authority of cities and counties to regulate highway signs in certain circumstances.

### § 2.187 Parking

A neighborhood may petition a county or municipality to post signs prohibiting the overnight parking of commercial vehicles by complying with Tex. Transp. Code § 545.307. See the section titled "Towing of Motor Vehicles" below.

### § 2.188 Parks and Recreational Projects

Cities and towns are restricted in certain instances from selling or encumbering parks and other recreational projects without authorization by a majority vote of qualified voters. Tex. Gov't Code §§ 1508.001–.010.

**§ 2.189 Partition**

Partition of real property is permitted under Tex. Prop. Code ch. 23 and Tex. R. Civ. P. 756-771. Unless waived by the parties, a nonexclusive access easement shall be granted on partition of property under chapter 23. Tex. Prop. Code § 23.006.

**§ 2.190 Partnerships**

Partnerships are governed generally by title 4 of the Texas Business Organizations Code. Chapters 151 and 154 apply to both general and limited partnerships. Chapter 152 applies to general partnerships, and chapter 153 applies to limited partnerships.

The sale, lease, exchange, or mortgage of property belonging to a domestic entity is controlled by Tex. Bus. Orgs. Code § 10.251. Every partner is an agent for the partnership, and any act done in the usual course of business, including the execution of instruments, binds the partnership and the partners. Tex. Bus. Orgs. Code §§ 152.301-302.

If a partner conveys partnership real property without authority and the transaction is not in the usual course of business, the partnership may recover the property from the grantee but not from a bona fide purchaser from the grantee for value without knowledge of the lack of authority. Tex. Bus. Orgs. Code § 152.302(c).

Title to partnership property for general partnerships is governed by Tex. Bus. Orgs. Code § 152.102.

See also the sections titled "Business Organizations Code," "Corporations," "Foreign Entities," "Limited Liability Companies," and "Nonprofit Corporations" above.

**§ 2.191 Personal Property Leases**

Personal property leases are governed by the provisions of Tex. Bus. & Com. Code ch. 2A. In addition, Tex. Bus. & Com. Code ch. 92 addresses rental-purchase agreements of consumer personal property.

**§ 2.192 Pest Control**

The Texas Structural Pest Control Act is found in Tex. Occ. Code ch. 1951.

**§ 2.193 Pipeline Easements**

See the section titled "Easements, Pipeline" above.

**§ 2.194 Plats**

See the section titled "Subdivisions" below.

**§ 2.195 Pool-Yard Enclosures**

Pools in multifamily residential projects must have enclosures that comply with Tex. Health & Safety Code ch. 757. Municipalities also may adopt ordinances governing pool enclosures. Tex. Loc. Gov't Code § 214.101.

**§ 2.196 Powers of Attorney**

See the section titled "Durable Powers of Attorney" above.

**§ 2.197 Private Mortgage Insurance Notice**

Lenders that require borrowers to purchase mortgage guaranty insurance must provide annually a prescribed statutory notice about the right to cancel. Tex. Ins. Code § 3502.201.

### § 2.198 Private Property Rights

Private real property owners have certain rights under state law to challenge state and local regulations and governmental actions that result in a taking of their property. Tex. Gov't Code ch. 2007. Governmental entities are required to prepare a written takings impact assessment of proposed governmental action that may result in a taking. Failure to do so may render the action void. Tex. Gov't Code ch. 2007. Private real property owners have certain rights to reacquire property taken through eminent domain. Tex. Prop. Code § 21.023. Before a governmental entity with eminent domain authority begins negotiating with a property owner to acquire real property, the entity must provide a landowner's bill of rights statement provided by Tex. Gov't Code § 402.031. Tex. Prop. Code § 21.0112.

See also the sections titled "Condemnation and Eminent Domain" and "Landowner's Bill of Rights" above and "Vested Land Use Rights" below.

### § 2.199 Property Inspection

The licensing of property inspectors is addressed in the Real Estate License Act. Tex. Occ. Code ch. 1102. Property inspections may be conducted, in part, by electricians, plumbers, carpenters, and others, such as engineers, in their respective fields.

### § 2.200 Property Owners Associations

The Texas Residential Property Owners Protection Act applies to residential subdivisions that are subject to restrictions that authorize a property owners association to collect regular or special assessments and that require mandatory membership in the association. Tex. Prop. Code ch. 209. The Act also regulates the foreclosure of an assessment lien and provides a right of

redemption after foreclosure. Tex. Prop. Code §§ 209.009–.011. In addition, the Property Code affords certain rights to property owners associations in cities or counties that meet various specified minimum population requirements to amend, extend, or supplement deed restrictions and to establish assessment lien mechanisms. Tex. Prop. Code chs. 201, 204–206. The statute also sets out certain other statutory powers of property owners associations. Property owners associations are subject to the state open meetings and open records laws in very limited circumstances. Tex. Gov't Code §§ 551.0015, 552.0036. Property owners associations are required to deliver a resale certificate to owners, purchasers of a property in a subdivision, or title companies on demand. The resale certificate must include information relevant to the specific property as well as to the subdivision as a whole. Tex. Prop. Code ch. 207.

Condominium property owners associations are not governed by chapters 207 and 209; rather, condominiums formed after December 31, 1993, are governed by Texas Property Code chapter 82. Condominiums formed before January 1, 1994, are generally governed by Texas Property Code chapter 81 and selected provisions of chapter 82 set forth in section 82.002(c), unless they amend the condominium declaration and elect to be governed solely by all of chapter 82.

### § 2.201 Property Tax Consultants

Chapter 1152 of the Texas Occupations Code provides for the registration of property tax consultants. A property tax consultant is a person who performs or supervises the performance of property tax consulting services for compensation. Property tax consulting services means preparing for another person a rendition statement or property record, representing another person in a property tax protest, consulting or advising another person concerning the preparation of a rendition statement or property report or acting

on behalf of another person in a protest under the Tax Code, negotiating or entering into an agreement with an appraisal district on behalf of another person, or acting as the agent of a property owner in connection with certain property tax matters. Tex. Occ. Code §§ 1152.001–.251.

### § 2.202 Property Tax Loans

With certain exceptions, a person engaging in the business of making, transacting, or negotiating property tax loans, or a person making property tax loans who contracts for, charges, or receives, directly or indirectly, a charge, including interest, compensation, consideration, or any other amount authorized under the statute, must be licensed by the Texas Consumer Credit Commissioner. Tex. Fin. Code ch. 351. The lender must provide the commission records to investigate compliance with the laws, an audit of net assets, and access to the lender's place of business for inspection. The commission is also authorized to prescribe filing documents necessary when a property tax lender pays property taxes for another person. Tex. Tax Code § 32.06.

### § 2.203 Racial Discrimination

See the sections titled "Discrimination" and "Fair Housing" above.

### § 2.204 Real Estate Appraisers

See the section titled "Appraisers" above.

### § 2.205 Real Estate Investment Trusts (REITs)

Real estate investment trusts are governed by the Texas Business Organizations Code generally and by title 5 more specifically. Tex. Bus. Orgs. Code §§ 200.001–.503.

### § 2.206 Real Estate License Act

The Real Estate License Act, Tex. Occ. Code ch. 1101, authorizes the Texas Real Estate Commission to regulate the actions of brokers, salespersons, real estate inspectors and appraisers, and others. It also contains numerous other provisions relating to real estate transactions involving brokers or salespersons.

### § 2.207 Real Estate Settlement Procedures Act (RESPA)

The Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. §§ 2601–2617, and its implementing Regulation X, 12 C.F.R. pt. 1024, apply to mortgage loan transactions that are secured by a lien on residential real property designed principally for occupancy by one to four families and that otherwise meet the definition of a "federally related mortgage loan" set out in 12 C.F.R. § 1024.2. Certain loans such as business purpose loans and various construction loans with a term of less than two years are exempt from coverage. 12 C.F.R. § 1024.5. On July 21, 2011, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 111-203, 124 Stat. 1376) mandated that all rulemaking and enforcement authority for RESPA and Regulation X be transferred to, and consolidated within, the Consumer Financial Protection Bureau (CFPB). In accordance with the Dodd-Frank Act, and in an attempt to provide clear and accurate disclosures to consumers, the CFPB combined the disclosure requirements of RESPA and TILA into new forms for certain loan transactions (TILA-RESPA Integrated Disclosures or "TRID"), effective on October 3, 2015. See the final rule on the TRID, 78 Fed. Reg. 79,730 (Dec. 31, 2013). The initial truth-in-lending disclosure and RESPA good-faith estimate (GFE) forms have combined into the new loan estimate (LE) form that must (1) provide the applicant with a good-faith estimate of credit costs and transaction terms, (2) be in writing and contain the pre-

scribed information in 12 C.F.R. § 1026.37 and appendix H-24, and (3) satisfy timing and delivery requirements. The final truth-in-lending disclosure and RESPA HUD-1 have now been combined into the new closing disclosure (CD) and must (1) provide generally the actual terms and costs of the transaction, (2) be in writing containing the prescribed information in 12 C.F.R. § 1026.38 and appendix H-25, and (3) satisfy timing and delivery requirements as set out in this rule. The integrated disclosures are subject to certain timing, tolerance, or variance requirements for accuracy. *See* 12 C.F.R. pts. 1024, 1026.

Section 8 of RESPA prohibits kickbacks, referral fees, and unearned fees in connection with federally related mortgage loans. Violators of section 8 may be found civilly liable for treble damages to persons charged for settlement services involved in the violation and criminally liable for both a statutory fine and imprisonment. Referrals of settlement services to affiliates are permitted as an exception to the section 8 prohibitions under strict guidelines for affiliated business arrangements set out in 12 C.F.R. § 1024.15. Sample forms of required consumer disclosures are illustrated in appendix H to Regulation Z, in public guidance documents published in the Federal Register from time to time by the Department of Housing and Urban Development, and as published by the CFPB. See also the discussion in chapter 12 in this manual.

### § 2.208 Recording

The Property Code addresses the recording of instruments used in property transactions. Tex. Prop. Code chs. 11–13. The rerecording of instruments is permitted under the terms of Tex. Civ. Prac. & Rem. Code § 19.008 if the record was lost, destroyed, or removed and is effective from the date of original recordation. See also the section titled “Deeds” above.

### § 2.209 Record Retention

Various federal laws and regulations, including Internal Revenue Service regulations, require the retention of records that affect or involve realty. Records that must be retained under state law may be destroyed after three years, unless otherwise provided. Tex. Bus. & Com. Code § 72.002.

### § 2.210 Recreational Projects and Recreational Use

See the sections titled “Camping Resorts,” “Landowner Liability,” and “Parks and Recreational Projects” above and “Timeshares” below.

### § 2.211 Redemption Rights

After foreclosure of an assessment lien, condominium unit owners and residential property owners have rights of redemption. *See* Tex. Prop. Code § 82.113(g) (condominium unit owners); Tex. Prop. Code ch. 209 (residential property owners). Redemption rights after a tax foreclosure sale are governed by Tex. Tax Code §§ 34.21–.23. A certificate of redemption properly issued by the United States may be recorded. Tex. Prop. Code § 12.011.

### § 2.212 Registered Mail

If a contract or statute requires that notice be delivered by registered mail, certified mail will also suffice unless registered mail is required by law to provide insurance against loss. Tex. Civ. Prac. & Rem. Code § 136.001.

### § 2.213 Release of Lien by Affidavit

If a mortgagee holds a mortgage on one-to-four-family residential property, or on other real property where the original face amount of the debt is less than \$1.5 million, and the mortgagee or its mortgage servicer fails to execute a release



of the mortgage, an authorized officer of a title insurance company or a title insurance agent may execute and record an affidavit in a form substantially similar to the affidavit prescribed by Tex. Prop. Code § 12.017. An uncontroverted affidavit, executed and recorded as provided in the statute, operates as a release of the mortgage. Tex. Prop. Code § 12.017.

### § 2.214 Release of Lien by Attorney or Others

Tex. Prop. Code § 52.005 allows the agent or attorney of record to release an abstract of judgment by recording a return or copy of the return on an execution issued on the judgment that is certified by the officer making the return and that complies with the requirements of section 52.005 or a receipt, acknowledgement, or release signed by the party (or his agent or attorney of record) entitled to receive payment of the judgment and that is acknowledged or otherwise proven for record. Tex. Prop. Code § 52.021 allows a release by discharge under bankruptcy laws. Tex. Civ. Prac. & Rem. Code § 31.008 authorizes judges to release liens when the amount due is paid to the court. If a judgment creditor refuses to accept payment of a judgment or refuses to execute a release of judgment after accepting payment, the court may hold a hearing to determine whether a release should be issued. Tex. Civ. Prac. & Rem. Code § 31.008(g). Tex. Prop. Code § 12.017 permits authorized title insurance companies and title insurance agents to file affidavits of record as a substitute for an executed release by the lienholder under certain circumstances. See also the sections titled "Abstracts of Judgment" and "Judgment Liens" above.

### § 2.215 Republic of Texas Liens

See the section titled "Fraudulent Filings" above.

### § 2.216 Residential Construction Liability

Liability for damages arising out of defects in residential construction projects is addressed in the Residential Construction Liability Act (Tex. Prop. Code ch. 27).

### § 2.217 Residential Rental Locators

The Real Estate License Act requires that residential rental locators be licensed as brokers or salespersons, with certain exceptions. Tex. Occ. Code §§ 1101.002, 1101.151, 1101.351, 1101.553, 1101.757.

### § 2.218 Restrictive Covenants

Any clause not in contravention of law may be inserted into an instrument of conveyance. Tex. Prop. Code § 5.022(c). Restrictive covenants that require the use of wood shingles for structures on residential properties or that are discriminatory on the basis of race, color, religion, or national origin are void. Tex. Prop. Code §§ 5.025, 5.026. Restrictive covenants that are at odds with certain water conservation initiatives are void. Tex. Prop. Code § 202.007. In an action based on breach of a restrictive covenant, the prevailing party who asserted the action may recover attorney's fees in addition to the party's costs and claim. Tex. Prop. Code § 5.006.

The governing body of a municipality that does not have zoning ordinances or that has a population of 1.5 million or more may elect application of Tex. Loc. Gov't Code §§ 212.151–157 ("Enforcement of Land Use Restrictions Contained in Plats and Other Instruments") for enforcement of restrictive covenants. The municipality may require any person who sells or conveys restricted property located within the municipality first to give the purchaser written notice of the restrictions and of the municipality's right to enforce them. Tex. Loc. Gov't Code § 212.155. A municipal utility district may

enforce restrictive covenants. Tex. Water Code § 54.237.

Tex. Gov't Code § 27.034 permits enforcement of certain restrictive covenants in a justice court, although a justice court is prohibited from granting a writ of injunction.

See also the sections titled "Community Homes; Group Homes" and "Property Owners Associations" above.

### § 2.219 Reverse Mortgages

A reverse mortgage is a type of home equity loan authorized by the Texas Constitution that permits homeowners, age sixty-two or older, to borrow without recourse, based on the equity in their homesteads. Tex. Const. art. XVI, § 50(a)(7), (k)-(p), (v).

See the section titled "Home Equity Lending" above.

### § 2.220 Right of Rescission

In a credit transaction that involves a principal residence and that is subject to the Truth in Lending Act, the consumer may have a right to rescind the transaction within a certain period. The consumer must be notified of this right. 12 C.F.R. § 226.23.

### § 2.221 Risk of Loss

See the section titled "Uniform Vendor and Purchaser Risk Act" below.

### § 2.222 Roadway Forming County Boundary

Tex. Civ. Prac. & Rem. Code § 15.065 confers concurrent jurisdiction over roadways forming a common county boundary.

### § 2.223 Rule against Perpetuities

Tex. Const. art. I, § 26, provides that perpetuities are not allowed. The principal statutory provision incorporating the rule against perpetuities is found in Tex. Prop. Code § 5.043. The rule as applied to trusts is addressed in Tex. Prop. Code § 112.036.

### § 2.224 Sale of Trust Property to Governmental Entities

A governmental entity may not purchase real property held in trust unless the trustee submits to the governing body of the governmental entity a copy of the trust agreement identifying the true owner of the property. Tex. Gov. Code § 2252.092. See also the section titled "Disclosure of Interested Parties When Contracting with Governmental Entities" above.

### § 2.225 Sculptures

See the section titled "Copyrights" above.

### § 2.226 Securities Acts

The Securities Act of 1933 (15 U.S.C. §§ 77a-77aa) and the Texas Securities Act (Tex. Rev. Civ. Stat. arts. 581-1 to -43) may apply to group ownership of real estate in which passive investors furnish capital and rely on a promoter to make the investment successful. These statutes generally require certain disclosures to the passive investors and prohibit the use of fraudulent devices or schemes in connection with the sale of securities.

### § 2.227 Security Deposits

The Texas Property Code addresses the rights and requirements associated with security deposits in residential leases (Tex. Prop. Code §§ 92.101-.109) and in commercial leases (Tex. Prop. Code §§ 93.004-.012).

**§ 2.228 Security Interests**

Security interests in many categories of personal property are governed by Tex. Bus. & Com. Code ch. 9. For a more extensive discussion of security interests, see chapter 9 in this manual.

**§ 2.229 Self-Service Storage Facilities**

The Texas Property Code governs the creation and perfection of liens against property held in self-service storage facilities or mini-warehouse facilities. Tex. Prop. Code §§ 59.001–.046.

**§ 2.230 Seller's Disclosure of Property Condition**

See the section titled "Disclosures and Notices" above.

**§ 2.231 Sewer Service**

The sale of sewer service to the public is regulated under Tex. Water Code ch. 13. No retail utility may provide sewer service to the public without first receiving a certificate of convenience and necessity (CCN) from the Texas Commission on Environmental Quality (TCEQ), with the exception of municipalities (which may provide retail service to areas within their corporate limits without a CCN, provided such areas are not within the certificated area of another retail utility provider). Tex. Water Code § 13.242.

Certain owners with property within a proposed service area will receive notice of new applications for certificates and amendments to existing certificate applications. Tex. Water Code § 13.246. Certain owners may "opt out" or exclude their property from the CCN application. Tex. Water Code § 13.246. Certain owners may petition the TCEQ for a release from a CCN if they can demonstrate that the certificate holder conditions the provision of service on the

payment of costs not properly allocable directly to the petitioner's service request. Tex. Water Code § 13.254. Each certificate holder must record a map and a boundary description of the certificated area in the real property records of each applicable county. Tex. Water Code § 13.257.

**§ 2.232 Sex Offenders**

Convicted sex offenders must register their residences with, and certain notices must be provided to, law enforcement authorities. Tex. Code Crim. Proc. ch. 62.

A convicted sex offender may not own an interest in, be employed by, be an independent contractor for, or be an officer or director of a sexually oriented business. Tex. Bus. & Com. Code ch. 102.

**§ 2.233 Shopping Center Stores, Open on Sundays**

A clause in a shopping center lease that requires a store to be open when another store in the center is open does not apply on Sundays unless the lease expressly states that it applies on Sundays. Tex. Bus. & Com. Code § 53.001.

**§ 2.234 Smoke Alarms**

A landlord's obligation to install smoke alarms in residential leased premises is governed by Tex. Prop. Code §§ 92.251–.262.

**§ 2.235 Soldiers' and Sailors' Civil Relief Act**

The Soldiers' and Sailors' Civil Relief Act has been renamed the Servicemembers Civil Relief Act. See the section titled "Military Personnel" above.

### § 2.236 Special Districts

Numerous special districts created by state statutes affect real estate transactions. Among the most important are conservation districts, drainage districts, fresh water supply districts, hospital districts, irrigation districts, levee improvement districts, municipal management districts, municipal utility districts, navigation districts, utility and reclamation districts, and water control and improvement districts. Statutes creating and governing special districts can be found in the Texas Local Government Code, Texas Health & Safety Code, and the Texas Water Code. The 2003 Texas legislature created a Special District Local Laws Code, organized so that each special district's local law is contained in a single, separate chapter. The Code is a revision of Texas statutes compiled only to make special district laws more accessible and understandable.

### § 2.237 State of Texas Leases

Real property leases between state entities and private parties are governed by the requirements of Tex. Gov't Code chs. 2165, 2167 and 1 Tex. Admin. Code ch. 115.

### § 2.238 Statute of Frauds

To be enforceable, the following types of transactions, among others, must be in writing: contracts for the sale of real estate; conveyances of an interest in land, including an estate of inheritance, a freehold interest, and an estate for a term longer than one year; agreements to pay a commission for certain real property transactions; and agreements that will not be performed within one year from the date they are made. Tex. Prop. Code § 5.021; Tex. Bus. & Com. Code § 26.01. See also the section titled "Loan Documents" above, relating to a notice that

must be given to claim a statute-of-frauds defense in connection with a loan.

See chapter 3 in this manual for comments and suggestions relating to the preparation of documents used in any conveyance of real property.

### § 2.239 Statute of Limitations

See the section titled "Limitations" above.

### § 2.240 Statutes of Repose

The ten-year statute of repose for registered or licensed architects, engineers, interior designers, and landscape architects is found at Tex. Civ. Prac. & Rem. Code § 16.008; for persons who construct or repair improvements to real property, at Tex. Civ. Prac. & Rem. Code § 16.009; and for surveyors, at Tex. Civ. Prac. & Rem. Code § 16.011.

### § 2.241 Stormwater Permits

Construction sites of five acres or more must comply with the general stormwater permit requirements found in 57 Fed. Reg. 41,176-41,190 (1992). See 40 C.F.R. pt. 122. Construction sites of between one and five acres are addressed by the rules published in 64 Fed. Reg. 68,722 (1999). The general permits for industrial activities were published in 57 Fed. Reg. 41,236 (1992). A new multisector permit for industrial activities was published in 65 Fed. Reg. 64,746 (2000) as corrected in 66 Fed. Reg. 16,755 and 16,233 (2001). Certain industrial and other uses may have other stormwater permit requirements under the National Pollutant Discharge Elimination System permit program under the Clean Water Act. Certain large metropolitan areas may implement stormwater permitting programs in compliance with the Clean Water Act. Tex. Loc. Gov't Code ch. 573. See the section titled "Environmental Laws" above.

### § 2.242 Streets and Roads

Cities have the authority to assess landowners for the costs to improve streets and sidewalks. Tex. Transp. Code §§ 311.091–.096. Cities may grant the use of streets for private purposes under the provisions of Tex. Transp. Code ch. 316. Suits for relief from street closings are regulated by Tex. Civ. Prac. & Rem. Code §§ 16.005, 65.015. Tex. Transp. Code ch. 203 authorizes the Texas Transportation Commission to construct and maintain state highways. Tex. Transp. Code ch. 311 applies to municipalities. Tex. Transp. Code chs. 251–286 address various aspects of county roads, including the ability of a county road supervisor to limit or prohibit the use of certain county roads by vehicles that may damage the road. Tex. Transp. Code § 251.157. County roads may be abandoned in some cases in which the use becomes infrequent and one of the adjoining property owners has fenced the property for a continuous period of more than twenty years. Tex. Transp. Code § 251.057.

### § 2.243 Subdivisions

Counties may establish substantive requirements for subdivision plats for tracts outside the extraterritorial jurisdiction of municipalities. Tex. Loc. Gov't Code §§ 232.001–.010, 232.0034, 242.001. Cities have the same power over subdivisions within their corporate limits. Tex. Loc. Gov't Code §§ 212.001–.018. Generally, counties and cities are required to enter into a written agreement that identifies the entity authorized to regulate subdivision plats in the city's extraterritorial jurisdiction. Tex. Loc. Gov't Code § 242.001. If counties and cities do not enter into a written agreement before the dates specified in Tex. Loc. Gov't Code § 242.0015(a), the parties must arbitrate the disputed issues. Tex. Loc. Gov't Code § 242.0015.

Special subdivision requirements apply to populous counties (Tex. Loc. Gov't Code

§§ 212.0146, 232.006, 242.002), counties near the Mexican border (Tex. Loc. Gov't Code §§ 232.021–.043), and to certain economically distressed counties (Tex. Loc. Gov't Code §§ 232.071–.080). See also the sections titled “Colonias” and “Contracts for Deed” above.

Special subdivision requirements also apply to replats of golf courses in certain counties. Tex. Loc. Gov't Code § 212.0155.

A subdivision plat, replat, or amended plat or replat may not be recorded unless (1) it is approved by the entity authorized to regulate subdivisions, (2) it has attached to it an original tax certificate from each taxing unit with jurisdiction over the tract indicating that no delinquent ad valorem taxes are owed on the tract, and (3) it has attached to it the documents required by Tex. Loc. Gov't Code § 212.0105 or Tex. Loc. Gov't Code § 232.023, if applicable. Tex. Prop. Code § 12.002. If the subdivision plat, replat, or amended plat or replat is filed after September 1 of a year, the plat, replat, or amended plat or replat must also have attached to it a tax receipt from each taxing unit with jurisdiction over the tract indicating that taxes for the current year have been paid or a statement from the collector indicating that taxes for the current year have not been calculated. Tex. Prop. Code § 12.002(e). The tax collector is required, on request, to give the property owner or his agent a statement indicating that taxes for the current year have not been calculated. Tex. Tax Code § 31.075.

Note that tracts within the extraterritorial jurisdiction of a city may require approval from both the city and the county. *See* Tex. Loc. Gov't Code § 242.001. The cancellation and revision of certain subdivision plats are governed by Tex. Loc. Gov't Code §§ 212.013–.016, 232.008–.009. County-approved subdivision plats terminate on January 1 of the fifty-first year after the year approved if none of the platted land has

been sold by that date. Tex. Loc. Gov't Code § 232.002(c).

A property description based on a pending but unrecorded subdivision plat may be used in a sales contract, contract for deed, or deed only if certain conditions are met. Tex. Prop. Code § 12.002.

In counties with populations of 65,000 or more, if all or part of a subdivision plat is revised to provide for another subdivision within all or part of the earlier subdivision, the restrictions that apply to the earlier subdivision apply to the newly created subdivision. Tex. Prop. Code § 205.003.

Municipalities and counties are authorized to require as a condition of platting that a registered engineer certify the adequacy of groundwater. Tex. Loc. Gov't Code §§ 212.0101, 232.0032.

Counties may require that plat applications include a digital map meeting certain criteria, provided that the necessary "digital mapping technology" is "reasonably accessible." Tex. Loc. Gov't Code §§ 232.001, 232.023, 232.072.

#### § 2.244 Subletting or Assignment

Subletting or assignment of leased premises is prohibited without the prior consent of a landlord. Tex. Prop. Code § 91.005.

#### § 2.245 Submetering

See the section titled "Utility Submetering and Nonmetering" below.

#### § 2.246 Surety

Legal obligations between principals and sureties are governed by the provisions of Tex. Civ. Prac. & Rem. Code ch. 43. The Insurance Code

governs construction payment bonds issued by surety companies. See Tex. Ins. Code §§ 3503.051–.057. Performance and payment bonds are governed by Tex. Gov't Code ch. 2253 and Tex. Prop. Code §§ 53.201–.239.

#### § 2.247 Surveyors

The Professional Land Surveying Practices Act is contained in Tex. Occ. Code ch. 1071. Regulations under the Act are in 22 Tex. Admin. Code chs. 661, 663, 664, 665.

The circumstances under which a surveyor's lien attaches to real estate are addressed in Tex. Prop. Code § 53.021(c).

#### § 2.248 Survival of Representations and Warranties

Contracts that purport to limit the time in which to bring suit on the contract to less than two years are void. The provision does not apply to transactions of more than \$500,000 by business entities. Tex. Civ. Prac. & Rem. Code § 16.070.

#### § 2.249 Surviving Spouse of Mortgagor

Chapter 343 of the Texas Finance Code requires a residential mortgage servicer to provide to the surviving spouse of the mortgagor the loan number, the current balance, whether any amounts are delinquent, and what amount, if any, is held in escrow, within thirty days of receiving a request for the loan information. A request from a surviving spouse must include statutory language, a death certificate of the mortgagor, an affidavit from a disinterested party in a form similar to an affidavit of heirship as set forth in Tex. Est. Code § 203.002, and an affidavit from the surviving spouse stating the property is the surviving spouse's primary residence.

**§ 2.250 Swimming Pools**

See the section titled "Pool-Yard Enclosures" above.

**§ 2.251 Taxes**

The Property Redevelopment and Tax Abatement Act permits tax abatements in reinvestment zones. Tex. Tax Code ch. 312. See also the sections titled "Ad Valorem Taxes," "Hotel Occupancy Taxes," "Non-Real Estate Taxes Affecting Real Estate," and "Open-Space Exemption" above.

**§ 2.252 Telecommunications**

Telecommunications companies have certain rights of access to private commercial buildings under the Texas Utilities Code. See especially Tex. Util. Code chs. 51, 54. A telecommunications provider is defined as a person who has been issued a certificate of convenience and necessity or certificate of operating authority by the Public Utility Commission. Tex. Util. Code § 51.002(10).

**§ 2.253 Terrorism Regulation**

Federal law prohibits transactions with persons who commit, threaten to commit, or support terrorism. See Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001). Additional terrorism regulations are governed by the Office of Foreign Assets Control (OFAC) of the Department of the Treasury. 31 C.F.R. pts. 595-597. Prohibited transactions include those with specially designated terrorists (31 C.F.R. pt. 595), terrorism list governments (31 C.F.R. pt. 596), and foreign terrorist organizations (31 C.F.R. pt. 597). A list of "Specially Designated Nationals and Blocked Persons" is administered by OFAC and is accessible online at <https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>.

**§ 2.254 Texas Department of Housing and Community Affairs**

The Texas Department of Housing and Community Affairs is the principal agency in the state that administers programs of housing assistance and development for individuals and families of low, very low, and extremely low income and families with moderate income. Its general enabling statute can be found at Tex. Gov't Code ch. 2306.

**§ 2.255 Texas General Land Office**

Use of evidence to demonstrate superior title to land based on records filed in the General Land Office is addressed in Tex. Prop. Code § 12.003.

**§ 2.256 Timber Production**

See the section titled "Ad Valorem Taxes" above.

**§ 2.257 Timeshares**

Timeshare projects coming into existence on or after August 26, 1985, must comply with the terms of the Texas Timeshare Act, Tex. Prop. Code ch. 221.

**§ 2.258 Title Insurance**

The business of title insurance is governed by the Texas Title Insurance Act, Texas Insurance Code chapters 2501-2704. Insuring forms, rate rules, procedural rules, administrative rules, and claims handling principles and procedures are set out in the "Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas" promulgated by the Texas Department of Insurance in accordance with Texas Insurance Code title 11.

**§ 2.259 Towing of Motor Vehicles**

Tex. Occ. Code ch. 2308 governs the removal of unauthorized vehicles from a parking facility or public roadway, the establishment of reserved parking spaces, the enforcement of parking restrictions in parking lots and garages, the towing of unauthorized vehicles from private property, and the regulation of towing companies and parking-facility owners.

**§ 2.260 Trademark and Trade-Name Rights**

Trademark and trade-name rights are addressed in the provisions of Tex. Bus. & Com. Code ch. 16. The Lanham Act, 15 U.S.C. §§ 1051–1127, is the primary federal trademark statute.

**§ 2.261 Transfer on Death Deed**

The Texas Real Property Transfer on Death Act, Tex. Est. Code ch. 114, authorizes an individual to make a revocable transfer to one or more designated beneficiaries, including alternate beneficiaries, effective at the transferor's death, by executing and recording a transfer on death deed. During the transferor's lifetime, a transfer on death deed does not affect any right, title, or interest of the transferor in the property; vest any legal or equitable title in a designated beneficiary; or subject the property to the claims of creditors of any designated beneficiary. Notwithstanding the recording of a transfer on death deed, the transferor retains the right to transfer or encumber the property, any present or future homestead rights, and any present or future ad valorem tax exemptions to which the transferor is entitled. A transfer on death deed does not affect the rights of creditors of the transferor, secured or unsecured, nor does it trigger any due-on-sale clause. A transfer on death deed does not affect the eligibility for public assistance of either the transferor or any designated beneficiary. See form 5-25.

**§ 2.262 Transportation**

Certain adjacent counties are authorized to create a regional county transportation authority. Tex. Transp. Code ch. 460.

**§ 2.263 Trespass to Try Title**

Trespass to try title is a statutory action to establish title to real property. Tex. Prop. Code ch. 22; Tex. R. Civ. P. 783–809. A declaratory judgment action can be maintained if the sole title issue is the determination of the boundary between adjoining properties. Tex. Civ. Prac. & Rem. Code § 37.004(c).

**§ 2.264 Trust Code**

The Texas Trust Code, Tex. Prop. Code §§ 111.001–115.017, governs express trusts. If the Trust Code and the terms of a trust conflict, the trust controls, “except the settlor may not relieve a corporate trustee from the duties, restrictions, and liabilities under Section 113.052 or 113.053” (relating to loans of trust funds to, and purchase or sale of trust property by, the trustee). Tex. Prop. Code § 111.002(a). Trustees have certain management rights if environmental problems arise on properties held in trust under Tex. Prop. Code §§ 113.025, 114.001 even if the trust instrument does not expressly authorize such actions. A trustee may grant an agent authority to act for the trustee with respect to real property transactions unless the governing instrument prohibits the trustee from hiring agents. Tex. Prop. Code § 113.018. See also the section titled “Blind Trusts and Undisclosed Beneficiaries” above.

**§ 2.265 Truth in Lending**

The Truth in Lending Act, 15 U.S.C. §§ 1601–1667f, and its implementing Regulation Z, 12 C.F.R. pt. 226, promote the informed use of consumer credit by requiring disclosures about the terms and cost of credit transactions. The Act



applies to credit transactions, including mortgage credit secured by a lien on real property, if the credit is regularly extended by a creditor to natural persons primarily for personal, family, or household purposes and is subject to a finance charge or payable by a written agreement in more than four installments. *See* 12 C.F.R. §§ 226.1(c), 226.3. Creditors subject to the Act generally are persons who regularly extend such credit and to whom the credit obligation is initially payable. Creditors must make written disclosures for each credit transaction before consummation that reflect the terms of the actual legal obligation between the parties and show the calculated annual percentage rate, finance charge, and other material disclosures of the cost of credit within permitted tolerances for accuracy. Additional written disclosures are required at the time of application for variable rate transactions in which the annual percentage rate may increase after loan consummation. Certain credit transactions secured by a lien on a consumer's principal dwelling are subject to rescission, and creditors must provide consumers written notices of their rights of rescission of those transactions at consummation. Special disclosure rules and limitations on permitted terms apply to certain home mortgage transactions secured by a consumer's principal dwelling in which the annual percentage rate or total points and fees charged the consumer exceed standards set out in the Act. Advertising rules intended to ensure that advertisements promoting credit provide accurate and balanced information about rates, payments, and other loan features apply to all home mortgage loans subject to the Act. Sample forms of various required consumer disclosures are illustrated in appendix H to Regulation Z. Creditors failing to comply with requirements of the Act may be subject to civil liability, administrative penalties, and, in the case of willful and knowing violations, criminal liability. Title XIV of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") (Pub. L. No. 111-203, 124 Stat. 1376), enacted July 21, 2010, which may

be cited by its short title as the Mortgage Reform and Anti-Predatory Lending Act, contains extensive reform measures amending the Truth in Lending Act to regulate residential mortgage loan origination, underwriting, and servicing practices. *See* 15 U.S.C. §§ 1607, 1611, 1640. *See* also chapter 12 in this manual.

The Consumer Financial Protection Bureau (CFPB) was created by the Dodd-Frank Act. All rulemaking and enforcement authority for the Real Estate Settlement Procedures Act (RESPA and Regulation X), the Truth in Lending Act and Regulation Z, the Equal Credit Opportunity Act and Regulation B, the Home Mortgage Disclosure Act and Regulation C, and other federal statutes regulating consumer finance was transferred to, and consolidated within, the CFPB as of July 21, 2011. The CFPB is required to adopt new mortgage finance regulations to implement and interpret the extensive reform measures of the Dodd-Frank Act. To date, the CFPB has under consideration seven proposed rules, which have been published in the Federal Register for public comment. The CFPB expects to adopt final rules during calendar year 2013. In an effort to coordinate the effective dates of these expected final rules, the CFPB gave notice in November, 2012, that it is amending Regulation Z (Truth in Lending) to effectively delay implementation of rules and forms required by Title XIV of the Dodd-Frank Act that otherwise would have automatically taken effect on January 21, 2013. *See* 77 Fed. Reg. 70,105 (Nov. 23, 2012). The CFPB intends to implement these Title XIV consumer disclosures as part of rulemaking in which mortgage disclosure forms that consumers receive under the Truth in Lending Act and RESPA when applying for and closing on a home mortgage loan will be integrated into a single set of disclosures as required by Title X of the Dodd-Frank Act. By delaying the implementation of the Title XIV disclosure rules to coincide with the integrated RESPA and Truth in Lending Act disclosure rules, the CFPB hopes to reduce the

consumer confusion and compliance burden on the industry caused by a trickling down of multiple new rule releases over the coming months. Because of the continuing rule-making process, practitioners should check the CFPB website found at [www.consumerfinance.gov](http://www.consumerfinance.gov) for current regulations.

### § 2.266 Unauthorized Preparation of Real Estate Documents

The Texas Government Code prohibits the preparation of deeds, deeds of trust, notes, mortgages, and other instruments affecting title to real property for compensation unless the preparer is an attorney licensed in Texas or qualifies under one of the other listed exemptions. Tex. Gov't Code ch. 83. Texas law broadly construes the meaning of a charge of compensation for this purpose. See *Hexter Title & Abstract Co. v. Grievance Committee*, 179 S.W.2d 946, 952 (Tex. 1944); Tex. Att'y Gen. Op. No. JM-943 (1988). Written materials, books, printed forms, Internet sites, computer software, and similar products are excluded from the definition of the unauthorized practice of law if the items clearly and conspicuously state that the products are not a substitute for the advice of an attorney licensed to practice law in Texas. Tex. Gov't Code § 81.101(c). However, this exclusion does not affect the applicability or enforceability of chapter 83 and such products or similar media expressly cannot be used in violation of the prohibitions of that chapter against the unauthorized preparation of real estate documents.

### § 2.267 Unclaimed Property

See the sections titled "Abandonment" and "Escheat" above.

### § 2.268 Underground and Aboveground Storage Tanks

Underground storage tanks and certain aboveground tanks must be registered with the Texas

Commission on Environmental Quality. See 30 Tex. Admin. Code § 334.7; Tex. Water Code §§ 26.341–367. Underground tanks must also meet certain technical specifications under the provisions of 40 C.F.R. pt. 280. In Texas, an owner of land having an underground storage tank must disclose the existence of the tank to prospective purchasers. 30 Tex. Admin. Code § 334.9. Section 26.342 of the Water Code defines the owner of an underground storage tank for liability purposes. Tex. Water Code § 26.342.

### § 2.269 Underground Facility Damage Prevention and Safety Act

The Underground Facility Damage Prevention and Safety Act, Tex. Util. Code ch. 251, provides for a "one-call" statewide notification service for the location of underground facilities. All excavators in Texas must notify the notification center of their intention to excavate or be subject to penalties.

### § 2.270 Uniform Commercial Code

The Texas version of the Uniform Commercial Code can be found in chapters 1 through 9 of the Texas Business and Commerce Code.

### § 2.271 Uniform Electronic Transactions Act

The Uniform Electronic Transactions Act, Tex. Bus. & Com. Code ch. 322, establishes the enforceability of electronic records and signatures in electronic transactions.

### § 2.272 Uniform Principal and Income Act

The Uniform Principal and Income Act, Tex. Prop. Code ch. 116, determines the allocation of principal and income for trusts.

### § 2.273 Uniform Transfers to Minors Act

Texas has adopted the Uniform Transfers to Minors Act, Tex. Prop. Code §§ 141.001-.025. The Act establishes the terms, conditions, manner, and effect of making transfers to minors.

### § 2.274 Uniform Unincorporated Nonprofit Association Act

Unincorporated nonprofit organizations in Texas are governed by the Texas Business Organizations Code generally and chapter 252 of that code more specifically. *See* Tex. Bus. Orgs. Code §§ 252.001-.017.

An “association” is defined as an entity governed as a cooperative association, an unincorporated nonprofit association, or a for-profit professional association. Tex. Bus. Orgs. Code § 1.002(3).

A “nonprofit association” is defined as an unincorporated organization, other than one created by a trust, consisting of three or more members joined by mutual consent for a common, nonprofit purpose. A form of joint tenancy, tenancy in common, or tenancy by the entirety does not by itself establish a nonprofit association, regardless of whether the co-owners share use of the property for a nonprofit purpose. Tex. Bus. Orgs. Code § 252.001(2).

### § 2.275 Uniform Vendor and Purchaser Risk Act

Tex. Prop. Code § 5.007 adopts the Uniform Vendor and Purchaser Risk Act and allocates responsibility for risk of loss between buyers and sellers, depending on whether legal title and possession have been transferred. However, the parties may by contract allocate the risk differently. Tex. Prop. Code § 5.007(a).

### § 2.276 Usury

When using any document that extends credit, attorneys should consider the implications of state and federal usury laws. *See* 12 U.S.C. § 1735f-7; Tex. Fin. Code chs. 301-349. *See* the section titled “Variable Interest Rates” below.

### § 2.277 Utility District Disclosures

Any person selling or transferring property located in a water, sewer, or other district with taxing authority must give a prospective purchaser notice of the current tax rate and amount of authorized bonded indebtedness and whether the property is located in a municipality’s extra-territorial jurisdiction before or at the time of the execution of the contract. A separate copy of the notice must be executed at closing and recorded. Tex. Water Code § 49.452. *See* the form of utility district disclosure in chapter 4 in this manual. *See* also the sections titled “Disclosures and Notices” and “Municipal Utility Districts (MUDs)” above.

### § 2.278 Utility Submetering and Nonmetering

The Texas Water Code requires that multiunit facilities built after January 1, 2003, be submetered or individually metered and imposes certain requirements before conversion of an existing facility to submetering or allocated billing. Tex. Water Code §§ 13.502, 13.506. The Water Code also limits the right of certain condominium managers and landlords of apartments, manufactured-home rental communities, and commercial multiple-use facilities to charge tenants for utility expenses without proper evidence to show how the utility expenses were calculated. These provisions also limit rent increases before the installation of submeters and provide tenants means of enforcement. Tex. Water Code §§ 13.501-.506.

Utility disconnections by landlords are also limited under the provisions of Tex. Prop. Code § 92.008.

### § 2.279 Variable Interest Rates

The Alternative Mortgage Transaction Parity Act of 1982, 12 U.S.C. §§ 3801–3806, was enacted to give nonfederally chartered housing creditors the same ability to devise alternatives to fixed-rate financing as federal institutions have. It permits nonfederally chartered lenders to make, purchase, and enforce certain mortgage transactions in which the interest rate can change as long as the transactions comply with federal regulations. See also the section titled “Usury” above.

### § 2.280 Vendor and Purchaser Risk Act

See the section titled “Uniform Vendor and Purchaser Risk Act” above.

### § 2.281 Venue

Venue for “major transactions” (in which the consideration is more than \$1 million) may be determined by the parties. Tex. Civ. Prac. & Rem. Code § 15.020. Venue for actions for the recovery of real property or an estate or interest in real property, for partition of real property, to remove encumbrances from the title to real property, for recovery of damages to real property, or to quiet title to real property is in the county in which all or a part of the property is located. Tex. Civ. Prac. & Rem. Code § 15.011. Venue for most suits between landlord and tenant is in the county in which all or part of the property is located. Tex. Civ. Prac. & Rem. Code § 15.0115. Venue for trust-related actions is governed by Tex. Prop. Code § 115.002. Venue provisions are addressed generally in chapter 15 of the Civil Practice and Remedies Code. The Property Code contains venue provisions for suits alleging a breach of fiduciary

duty by a fiduciary or managerial agent of a charitable trust (Tex. Prop. Code § 123.005); actions to enforce rights or obligations under condominium association declarations, bylaws, or rules (Tex. Prop. Code § 82.008); condemnation proceedings (Tex. Prop. Code § 21.013); and partition actions (Tex. Prop. Code § 23.002).

### § 2.282 Vested Land Use Rights

Chapter 245 of the Local Government Code regulates the issuance of local permits and provides that, if a series of permits is required for a project, the rules, regulations, and other requirements in effect at the time the application for the first permit is filed shall be the sole basis for considering all subsequent permits to complete the project. Tex. Loc. Gov’t Code § 245.002(b). Permit holders may take advantage of new rules or changes to the law that enhance a project. Tex. Loc. Gov’t Code § 245.002(d). A municipality may adopt a moratorium on the development of residential or commercial property only if it finds a need to prevent a shortage of essential public facilities or that the moratorium is justified because existing commercial development laws are inadequate to protect the public health, safety, or welfare of its residents. Notice and hearing procedures are required. Tex. Loc. Gov’t Code §§ 212.131–136. Certain types of regulations are exempt from the application of chapter 245. See Tex. Loc. Gov’t Code § 245.004.

After annexing an area, a municipality may not prohibit a person from (1) continuing to use land in the area in the manner in which the land was being used on the date the annexation proceedings were instituted if the land use was legal at that time or (2) beginning to use land in the area in the manner that was planned for the land before the ninetieth day before the effective date of the annexation if certain conditions are met. Tex. Loc. Gov’t Code § 43.002. These prohibitions also apply to municipalities incorporated

after September 1, 2003. Tex. Loc. Gov't Code § 211.016. See also the section titled "Private Property Rights" above.

### § 2.283 Visual Arts

The Visual Artists Rights Act of 1990 (VARA), 17 U.S.C. § 106A, protects the reputations of certain visual artists and the works of art they create. With numerous exceptions, VARA grants three rights: the right of attribution; the right of integrity; and in the case of works of visual art of "recognized stature," the right to prevent destruction. 17 U.S.C. § 106A.

### § 2.284 Voluntary Cleanup Program

Texas has a voluntary cleanup statute, also known as a Brownfields statute, in Tex. Health & Safety Code §§ 361.601–.613. Regulations for the voluntary cleanup program are published at 30 Tex. Admin. Code ch. 333.

### § 2.285 Wage Liens

Under chapter 61 of the Texas Labor Code and chapter 113 of the Texas Tax Code, if the Texas Workforce Commission (TWC) determines that an employer owes unpaid wages to an employee, the TWC is authorized to file an administrative lien against the employer's property to secure the payment of the unpaid wages. See Tex. Lab. Code §§ 61.081–.085. Section 61.0825 of the Texas Labor Code provides that such wage liens have priority over all other liens against the same property, except for a lien securing the payment of ad valorem taxes. See Tex. Lab. Code § 61.0825.

### § 2.286 Warehouseman's Liens

A warehouseman's lien for property removed from a tenant's premises is governed by Tex. Prop. Code § 24.0062. See also the section titled "Self-Service Storage Facilities" above.

### § 2.287 Water

Groundwater districts and water rights are subject to the Texas Water Code. A district has the authority to collect assessments, pursuant to Tex. Water Code ch. 51, including the ability to place a lien on real and personal property. Tex. Water Code § 51.309. As a condition of service, a water district may require a service applicant or developer to grant permanent recorded easements for the construction and maintenance of the facilities necessary for service. Tex. Water Code § 49.218. Under certain circumstances, a landowner can petition a water district board to have his property deannexed from a water district. Tex. Water Code §§ 49.3075–.3077. See also the section titled "Utility District Disclosures" above.

### § 2.288 Watercourse Forming County Boundary

Tex. Civ. Prac. & Rem. Code § 15.065 provides concurrent jurisdiction over a watercourse that forms a county boundary.

### § 2.289 Water Service

The sale of potable water to the public is regulated under Tex. Water Code ch. 13. See also the section titled "Sewer Service" above.

### § 2.290 Water Wells

Water-well drillers are regulated under Tex. Occ. Code ch. 1901, and water-well pump installers are regulated under Tex. Occ. Code ch. 1902.

Counties with populations of 1.8 million or more may adopt rules to regulate the placement of private water wells in unincorporated areas of the county. See Tex. Loc. Gov't Code §§ 240.041–.048.

**§ 2.291 Weeds**

It is a public nuisance in the unincorporated area of a county to allow weeds to grow within three hundred feet of another residence or commercial establishment. Tex. Health & Safety Code § 343.011. Municipalities may require property owners to keep property free from weeds. Tex. Health & Safety Code §§ 342.004, 342.008.

**§ 2.292 Wetlands**

Wetlands are regulated under section 404 of the Clean Water Act, codified at 33 U.S.C. § 1344. Under section 1344, dredging and filling activities in wetlands are prohibited unless a permit is obtained from the Army Corps of Engineers or other statutory exceptions apply.

**§ 2.293 Wills and Estates**

A will may be admitted to probate as a muniment of title if the court is satisfied that there are no unpaid debts, excluding debts secured by liens on real estate. Tex. Est. Code § 257.001. Title to real estate can be transferred by a duly probated will. Tex. Est. Code §§ 251.002, 256.001. Subject to the payment of certain debts, the estate devised or bequeathed in a lawful will vests immediately in the devisees or legatees when the testator dies. Tex. Est. Code § 101.001. See also the section titled "Affidavits of Heirship" above.

**§ 2.294 Windstorm Inspection**

Completed structures in coastal counties are required to comply with the state windstorm building specifications and inspection program to qualify for windstorm and hail insurance

through the Texas Windstorm Insurance Association. This program is administered by the State Board of Insurance. After January 1, 2004, notice of a windstorm inspection must be submitted before beginning construction, repairs, or remodeling of a structure. Tex. Ins. Code § 2210.251(c). See also the section titled "Building Codes" above.

**§ 2.295 Wood Shingles**

A restrictive covenant that requires the use of wood shingles on a residential building is void under Texas law. Tex. Prop. Code § 5.025.

**§ 2.296 Zoning**

The authority of municipalities to establish and regulate zoning in their territorial jurisdictions is governed by the provisions of Tex. Loc. Gov't Code ch. 211. Certain counties also have limited authority to impose zoning regulations in unincorporated areas. Tex. Loc. Gov't Code ch. 231.

The authority of municipalities and other political subdivisions to regulate oil and gas operations within the state is expressly preempted in favor of the state's authority to regulate all such operations. Such operations include exploration and production, processing, drilling, hydraulic fracturing, transporting (including by pipelines), disposal, plugging of wells, and remediation activities. Commercially reasonable regulation by municipalities and other political subdivisions of aboveground activities, such as fire safety regulations, emergency response, and traffic control measures that would not prohibit operations by a reasonably prudent operator are permitted. Tex. Nat. Res. Code § 81.0523.

### § 3.12:8 Certificate Must Recite Date of Acknowledgment

All statutory forms for certificates of acknowledgment provide for the certificate to be dated. The date must be the date on which the instrument was acknowledged. The date of the acknowledgment must not be earlier than the date of execution of the instrument; otherwise, the notary would appear to have taken the acknowledgment before the document was actually executed, giving rise to an ineffective acknowledgment. However, an instrument may be dated to become effective on some future date while the acknowledgment is taken and dated with a current date.

### § 3.12:9 Certificate Must Bear Signature of Officer

The officer taking the acknowledgment must sign the certificate. Tex. Civ. Prac. & Rem. Code § 121.004(b)(2).

### § 3.12:10 Certificate Must Bear Official Seal of Officer

The officer taking the acknowledgment of an instrument must affix the officer's official seal of office. Tex. Civ. Prac. & Rem. Code § 121.004(b)(3). An acknowledgment without a seal or containing the wrong seal is generally, but not always, fatally defective. *See McDonald v. Stanfield*, 197 S.W. 892, 893–94 (Tex. Civ. App.—Beaumont 1917, writ ref'd). *But see* Tex. Civ. Prac. & Rem. Code § 121.001(d) (failure to attach seal does not invalidate acknowledgment taken by officer of armed forces); Tex. Civ. Prac. & Rem. Code § 121.004(c); Tex. Prop. Code § 12.001(d) (failure to attach seal invalidates acknowledgment only if taken in jurisdiction that requires seal).

The notary must use a seal of office that clearly shows, when embossed, stamped, or printed on a document, the words "Notary Public, State of

Texas" around a star of five points, the notary's name, and the date the notary's commission expires. For notaries commissioned or reappointed on or after January 1, 2016, the seal of office must also show the notary's identification number assigned by the secretary of state. The seal may be in a circular form not more than two inches in diameter or a rectangular form not more than one inch in width and two and one-half inches in length; must have a serrated or milled-edge border; and must be affixed by a seal press or stamp that embosses or prints a seal that legibly reproduces the required elements of a seal under photographic methods. An indelible ink pad must be used for the stamp. Tex. Gov't Code § 406.013.

Documents notarized before September 1, 1989, are valid if the seal used contained the words "Notary Public, State of Texas" or "Notary Public" and the name of the county but did not have the notary's name and commission expiration date. Continued use of previously authorized forms of seals is not authorized after August 31, 1989.

The notary's seal should not cover or obscure signatures or text.

The ordinary, or long-form, certificate of acknowledgment includes the language above the signature of the officer that the certificate is "given under my hand and seal of office." Tex. Civ. Prac. & Rem. Code § 121.007. However, the presence or absence of these words does not affect the validity of the certificate. The phrase has been eliminated from short-form certificates of acknowledgment. *See* Tex. Civ. Prac. & Rem. Code § 121.008.

### § 3.12:11 Officer Required to Keep Record of Acknowledgments Taken

Unless specifically excused by statute, each officer authorized to take acknowledgments of

instruments must enter in a "well-bound book" and officially sign a short statement of each acknowledgment taken. There are general requirements of the information to be recorded in the book, such as the date of the instrument, the date the acknowledgment or proof was taken, the name and mailing address of the acknowledger, information about how the acknowledger was identified, the name of the grantee of the land, the county in which the land is located, and a brief description of the instrument. *See* Tex. Civ. Prac. & Rem. Code § 121.012; Tex. Gov't Code § 406.014(a). Books suitable for this purpose are available commercially.

No penalty is prescribed for the failure of an officer to maintain a well-bound book or to make entries of acknowledgments taken. The failure to make the entry does not affect the validity of the instrument or prove that the acknowledgment was not taken. *See Martin v. Bane*, 450 S.W.2d 142, 144 (Tex. Civ. App.—Dallas 1969, no writ).

### § 3.13 Alternative Methods of Proving Instruments

Notwithstanding that an instrument may not contain a valid acknowledgment, it may nevertheless be recorded if proved by alternative methods. The alternative methods of proving a document for recordation include proof by jurat, proof by subscribing witness, acknowledgment by handwriting, proof by suit, and proof by an unsworn declaration.

See sections 3.13:1 through 3.13:5 below for more detailed information.

#### § 3.13:1 Proof by Jurat

Jurats are ordinarily used only for affidavits. However, since September 1, 1989, instruments that are only sworn to and not acknowledged or

otherwise proved are eligible for recordation. *See* Tex. Prop. Code § 12.001. Affidavits recorded before September 1, 1989, must have been accompanied by an acknowledgment. Any affidavit recorded without an acknowledgment before that date may not constitute constructive notice.

As with acknowledgments, an officer cannot take a valid affidavit by simply sitting in mute observation of the affiant signing the instrument. The officer taking the affidavit should place the affiant under oath or receive the affiant's declaration that the statements contained in the affidavit are true and correct. Failure to attend to these formalities may render the affidavit ineffective. *See* Tex. Gov't Code § 312.011(1). A sample oath for the officer to administer to the affiant is: "Do you swear or affirm to tell the truth, the whole truth, and nothing but the truth?" The affiant must answer "yes" before signing the sworn document.

Affidavits in this manual contain a statement similar to the following: "Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant." Although the statement is not required by statute, the Supreme Court of Texas has held that an affidavit is insufficient unless the allegations contained in it are direct and unequivocal and perjury can be assigned to them. This requires that the affidavit positively and unqualifiably represent that the facts disclosed in the affidavit are true and within the personal knowledge of the affiant. *Brownlee v. Brownlee*, 665 S.W.2d 111 (Tex. 1984).

The persons before whom oaths, affidavits, and affirmations may be made include—

1. a notary public;
2. a judge, retired judge, or clerk of a municipal court, in a matter pertaining to a duty of the court;



3. a judge, retired judge, senior judge, clerk, or commissioner of a court of record;
4. a justice of the peace or a clerk of a justice court;
5. a member of a board or commission created by a law of this state, in a matter pertaining to a duty of the board or commission;
6. a person employed by the Texas Ethics Commission who has a duty related to a report required by title 15 of the Texas Election Code in a matter pertaining to that duty;
7. a county tax assessor-collector or an employee of the county tax assessor-collector if the oath relates to a document that is required or authorized to be filed in the office of the county tax assessor-collector;
8. the secretary of state or a former secretary of state;
9. an employee of a personal bond office, or an employee of a county, who is employed to obtain information required to be obtained under oath if the oath is required or authorized by article 17.04 or article 26.04(n) or (o) of the Texas Code of Criminal Procedure;
10. the lieutenant governor or a former lieutenant governor;
11. the speaker of the house of representatives or a former speaker of the house of representatives;
12. the governor or a former governor;
13. a legislator or retired legislator;
14. the attorney general or a former attorney general;
15. the secretary or clerk of a municipality in a matter pertaining to the official business of the municipality;
16. a peace officer described by article 2.12 of the Texas Code of Criminal Procedure if the oath is administered when the officer is engaged in the performance of the officer's duties and the administration of the oath relates to the officer's duties; or
17. an associate judge, magistrate, master, referee, or criminal law hearing officer.

Tex. Gov't Code § 602.002.

### § 3.13:2 Proof by Subscribing Witness

In some cases, an instrument cannot be proved by acknowledgment or jurat because a signatory is dead, unavailable, incompetent, or uncooperative. Proof by subscribing witness may be used if there is a credible witness who saw the signatory sign the instrument or in whose presence the signatory acknowledged the signature. The requirements of proof of an instrument by a subscribing witness are set out in Tex. Civ. Prac. & Rem. Code §§ 121.009, 121.010. Proofs of an instrument by a subscribing witness are included in forms 3-32 and 3-33 in this chapter.

### § 3.13:3 Acknowledgment by Handwriting

In certain limited instances in which neither a standard acknowledgment nor an acknowledgment by witness is available, an instrument may be proved by an acknowledgment by handwriting. The execution of an instrument may be established for recording by proof of the handwriting of persons who signed the instrument only if—

1. the grantor of the instrument and all the witnesses are dead;

2. the grantor and all the witnesses are not residents of Texas;
3. the residences of the grantor and the witnesses are unknown to the person seeking to prove the instrument and cannot be ascertained;
4. the witnesses have become legally incompetent to testify; or
5. the grantor of the instrument refuses to acknowledge the execution of the instrument and all the witnesses are dead, not residents of Texas, or legally incompetent or their places of residence are unknown.

Tex. Civ. Prac. & Rem. Code § 121.011.

### § 3.13:4 Proof by Suit

Any person having an interest in an instrument may bring an action in state district court for a judgment proving the instrument. Tex. Prop. Code § 11.005(a). Once a judgment in the action is obtained, a certified copy of it may be attached to the instrument; the instrument may then be recorded as if it contained a proper certificate of acknowledgment. Tex. Prop. Code § 11.005(c). This statute provides an alternative for making an instrument recordable; it does not cure those instruments missing an acknowledgment that require an acknowledgment for their validity. See *McCracken v. Sullivan*, 221 S.W. 336 (Tex. Civ. App.—San Antonio 1920, no writ).

### § 3.13:5 Proof by Unsworn Declaration

Chapter 132 of the Texas Civil Practices and Remedies Code provides that an unsworn declaration made under penalty of perjury may be used in lieu of some declarations, verifications, certifications, oaths, or affidavits required by law to be taken before a notary public. Tex. Civ. Prac. & Rem. Code § 132.001. Under this stat-

ute it may be possible for an instrument to be proved by an unsworn declaration of either the signatories to the instrument, the subscribing witnesses, or persons authorized to give evidence of handwriting. To be effective, unsworn declarations must substantially comply with the statutory forms. Tex. Civ. Prac. & Rem. Code § 132.001(d)–(f). This statute does not apply to a lien required to be filed with a county clerk, an instrument concerning real or personal property required to be filed with a county clerk, or an oath of office or an oath required to be taken before a specified official other than a notary public. Tex. Civ. Prac. & Rem. Code § 132.001(b).

### § 3.14 Filing of Documents

Texas is a race-notice state, and all real property conveyance instruments should be filed in the real property records (also referred to as the official public records, deed records, or deed-of-trust records, depending on the county) of the county in which the property is located as soon as possible after the transaction is complete. Powers of attorney and other authority documents requiring recordation used in connection with a sale or loan secured by real estate should be recorded before the conveyance or loan documents so that the proper authority is in place for the conveyance. Powers of attorney used for real property transactions must be recorded no later than thirty days after the recordation of the instrument signed by the agent. Tex. Est. Code § 751.151.

Some county clerks have filing requirements and fees unique to their county. Contacting the clerk for the specific guidelines before sending documents to be filed of record may prevent the return of unrecorded documents.

Attorneys, licensed lenders, title companies, federal agencies and lenders, and state agencies may file documents electronically with county clerks. Tex. Loc. Gov't Code § 195.003. Rules

for electronic filing have been adopted by the Texas State Library and Archives Commission and are found at 13 Tex. Admin. Code §§ 7.141–.145. *See* Tex. Loc. Gov't Code § 191.009. *See generally* Tex. Loc. Gov't Code ch. 195.

### § 3.15 Filing Fees

Filing fees of county clerks are usually computed per page. *See* Tex. Loc. Gov't Code § 118.011. The per-page filing fee is twice the usual amount if the first page of the document has no identifying heading, the page is not legible, any signature on a page appears without having the name legibly typed or printed beneath it, or a page is oversized. A page must be printed in type no smaller than eight point. However, failure to meet the type-size requirement does not result in a fee increase or invalidate the recordation of the document. *See* Tex. Loc. Gov't Code §§ 118.0525, 191.007.

If a manuscript cover with legible marks (for example, the name of the attorney preparing the document) is affixed to a document delivered for recording, the clerk is authorized to charge the usual recording fee for the page. *See* Tex. Loc. Gov't Code § 118.011(a)(2).

Filing fees for a low- or moderate-income person buying or improving the person's residence with federal or state assistance may be waived on the county clerk's receipt of a commissioners court directive to waive such fees. A county clerk may have a list of approved grant or aid programs issued by that county's commissioners court, which provides the authorization for waiver of these fees. Tex. Loc. Gov't Code § 118.0135.

No additional fee may be charged for electronic filing. Tex. Loc. Gov't Code § 195.006. A county clerk may not impose requirements or fees for filing or recording a legal paper in addition to those prescribed by statute, Tex. Loc. Gov't Code § 191.007(a). Attorneys should con-

sult, in advance, with the county clerk's office or website to determine applicable fee policies for the instrument(s) at issue.

### § 3.16 Confidentiality Notice

Section 11.008 of the Texas Property Code provides that an individual's Social Security number is not required and should not be included in a document presented for recording in the county clerk's office and that the county clerk does not obtain or maintain the Social Security numbers of individuals. *See* Tex. Prop. Code § 11.008(b). An instrument transferring an interest in real property to or from an individual, regardless of whether the document contains an individual's Social Security number or driver's license number, must include a notice that appears on the top of the first page of the instrument in twelve-point bold-faced type or twelve-point uppercase letters and reads substantially as follows:

**Notice of confidentiality rights:  
If you are a natural person, you  
may remove or strike any or all  
of the following information  
from any instrument that trans-  
fers an interest in real property  
before it is filed for record in the  
public records: your Social  
Security number or your  
driver's license number.**

Tex. Prop. Code § 11.008(c).

An "instrument" is "a deed or deed of trust." Tex. Prop. Code § 11.008(a). Even though this statute requires the confidentiality notice only on a deed or deed of trust, it is recommended that the notice be added to any instrument, to be recorded in the public records, transferring an interest in real estate to or from an individual. For example, see the sections titled "Contracts for Deed" and "Mechanic's Liens" in chapter 2 of this manual, section 25.2, and section 10.3.2.

“The validity of an instrument as between the parties to the instrument and the notice provided by the instrument are not affected by the party’s

failure to include the notice required under Subsection (c).” Tex. Prop. Code § 11.008(d).

## Form 3-31

**Military Acknowledgment**

IN THE ARMED FORCES OF THE UNITED STATES OF AMERICA with the [branch of military] at [name of base or post], [include if applicable: [city and state],] [country].

Before me, [name, rank, branch, and serial number of officer in U.S. armed forces], a duly commissioned officer in [the Armed Forces/[specify auxiliary to armed forces]] of the United States of America at [city and country], on this day personally appeared [name of acknowledger], [include if applicable: the spouse of [name, rank, branch, and serial number of military personnel]], [known to me/proved to me on the oath of [name, rank, branch, and serial number of witness], a member of [the Armed Forces/[specify auxiliary to armed forces]] of the United States of America/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

\_\_\_\_\_  
[Name, rank, branch, and serial number of officer]

*[Reserved]*

## Chapter 4

### Sales Contracts and Transaction Guide

§ 4.1	General Considerations .....	4-1
§ 4.2	Real Estate Sales Contract .....	4-1
§ 4.3	Introductory Paragraph: Offer and Acceptance .....	4-1
§ 4.4	Defined Terms .....	4-1
	§ 4.4:1 Seller and Buyer .....	4-1
	§ 4.4:2 Property .....	4-1
	§ 4.4:3 Escrow Agent .....	4-1
	§ 4.4:4 Underwriter .....	4-2
	§ 4.4:5 Consideration .....	4-2
	§ 4.4:6 Earnest Money .....	4-2
	§ 4.4:7 Buyer's and Seller's Additional Liquidated Damages .....	4-2
	§ 4.4:8 County for Performance .....	4-3
§ 4.5	Deadlines .....	4-3
§ 4.6	Closing Documents .....	4-3
	§ 4.6:1 Exhibit B—Representations; Environmental Matters .....	4-3
	§ 4.6:2 Exhibit C—Seller's Records .....	4-3
	§ 4.6:3 Exhibit D—Notices, Statements, and Certificates .....	4-3
	§ 4.6:4 Exhibit E—Seller Financing Addendum .....	4-3
§ 4.7	Investment of Earnest Money .....	4-3
§ 4.8	Title and Survey .....	4-3
	§ 4.8:1 Review of Title Commitment .....	4-4
	§ 4.8:2 Review of Survey .....	4-5
	§ 4.8:3 Review of UCC Search .....	4-6
§ 4.9	Inspection Period .....	4-6
§ 4.10	Representations .....	4-7
§ 4.11	Condition of Property until Closing; Cooperation; No Recording .....	4-8
§ 4.12	Termination .....	4-8
§ 4.13	Closing .....	4-8
§ 4.14	Default and Remedies .....	4-9
§ 4.15	Assignment .....	4-9

CHAPTER CONTENTS

§ 4.16	Closing Functions .....	4-9
§ 4.16:1	Payoff Information and Other Closing Expenses .....	4-9
§ 4.16:2	Prorations and Deposits .....	4-9
§ 4.16:3	Preparation of Closing Documents .....	4-10
§ 4.16:4	Funding .....	4-10
§ 4.16:5	Recording Documents .....	4-11
§ 4.16:6	Closing Instructions .....	4-11
§ 4.17	Additional Considerations .....	4-11
§ 4.17:1	Transactions Involving Foreign Persons .....	4-11
§ 4.17:2	Other Requirements .....	4-11
§ 4.17:3	Closing Checklist .....	4-12
§ 4.17:4	Postclosing Considerations .....	4-12
	Additional Resources .....	4-13

*Forms*

Form 4-1	Real Estate Sales Contract .....	4-1-1 to 4-1-58
Form 4-2	Escrow Agent Receipt and Escrow Agreement .....	4-2-1 to 4-2-4
Form 4-3	Letter of Intent .....	4-3-1 to 4-3-10
Form 4-4	Notice of Cancellation .....	4-4-1 to 4-4-2
Form 4-5	Notice of Obligation to Pay Public Improvement District Assessment to [name of municipality or county levying assessment] Concerning the Property at [street address] .....	4-5-1 to 4-5-2
Form 4-6	Notice Regarding Insulation to Buyer of New Home .....	4-6-1 to 4-6-2
Form 4-7	Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards [Sales] .....	4-7-1 to 4-7-4
Form 4-8	Asbestos Disclosure Notice [Sales] .....	4-8-1 to 4-8-2
Form 4-9	Notice Regarding Sale Subject to a Recorded Lien .....	4-9-1 to 4-9-4
Form 4-10	Storage Tanks Disclosure Provider .....	4-10-1 to 4-10-2
Form 4-11	Notice to Purchaser Regarding Restrictive Covenants .....	4-11-1 to 4-11-2
Form 4-12	Notice to Purchaser Regarding Coastal Area Property .....	4-12-1 to 4-12-2
Form 4-13	Notice to Purchaser of Property Seaward of Gulf Intracoastal Waterway .....	4-13-1 to 4-13-4
Form 4-14	Notice Regarding Possible Liability for Additional Taxes .....	4-14-1 to 4-14-2
Form 4-15	Notice Regarding Possible Annexation .....	4-15-1 to 4-15-2



Form 4-16	Notice for Unimproved Property in a Certificated Service Area of a Utility Service Provider . . . . .	4-16-1 to 4-16-2
Form 4-17	Utility District Notice . . . . .	4-17-1 to 4-17-4
Form 4-18	Notice to Purchaser of Property Located in Certain Annexed Water Districts . . .	4-18-1 to 4-18-2
Form 4-19	Notice to Purchaser That Property Is Located within the Area of the Alignment of a Transportation Project . . . . .	4-19-1 to 4-19-2
Form 4-20	Notice of Water Level Fluctuations . . . . .	4-20-1 to 4-20-2
Form 4-21	Waiver of Consumer Rights . . . . .	4-21-1 to 4-21-2
Form 4-22	Seller's Disclosure of Property Condition . . . . .	4-22-1 to 4-22-6
Form 4-23	Access and Due Diligence Agreement . . . . .	4-23-1 to 4-23-8
Form 4-24	Option to Purchase [For Use with Real Estate Sales Contract] . . . . .	4-24-1 to 4-24-2
Form 4-25	Memorandum of Option . . . . .	4-25-1 to 4-25-2
Form 4-26	Right of First Refusal Agreement . . . . .	4-26-1 to 4-26-4
Form 4-27	Right of First Offer Agreement . . . . .	4-27-1 to 4-27-4

*[Reserved]*

## Chapter 4

### Sales Contracts and Transaction Guide

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#### § 4.1 General Considerations

The real estate sales contract, form 4-1 in this chapter, is drafted as a neutral form of contract, intending to favor neither the buyer nor the seller. The basic elements of the transaction are stated in the sections to be completed at the beginning of the form. The general terms that follow may be used without change for many transactions. Terms that generally vary are located in the exhibits. Contracts for the purchase and sale of real estate are as diverse as their subject matter, and additional drafting will likely be necessary to tailor the form to the transaction.

#### § 4.2 Real Estate Sales Contract

The following sections describe the provisions of the real estate sales contract and include considerations for the attorney in drafting or reviewing a contract, assisting the client during investigation of the property, and closing the transaction. This commentary is organized in the same order as the sections of the contract.

#### § 4.3 Introductory Paragraph: Offer and Acceptance

The introductory paragraph of the contract states what the parties must do to form the contract of purchase and sale. If the buyer's earnest money cannot be collected, the buyer will be in default.

#### § 4.4 Defined Terms

##### § 4.4:1 Seller and Buyer

There are sections for the names and other information concerning the seller, the buyer, and their respective attorneys and brokers. Proper identification of the parties is important, and the seller and the buyer should be identified as fully as possible. Capacity and authority should be considered, especially if a party is not an individual acting on his or her own behalf. See chapter 3 in this manual for a discussion of party designations.

##### § 4.4:2 Property

The real and personal property are described in exhibit A. The contract should describe the real and personal property with legal specificity. If the property is not described sufficiently, the contract may be unenforceable because of vagueness. See chapter 3 in this manual for a discussion of property descriptions. Attention should also be given to the conveyance of appurtenant rights, such as permits, licenses, access easements, access to utilities, and similar rights.

##### § 4.4:3 Escrow Agent

The contract designates an escrow and closing agent. The escrow agent will be responsible for closing the transaction and receiving and disbursing funds under the terms of the contract. Form 4-2 in this chapter is the escrow agent receipt and escrow agreement, which defines the rights and duties of the escrow agent and is to be

signed by the buyer, the seller, and the escrow agent's representative.

The escrow agent's representative should sign the receipt on the last page of the contract and acknowledge the deposit of the earnest money with the escrow agent.

#### § 4.4:4 Underwriter

The contract designates an underwriter. In the event a title policy will be issued in the transaction, the drafting attorney should verify that the escrow agent named in the contract is an agent for the underwriter selected. Because not all escrow agents can issue policies for all underwriters, verification is needed.

#### § 4.4:5 Consideration

The contract provides for a purchase price that is a stated sum, but the price may be determined by a formula based on the gross or net area of the land or by other methods devised by the parties. The net area is typically computed by deducting from the gross area any portion of the land within roadways, floodplains, or other areas where rights are restricted, as shown on the survey. If this method is used, the purchase price cannot be calculated until after the survey is delivered, so applying a minimum and maximum price to the formula should be considered.

The contract provides for several payment options: the total consideration may be paid in cash at closing, or all or a portion of the purchase price may be financed.

At closing in the typical seller-financed transaction, the buyer delivers the cash portion of the purchase price, signs and delivers a promissory note payable to the seller, and also usually signs and delivers a deed of trust encumbering the property as security for the debt.

If the transaction is to be contingent on the buyer's obtaining third-party financing, the buyer has two options. The buyer can apply for the financing early enough to know before the end of the inspection period if the loan application has been accepted. Alternatively, the buyer can negotiate a right to terminate the contract after the end of the inspection period if the buyer is unable to obtain third-party financing. The parties may negotiate time limits within which the buyer must separately apply for and obtain third-party financing. The parties may also agree to limit or share the expenses of obtaining the financing.

See chapters 6 and 8 in this manual for further discussion of financing.

If the contract terminates before closing, and the buyer is otherwise entitled to have the earnest money returned, the contract provides that a stated amount (\$100) not be returned to the buyer but be paid to the seller, because that amount is the independent consideration to the seller for the buyer's right to terminate the contract.

#### § 4.4:6 Earnest Money

The amount of earnest money is negotiable and depends on several factors, including the purchase price, the type of financing, and the relative financial strengths of the parties.

#### § 4.4:7 Buyer's and Seller's Additional Liquidated Damages

These sections are provided so that the parties can agree on additional liquidated damages to be paid by the defaulting party to the nondefaulting party on default.

**§ 4.4:8 County for Performance**

This section permits the parties to designate the county in which litigation arising from the contract must be filed except as otherwise provided by applicable law.

**§ 4.5 Deadlines**

Section A of the contract groups most of the deadlines for ease of reference and provides two alternate ways to determine most of the deadlines: either a stated date or a specified number of days after the effective date of the contract or another milestone. The contract provides that time is of the essence. The contract provides that closing will occur at a certain time on a certain date, but closing may also be scheduled to occur a certain number of days following a stated event—for example, forty-five days after approval by the buyer's lender. The closing date may also be specified as "on or before" a certain date or event.

**§ 4.6 Closing Documents**

Section B of the contract lists the documents to be signed and delivered to close the transaction and serves as a checklist to prepare for closing.

**§ 4.6:1 Exhibit B—Representations; Environmental Matters**

Exhibit B contains the parties' representations. These items are always negotiated by the parties and will vary from transaction to transaction. See section 4.10 below for further discussion of representations.

**§ 4.6:2 Exhibit C—Seller's Records**

Exhibit C is a list of the seller's records of the property that will be delivered or made available to the buyer for review during the inspection period and also delivered to the buyer at closing.

**§ 4.6:3 Exhibit D—Notices, Statements, and Certificates**

Exhibit D lists notices, statements, and certificates required by federal and state laws and regulations to be delivered when common real estate contracts are executed. The items applicable to a specific transaction should be selected. See chapter 2 in this manual for a brief discussion of each law and regulation and for references to other laws and regulations that require notices, statements, and certificates for less common transactions.

**§ 4.6:4 Exhibit E—Seller Financing Addendum**

This addendum is for use only in situations in which the seller is providing the financing. If obtaining third-party financing is a condition to the buyer's obligations, that fact and the terms of the complying financing may need to be addressed in the contract.

**§ 4.7 Investment of Earnest Money**

The contract provides that the buyer may direct the escrow agent to invest the earnest money in an interest-bearing account in a federally insured financial institution. If the earnest money is to be invested, the escrow agent will require the buyer's tax identification or Social Security number so that accrued interest may be reported to the Internal Revenue Service. Form 4-2 (escrow agent receipt and escrow agreement) in this chapter provides that the buyer pays the fees charged by the financial institution.

**§ 4.8 Title and Survey**

The contract incorporates the statutory notice that the Texas Real Estate License Act requires real estate brokers and real estate salespersons to give to a buyer, advising that the buyer should either have title examined by an attorney or

obtain a title insurance policy. Tex. Occ. Code § 1101.652(b)(29). If a broker or salesperson is not involved, the paragraph may be deleted.

The contract requires that the seller provide to the buyer by the deadlines stated in the contract the title commitment, the survey, the UCC search, and legible copies of each document referred to in these instruments.

The contract provides a typical procedure under which the buyer reviews the title commitment, the survey, and the UCC search and notifies the seller of any objections. After notice, the seller may elect to cure the buyer's objections but is not required to do so. If the seller does not agree to cure, the buyer may either proceed to close the transaction and accept the property subject to the uncured matters or terminate the contract. The seller is obligated to cure title matters that arise by, through, or under the seller after the contract is signed.

#### § 4.8:1 Review of Title Commitment

The contract provides that the condition of title will be established by the title commitment and that the seller will pay for an owner title policy for the buyer at closing.

An essential reference on title insurance is the *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*, available from the Texas Department of Insurance at <https://www.tdi.texas.gov/title/titleman.html>. The manual contains Texas rate and procedural rules; the text of title 11 of the Texas Insurance Code, relating to title insurance; and various bulletins of the Texas State Board of Insurance dealing with title insurance practices.

The attorney should review the signature and effective date of the commitment.

**Schedule A:** The attorney should confirm that the proposed insured parties are correctly

named, the amounts of insurance are correctly stated, and the correct estate is insured—for example, fee simple, easement, or leasehold. Record title should be vested in the seller. The attorney should confirm that the property description is correct and conforms to the description in the survey (if applicable).

**Schedule B:** The attorney should review the following matters:

- Item 1, relating to covenants and restrictions, should be noted as either “Covenants, conditions, and restrictions (other than any restrictions indicating preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin) as set forth in [recording data] of the real property records of [county] County, Texas” or “Item 1 of schedule B is hereby deleted in its entirety.”
- Item 2, relating to the standard survey exception, may be amended and partially deleted to read “any shortages in area” if a current survey approved by the title company is obtained. An additional 5 percent premium is charged to amend the owner policy for a residential transaction; an additional 15 percent premium is charged to amend the owner policy for a commercial transaction. No additional premium is required to amend the loan policy. The responsibility for paying the extra premium for the survey modification in the owner policy of title insurance is often negotiated between the parties, although the pertinent provision in the contract form provides for the extra premium to be paid by the buyer.
- Item 3, relating to homestead or community property or survivorship rights, and paragraph 4, relating to tidelines, lands comprising the shores and beds of waterways, lands beyond the line of the harbor or bulkhead lines, filled-in lands, artificial islands, statutory water rights, and areas extending from

the line of mean low tide to the line of vegetation, apply only to the owner policy and cannot be deleted or amended.

- Paragraph 5, relating to property taxes, should be reviewed for the status of tax payments and the existence of rollback taxes. In the title policy, the exception for taxes should be restricted to taxes for the year in which the closing occurs (unless paid at or before closing), taxes for subsequent years, and rollback taxes for prior years.
- Paragraph 6, relating to the terms and conditions of the documents creating the insured's interest in the land, cannot be revised but will not appear on the title policy. The referenced documents should, however, be reviewed.
- Paragraph 7, relating to materialman's and mechanic's liens, applies only to mortgagee policies on interim construction loans and may be deleted if satisfactory evidence is furnished to the title company.
- Paragraph 8, relating to subordinate liens and leases, applies only to the mortgagee policy.
- Paragraph 9, relating to existing liens, should show only liens permitted by the contract. Copies of all lien documents should be reviewed with regard to due-on-sale provisions; dragnet clauses relating to other debt; condemnation provisions; notice, cure, and default provisions; and subordinate financing. A superior lienholder's estoppel agreement should be obtained from any lienholder whose note and lien are being either assumed or taken "subject to." All other special exceptions, such as easements, mineral interests, leases, or matters shown on a current survey, should be listed specifically and carefully reviewed to determine if they affect the buyer's intended use of the property.

**Schedule C:** The attorney should ensure that the seller has complied with the contract by curing and effectively removing all matters appearing on schedule C at or before closing. Schedule C matters may require obtaining releases of liens, settling specific claims or lawsuits affecting title to the property, furnishing evidence of good standing and authority (corporate resolution or partnership agreement), and obtaining proof of property settlement and divorce, proof of heirship or probate of a particular estate, or evidence relating to a bankruptcy. From the buyer's perspective, curative matters appearing on schedule C should be attended to by either the seller or the title company. The buyer should object to all schedule C items in the commitment to ensure that they are not added to schedule B of the title policy.

Note: Endorsements providing additional coverage may be available on request, subject to payment of the applicable additional premium. The *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas* should be consulted for the eligibility, cost, and use of these endorsements and policy.

#### § 4.8:2 Review of Survey

The contract requires that the seller provide a current survey of the property. Different types of surveys and survey certifications are available, depending on the nature of the property and the requirements of the parties. An excellent resource on surveys is the *Manual of Practice for Land Surveying in the State of Texas* ("Texas Standards"), published by the Texas Society of Professional Surveyors. It describes the various categories and conditions for surveys in Texas, the level of accuracy required for each category of survey, matters to be depicted on the survey, and the nature of certificates. In some cases the lender or buyer may require the surveyor to comply with the most recent Minimum Standard Detail Requirements and Accuracy Standards for ALTA/ACSM Land Title Surveys ("ALTA"),

as adopted by the American Land Title Association and the National Society of Professional Surveyors. See [www.alta.org/publications/#policy](http://www.alta.org/publications/#policy).

The attorney should keep the following points in mind when reviewing the survey:

- The survey should bear a recent date and should conform to, as applicable, ALTA or the required category and condition under the Texas Standards for the type of survey specified in the contract and location of the property.
- The certificate should be sealed and signed and should conform to any certificate specified in the contract.
- There should be a north compass bearing on the survey.
- The attorney should observe the system of reference used for the survey, locate the beginning point, and determine that it is monumented and locatable.
- The survey, particularly all course and distance notations, should be compared to the legal description either appearing on or attached to the survey. This description then should be compared to the one appearing in the contract and the title commitment or title opinion.
- All recorded easements appearing in the title commitment should be located and noted on the survey with the appropriate recording data. Conversely, the attorney should examine the survey for any matters (such as easements) not appearing in the title commitment.
- The survey should be examined for the location of improvements: Do improvements protrude onto adjoining property or easement areas; are there encroachments of improvements from adjoining property onto the property; are there building setback line violations?

- Any written notations on the survey, such as those relating to rights of parties in possession, should be reviewed to determine their effect on the property and its anticipated use.
- The property should have legal and adequate access to public streets or roads.
- The survey should show the existence and location of utilities.
- The surveyor's certificate should indicate the location of the floodplain, if applicable.

### § 4.8:3 Review of UCC Search

The contract includes provisions for personal property and requires that the seller furnish UCC searches of appropriate records. The scope of the search would depend on the nature of the collateral. See sections 9.2 through 9.6 in this manual.

### § 4.9 Inspection Period

The inspection period is intended to give the buyer the opportunity to investigate the property and decide whether to close the transaction. The contract provides that the buyer may terminate the contract at any time before the end of the inspection period for any reason and have the earnest money returned, except for the \$100 independent consideration described above.

The contract provides for reasonable rules of entry and that the buyer will indemnify the seller for claims resulting from the buyer's inspection of the property. Except for the environmental indemnity stated in exhibit B in the contract, the indemnity provisions of the contract are not intended to shift risk from the indemnified party to the indemnitor for the indemnified party's own negligence. One consequence of this allocation of risk is that the indemnified party may not be able to recover the costs of defense from the indemnitor if the indemnified party is sued for the consequences of its alleged negligence.



See *Fisk Electric Co. v. Constructors & Associates*, 888 S.W.2d 813 (Tex. 1994). The environmental indemnity shifts risk for the seller's own negligence from the seller to the buyer. It is unlikely, however, that the environmental indemnity will be effective to shift risk in the event of misrepresentation or fraud.

The contract provides that the earnest money will be deposited in one lump sum. The parties alternatively may agree that the buyer is obligated to deposit additional earnest money after agreed conditions have been satisfied—for example, if the buyer decides not to terminate the contract at the end of the inspection period and to proceed to closing.

#### § 4.10 Representations

Representations are negotiated by the parties with specific reference to the transaction. Representations may include such matters as ownership of the property; organization of the parties; authority to execute the contract and close the transaction; condition of title; parties in possession; pending litigation and claims that may ripen into litigation; pending or threatened condemnation or other taking; use restrictions, such as zoning and restrictive covenants; condition of the property or disclaimer of representations—for example, “as is”; presence of landfills or hazardous and toxic wastes; floodplain location; utility availability and capacity; compliance with all laws; effectiveness of required licenses and permits; status of leases; operation and maintenance of property before closing; accuracy of books and records; agricultural or other special-use tax assessment; payment of ad valorem taxes; and status of debt to be assumed or taken “subject to.”

In negotiating representations, the parties often consider issues such as whether the representations will be absolute or based on the seller's knowledge and belief; whether the representations will be based on the knowledge of the

entity that is the seller or on the knowledge of specified individuals; whether the seller must perform further investigation to make the representations or may rely on its current knowledge, without further investigation; and whether and to what extent the representations will survive closing.

The approach used in this contract limits the seller's representations, but it is not intended to insulate the seller from liability for fraud or misrepresentation.

- The seller represents only facts, not opinions. For example, the seller does not represent whether, in the seller's opinion, the property is in compliance with applicable laws and regulations. Instead, the seller represents that it has not received notice of violation of any law, ordinance, regulation, or requirement affecting the property or use of the property, except as stated in the contract.
- The seller makes no representation that is not stated in the contract, including exhibit D (notices, statements, and certificates required by law and regulation).

The following optional clauses are also provided:

- The buyer agrees to accept the property in its “as is, where is” condition, investigate the property on the buyer's own behalf, and not rely on information or representations attributable to the seller, except to the extent stated in the contract.
- The buyer waives its rights under the Texas Deceptive Trade Practices–Consumer Protection Act.
- The buyer assumes responsibility after closing for all environmental matters relating to the property.

If the parties negotiate different representations, exhibit B must be revised accordingly.

The contract provides that the parties' representations are true and accurate when made and must be true and accurate at closing, or the buyer may terminate the contract.

It is common practice to include representations regarding the organization and authority of the parties in contracts but to defer the obligation to deliver documentary evidence confirming those representations until the closing of the transaction. That evidence customarily consists of certificates of existence and good standing from public officials, certified copies of organizational documents, certified corporate resolutions or partnership consents, and certificates of incumbency. The attorney may consider requiring such documentary evidence at the execution of the contract to avoid encountering a claim after substantial obligations have been paid or incurred that the other party is not authorized to consummate the transaction. While the seller's organizational documents should be available at the time of execution of the contract, the buyer's organizational documents are often not prepared until before closing.

#### **§ 4.11 Condition of Property until Closing; Cooperation; No Recording**

The contract provides for the parties' obligations after signing the contract concerning maintenance and operation of the property, casualty damage, condemnation, claims, governmental proceedings, permits, licenses, and inspections. The contract also sets out the parties' agreement not to record the contract.

#### **§ 4.12 Termination**

The contract provides for disposition of the earnest money after termination and for post-termination obligations in certain events.

#### **§ 4.13 Closing**

The contract provides that, unless the parties agree otherwise before closing, certain closing documents will be on the forms contained in the current edition of the *Texas Real Estate Forms Manual* (State Bar of Texas). This approach defers the time and expense of negotiating the closing documents until after the contract is signed, while providing certainty if the parties do not otherwise negotiate closing documents. Alternately, the closing documents can be negotiated before the contract is signed and, if so, should be attached as exhibits to the contract.

The contract allocates closing obligations and transaction costs between the parties and provides for proration of ad valorem taxes, income, and expenses and for postclosing adjustments.

The contract provides that the buyer acquires possession of the property at closing. The parties may agree, however, on earlier or later possession by the buyer. If the buyer takes possession before closing or the seller remains in possession after closing, a lease may be appropriate. See chapter 25 in this manual.

Real estate brokers and real estate salespersons must have a written commission agreement to enforce payment of a real estate commission. The commission may be payable on contract execution, when the contract closes, or as otherwise agreed by the parties. The contract provides that the commission agreement is a separate document between the broker and the party responsible for paying the commission. For applicable forms, see forms 26-29 through 26-31 in this manual. Alternately, the contract may include the commission agreement or restate its key terms. The parties indemnify each other against claims by brokers and finders arising by, through, or under the indemnifying party. The contract may state that there are no brokers, but there is no requirement to do so.

If either buyer or seller is licensed as a real estate salesperson or real estate broker and is acting as a broker in the transaction, a disclosure to that effect is required under the Real Estate License Act. Tex. Occ. Code § 1101.652(b)(16).

#### § 4.14 Default and Remedies

The contract provides that each party may elect one of the following remedies for the other's default: termination (with disposition of the earnest money and payment of additional liquidated damages to the nondefaulting party) or specific performance. In addition, the buyer may terminate if the seller's representations are not true and correct for a reason not the seller's fault. The parties may alternately agree to payment of actual damages and perhaps consequential damages. The contract is drafted to limit the parties' remedies, but remedies are often negotiated.

The contract provides that the party prevailing in litigation is entitled to recover attorney's fees and court and other costs.

#### § 4.15 Assignment

The contract contains alternate clauses concerning assignment. The buyer either may not assign the contract or may assign the contract only to an entity controlled by the buyer.

If the contract provides that the buyer has the right to assign, the assignment provision should state whether the buyer is relieved from obligations under the contract after assignment.

#### § 4.16 Closing Functions

The party handling the closing (in this instance, the escrow agent) commonly attends to the following matters.

##### § 4.16:1 Payoff Information and Other Closing Expenses

Written request should be made to each lienholder for the lienholder's written payoff statement. The lienholder should be requested through an authorized representative to state the remaining principal balance due on the note, the accrued interest as of a certain date, a per diem amount of interest, and whether the lienholder will credit the amount held in the escrow account, if one exists, to the total due or, alternatively, refund the amount directly to the borrower. Closing must occur and payment be made to the lienholder before the release of lien will be signed.

Additionally, information concerning other matters requiring payment at closing should be obtained, such as payoff amounts for mechanic's lien claims, federal or state tax liens, property taxes, paving assessments, and abstracted judgments that affect the property.

The closing agent must also determine the amounts of closing costs, such as surveying expenses, attorney's fees, brokers' commissions, and loan fees.

##### § 4.16:2 Prorations and Deposits

Unless otherwise provided in the contract, the buyer acquires both the monetary benefits and burdens of the property. Prorations are generally based on the settlement or closing date.

**Tax Prorations:** Tax prorations may be based on the most current property tax information available to the closing agent. The tax proration serves as a bookkeeping adjustment on the closing statement between the seller and the buyer relating to taxes. If taxes have not been paid for the current year, this adjustment involves the seller's being charged on the closing statement with property taxes for the period the seller owned the property. The buyer is then responsi-

ble for actual payment of taxes. The buyer receives a corresponding credit of the seller's prorated amount. The contract requires that the seller and the buyer reproporate taxes when actual tax statements become available after closing.

**Insurance Prorations:** If the seller assigns its fire and extended coverage to the buyer, the buyer should be charged the unearned portion of the prepaid premium. The seller should receive a corresponding credit.

**Rent Prorations:** If the property is income-producing, rents already received by the seller for the current rental period should be prorated. The seller should be charged the amount for the prorated period, and the buyer should receive a corresponding credit.

**Interest Prorations:** If the sale is being financed through an assumption or "subject to" transaction, interest becoming due at the next regular payment period should be prorated between the seller and the buyer, usually as of the closing date.

**Security Deposits:** Tenant security deposits that the seller is holding should be charged to the seller and credited to the buyer, because the buyer ultimately should be responsible for the refund of the deposits. The seller will remain liable to the tenants for security deposits received while the seller was the owner of the property, until the buyer delivers to the tenants a signed statement acknowledging that the buyer of the property has received and is responsible for the tenants' security deposits and setting forth the amount of each deposit. *See* Tex. Prop. Code §§ 92.105(b), 93.007. Additional drafting is required to obligate the buyer to deliver the signed statements.

### § 4.16:3 Preparation of Closing Documents

The closing agent may be expected to prepare several documents.

**Closing Statements:** Closing statements may be on either the federally prescribed HUD-1 settlement statement, the State Board of Insurance settlement statement, or a separate seller's, buyer's, or borrower's statement, depending on the nature of the transaction. The purpose of a closing statement is to assemble in one document all the pertinent financial features of the contract, including purchase price, loan amounts, costs and expenses of closing the transaction, and prorations. Execution of the statement evidences the parties' agreement with the numbers and computations appearing on the statement.

**Affidavits:** Affidavits concerning debts and liens, parties in possession, identity of the parties, leases, and marital status will likely be required at closing by the escrow agent.

Financing documents are typically prepared by the lender's attorney. Conveyancing and other closing documents may be prepared by the parties to the transaction, by their attorneys, or by an attorney for the closing agent.

### § 4.16:4 Funding

The closing agent typically disburses funds in connection with closing. Disbursements are made according to the closing statement, usually from funds paid by the buyer and its lenders.

Except in the case of certain nontaxable sales of principal residences, the person responsible for closing a real estate transaction is required to file an information return with the Internal Revenue Service relating to the transaction and is subject to penalties for failing to report. *See* 26 U.S.C. § 6045. This reporting requirement is often satisfied by the responsible person by

delivering the seller's closing statement, together with an attachment of additional required information, to the IRS.

If funds will be disbursed at closing, payments must be made to the closing agent with "good funds" as defined by the regulations of the Texas State Board of Insurance. See Procedural Rule P-27, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*.

If it is not necessary to disburse funds at closing, the parties need not comply with the "good funds" rule, and payment may be made in other ways.

The attorney for each buyer and lender should consider obtaining an insured closing service letter from the title insurance underwriter whose policies are to be issued. This letter indemnifies the lender for any fraudulent acts of the closing title insurance company or agency relating to the handling of closing funds. See forms T-50 and T-51, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*. See <https://www.tdi.texas.gov/title/titlmm5.html>.

#### § 4.16:5 Recording Documents

The closing agent is responsible for recording documents intended to be recorded. This responsibility extends to the recording of releases or transfers of liens for notes paid at closing. Each document should be checked before recording to ensure that exhibits referred to in the document are attached and the name and address of the person to whom the document is to be returned after recording is included.

#### § 4.16:6 Closing Instructions

Attorneys for the buyer, the seller, and the lender may each prepare closing instructions for the

closing agent. For applicable forms, see forms 26-15 through 26-18 in this manual. These instructions relate to the conditions precedent to closing, including the status of the title after closing, the title insurance policies to be issued, disposition of funds, and distribution of documents received by the closing agent.

### § 4.17 Additional Considerations

#### § 4.17:1 Transactions Involving Foreign Persons

**Buyer:** If the buyer is a foreign person, certain disclosures and reports may be required under the Foreign Investment in Real Property Tax Act of 1980. See 26 U.S.C. § 6039C.

**Seller:** With certain exceptions, if the seller of real property located in the United States is a foreign person, the buyer must withhold 15 percent of the price and remit the funds to the Internal Revenue Service within twenty days of the date of transfer. See 26 U.S.C. § 1445(a), (b). The buyer should assume that the seller is a foreign person until the contrary is established, because buyers act at their own peril until they obtain a nonforeign affidavit. See 26 U.S.C. § 1445(b)(2). Forms 26-19 and 26-20 in this manual are suggested for use in all transactions.

#### § 4.17:2 Other Requirements

Before closing, the buyer should arrange for Causes of Loss—Special Form property insurance coverage, liability, flood, and similar types of insurance for any required mortgagee endorsements. The buyer and seller should arrange for payment out of the closing proceeds of any accrued taxes even if the taxes will not be delinquent until after closing. The buyer should notify the tax appraisal district of any change in ownership.

**§ 4.17:3 Closing Checklist**

The attorney should prepare a closing checklist, itemizing the documents that will be required to close the transaction, including curative documents. The checklist should also refer to all other preclosing considerations relating to the transaction.

**§ 4.17:4 Postclosing Considerations**

After closing, recorded documents and relevant title insurance policies issued after closing should be reviewed for accuracy and compli-

ance with the title commitment. The owner policy should be dated on or after the recording date of the deed conveying title to the buyer, and the mortgagee policy should be dated on or after the recording date of the deed of trust of the insured lien.

An original or escrow agent's certified copy of each executed document relating to the closing should be provided to the seller and the buyer or the borrower by their attorneys. Generally, the party benefiting from a document receives the original, and the other parties receive copies.

\_\_\_\_\_  
\_\_\_\_\_  
\* A single blockable main drain may cause a suction entrapment hazard for an individual.

5. Are you (Seller) aware of any item, equipment, or system in or on the Property that is in need of repair? \_\_\_ Yes (if you are aware) \_\_\_ No (if you are not aware). If yes, explain. (Attach additional sheets if necessary): \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

6. Are you (Seller) aware of any of the following?

Write Yes (Y) if you are aware; write No (N) if you are not aware.

\_\_\_ Room additions, structural modifications, or other alterations or repairs made without necessary permits or not in compliance with building codes in effect at that time.

\_\_\_ Homeowners' Association or maintenance fees or assessments.

\_\_\_ Any "common area" (facilities such as pools, tennis courts, walkways, or other areas) co-owned in undivided interest with others.

\_\_\_ Any notices of violations of deed restrictions or governmental ordinances affecting the condition or use of the Property.

\_\_\_ Any lawsuits directly or indirectly affecting the Property.

\_\_\_ Any condition on the Property which materially affects the physical health or safety of an individual.

\_\_\_ Any rainwater harvesting system located on the property that is larger than 500 gallons and that uses a public water supply as an auxiliary water source.

\_\_\_ Any portion of the Property that is located in a groundwater conservation district or a subsidence district.

If the answer to any of the above is yes, explain. (Attach additional sheets if necessary):

\_\_\_\_\_  
\_\_\_\_\_

- 7. If the property is located in a coastal area that is seaward of the Gulf Intracoastal Waterway or within 1,000 feet of the mean high tide bordering the Gulf of Mexico, the property may be subject to the Open Beaches Act or the Dune Protection Act (chapter 61 or 63, Natural Resources Code, respectively) and a beachfront construction certificate or dune protection permit may be required for repairs or improvements. Contact the local government with ordinance authority over construction adjacent to public beaches for more information.
  
- 8. This property may be located near a military installation and may be affected by high noise or air installation compatible use zones or other operations. Information relating to high noise and compatible use zones is available in the most recent Air Installation Compatible Use Zone Study or Joint Land Use Study prepared for a military installation and may be accessed on the website of the military installation and of the county and any municipality in which the military installation is located.

\_\_\_\_\_  
Signature of Seller

\_\_\_\_\_  
Date

The undersigned purchaser hereby acknowledges receipt of the foregoing notice.

\_\_\_\_\_  
Signature of Buyer

\_\_\_\_\_  
Date



## Chapter 5

### Deeds, Bills of Sale, and Other Transfers

§ 5.1	General Considerations for Deeds .....	5-1
	§ 5.1:1 Statutory Requirements .....	5-1
	§ 5.1:2 Characterization of Marital Property .....	5-2
§ 5.2	General Warranty Deed .....	5-3
	§ 5.2:1 General Information .....	5-3
	§ 5.2:2 Consideration—Cash Sale .....	5-3
	§ 5.2:3 Consideration—Assumption of Note .....	5-3
	§ 5.2:4 Consideration—Subject to Note That Grantee Does Not Assume .....	5-3
	§ 5.2:5 Consideration—Separate Property of Grantee .....	5-3
	§ 5.2:6 Reservations from Conveyance .....	5-4
	§ 5.2:7 Exceptions to Conveyance and Warranty .....	5-4
§ 5.3	General Warranty Deed with Vendor’s Lien .....	5-4
	§ 5.3:1 General Considerations .....	5-4
	§ 5.3:2 Execution of Note to Grantor or Third Party .....	5-5
	§ 5.3:3 Execution of First-Lien Note and Second-Lien Note .....	5-5
	§ 5.3:4 Assumption of First-Lien Note and Execution of Second-Lien Note .....	5-6
	§ 5.3:5 Consideration and Miscellaneous Clauses .....	5-6
§ 5.4	Special Warranty Deed .....	5-7
§ 5.5	Deed without Warranty .....	5-7
§ 5.6	Quitclaim .....	5-7
§ 5.7	Bill of Sale .....	5-7
	§ 5.7:1 Purpose and Effect .....	5-7
	§ 5.7:2 Instructions for Completing Forms .....	5-8
	§ 5.7:3 Warranties .....	5-8
§ 5.8	Correction Deed .....	5-8
§ 5.9	Gift Deed .....	5-10
§ 5.10	Partition Deed .....	5-10
§ 5.11	Transfer on Death Deed .....	5-11
	§ 5.11:1 Purpose and Effect .....	5-11
	§ 5.11:2 Requirements Generally; Exceptions .....	5-12

§ 5.11:3	Transferor Considerations .....	5-12
§ 5.11:4	Proper Recordation .....	5-12
§ 5.11:5	Caution—Existing Rights of Survivorship .....	5-12
§ 5.11:6	Revocation Generally .....	5-13
§ 5.11:7	Revocation—Subsequent Transfer on Death Deed .....	5-13
§ 5.11:8	Revocation—Subsequent Instrument of Revocation .....	5-13
§ 5.11:9	Revocation—Divorce .....	5-13
§ 5.11:10	Revocation—Subsequent Conveyance; Protection of Purchasers .....	5-13
§ 5.11:11	Instructions for Completing Form .....	5-13
§ 5.12	Additional Clauses .....	5-14
§ 5.12:1	Waiver of Implied Liens .....	5-14
§ 5.12:2	Bill of Sale Combined .....	5-14
§ 5.12:3	“As Is” Conveyance .....	5-15
§ 5.12:4	Fee Simple Determinable .....	5-15
§ 5.12:5	Strips and Gores .....	5-15
§ 5.12:6	Wraparound Lien .....	5-16
§ 5.12:7	Transfer of Escrow and Insurance Policy .....	5-16
§ 5.12:8	Assumption of Liability Agreements for VA-Guaranteed Loans .....	5-16
§ 5.12:9	Restrictive Covenants .....	5-17
§ 5.13	Additional Documents .....	5-17
§ 5.13:1	Acceptance of Deed .....	5-17
§ 5.13:2	Deed in Lieu of Foreclosure .....	5-17
§ 5.13:3	Trustee’s Deed in Nonjudicial Foreclosure .....	5-18
§ 5.13:4	Administration or Guardianship Deed .....	5-18
§ 5.13:5	Owely of Partition Deed and Agreement .....	5-18
§ 5.13:6	Survivorship Agreement for Community and Noncommunity Property .....	5-18
§ 5.13:7	Community Interest Special Warranty Deed .....	5-19
§ 5.13:8	Assignment and Assumption of Leases .....	5-20
§ 5.14	General Considerations for Minerals .....	5-20
§ 5.14:1	Generally .....	5-20
§ 5.14:2	Royalty .....	5-21
§ 5.14:3	Surface Use .....	5-21
§ 5.14:4	Existing Mineral Lease .....	5-21

§ 5.14:5	Life Tenant's Right to Consume Royalty .....	5-22
§ 5.14:6	Special Problem Areas .....	5-22
§ 5.15	General Considerations for Other Forms of Real Property .....	5-22
§ 5.15:1	Timber .....	5-22
§ 5.15:2	Easements .....	5-22
§ 5.15:3	Condominiums .....	5-22
§ 5.15:4	Townhouse and Planned Unit Development Properties .....	5-23
§ 5.15:5	Timeshare .....	5-23
§ 5.15:6	Manufactured Housing .....	5-23
	Additional Resources .....	5-25

*Forms*

Form 5-1	General Warranty Deed .....	5-1-1 to 5-1-2
Form 5-2	Warranty Deed with Vendor's Lien .....	5-2-1 to 5-2-2
Form 5-3	Special Warranty Deed .....	5-3-1 to 5-3-2
Form 5-4	Deed without Warranty .....	5-4-1 to 5-4-2
Form 5-5	Quitclaim .....	5-5-1 to 5-5-2
Form 5-6	Consideration Clauses .....	5-6-1 to 5-6-6
Clause 5-6-1	Assumption of First-Lien Note and Execution of Second-Lien Note to Grantor or Third Party .....	5-6-1
Clause 5-6-2	Assumption of Note Secured by Vendor's Lien and Deed of Trust .....	5-6-2
Clause 5-6-3	Capital Contribution .....	5-6-3
Clause 5-6-4	Cash .....	5-6-3
Clause 5-6-5	Cash .....	5-6-3
Clause 5-6-6	Cash .....	5-6-3
Clause 5-6-7	Exchange of Property .....	5-6-4
Clause 5-6-8	First-Lien Note to Third Party and Second-Lien Note to Grantor .....	5-6-4
Clause 5-6-9	Gift .....	5-6-5
Clause 5-6-10	Gift .....	5-6-5
Clause 5-6-11	Grantee's Separate Property .....	5-6-5
Clause 5-6-12	Grantee's Separate Property .....	5-6-5
Clause 5-6-13	Note to Grantor or Third Party .....	5-6-5
Clause 5-6-14	Wraparound Lien [Deed Subject to] .....	5-6-6

Form 5-7	Reservations from Conveyance . . . . .	5-7-1 to 5-7-8
Clause 5-7-1	Easement . . . . .	5-7-1
Clause 5-7-2	Easement—Access . . . . .	5-7-1
Clause 5-7-3	Easement—Access . . . . .	5-7-2
Clause 5-7-4	Easement—Access . . . . .	5-7-2
Clause 5-7-5	Life Estate . . . . .	5-7-3
Clause 5-7-6	Life Estate with Power of Sale . . . . .	5-7-4
Clause 5-7-7	Life Estate with Right to Consume Corpus . . . . .	5-7-4
Clause 5-7-8	Mineral Estate—Entirety . . . . .	5-7-5
Clause 5-7-9	Mineral Estate—Fraction of Entirety . . . . .	5-7-5
Clause 5-7-10	Mineral Estate—Term Mineral Interest . . . . .	5-7-5
Clause 5-7-11	Mineral Estate—Royalty . . . . .	5-7-6
Clause 5-7-12	Mineral Estate—Prohibition against Exploration by Minerals' Owner . . . . .	5-7-6
Clause 5-7-13	Mineral Estate—Waiver of Surface Rights . . . . .	5-7-7
Clause 5-7-14	Mineral Estate—Waiver of Surface Rights; Reservation of Drill Site . . . . .	5-7-7
Form 5-8	Exceptions to Conveyance and Warranty . . . . .	5-8-1 to 5-8-18
Clause 5-8-1	Broad Exceptions . . . . .	5-8-1
Clause 5-8-2	Broad Exceptions . . . . .	5-8-2
Clause 5-8-3	Broad Exceptions . . . . .	5-8-2
Clause 5-8-4	Abstract of Judgment . . . . .	5-8-3
Clause 5-8-5	Access Restrictions on Subdivision Plat . . . . .	5-8-4
Clause 5-8-6	Access Unavailable . . . . .	5-8-4
Clause 5-8-7	Access Unavailable . . . . .	5-8-4
Clause 5-8-8	Accretion . . . . .	5-8-4
Clause 5-8-9	Areas and Boundaries . . . . .	5-8-5
Clause 5-8-10	Assignment of Lien . . . . .	5-8-5
Clause 5-8-11	Building Setback Line . . . . .	5-8-5
Clause 5-8-12	Cemetery . . . . .	5-8-5
Clause 5-8-13	Condominiums . . . . .	5-8-6
Clause 5-8-14	Contract for Deed . . . . .	5-8-6
Clause 5-8-15	Covenant Rights . . . . .	5-8-6
Clause 5-8-16	Deed of Trust . . . . .	5-8-7
Clause 5-8-17	Deed of Trust to Secure Assumption . . . . .	5-8-7

Clause 5-8-18	Easement—Aerial .....	5-8-7
Clause 5-8-19	Easement—Common Area Utility .....	5-8-8
Clause 5-8-20	Easement—Flood Control .....	5-8-8
Clause 5-8-21	Easement—Pipeline .....	5-8-8
Clause 5-8-22	Easement—Reciprocal .....	5-8-8
Clause 5-8-23	Easement—Specific .....	5-8-9
Clause 5-8-24	Easement—Zero Lot Line on Subdivision Plat .....	5-8-9
Clause 5-8-25	Easements—Unrecorded .....	5-8-9
Clause 5-8-26	Electric Service Agreements .....	5-8-9
Clause 5-8-27	Financing Statement (County Records) .....	5-8-10
Clause 5-8-28	General Restrictions .....	5-8-10
Clause 5-8-29	Lease Agreement .....	5-8-10
Clause 5-8-30	Loan Modification .....	5-8-10
Clause 5-8-31	Maintenance Assessment Exception (Property Owners Association) .....	5-8-11
Clause 5-8-32	Mechanic's Lien by Affidavit .....	5-8-11
Clause 5-8-33	Mechanic's Lien Contract with Deed-of-Trust Provision .....	5-8-11
Clause 5-8-34	Mineral Estate or Royalty Conveyed or Reserved .....	5-8-12
Clause 5-8-35	Mineral Lease .....	5-8-12
Clause 5-8-36	Mineral Reservation by Predecessor .....	5-8-12
Clause 5-8-37	Notice of Assessment .....	5-8-13
Clause 5-8-38	Party Wall .....	5-8-13
Clause 5-8-39	Property Encumbered by Lien Securing Note That Grantee Does Not Assume .....	5-8-13
Clause 5-8-40	Reinstatement of Accelerated Loan .....	5-8-13
Clause 5-8-41	Riparian Rights .....	5-8-14
Clause 5-8-42	River Exception .....	5-8-14
Clause 5-8-43	Roadway .....	5-8-14
Clause 5-8-44	Taxes .....	5-8-14
Clause 5-8-45	Taxes .....	5-8-15
Clause 5-8-46	Tax Lien—Federal .....	5-8-15
Clause 5-8-47	Tax Lien—State .....	5-8-15
Clause 5-8-48	Tenant Possession Rights .....	5-8-15
Clause 5-8-49	Tideland .....	5-8-16

CHAPTER CONTENTS

	Clause 5-8-50	Title Insurance Concurrent Exceptions . . . . .	5-8-16
	Clause 5-8-51	Vendor's Lien and Deed of Trust . . . . .	5-8-18
Form 5-9	Additional Clauses for Deeds . . . . .		5-9-1 to 5-9-14
	Clause 5-9-1	"As Is" Conveyance . . . . .	5-9-1
	Clause 5-9-2	Assumption of Liability for VA-Guaranteed Loans . . . . .	5-9-2
	Clause 5-9-3	Condominium Deed—Property Description . . . . .	5-9-3
	Clause 5-9-4	Reserved . . . . .	5-9-3
	Clause 5-9-5	Correction Deed—New Document . . . . .	5-9-3
	Clause 5-9-6	Fee Simple Determinable . . . . .	5-9-4
	Clause 5-9-7	Fee Simple Determinable . . . . .	5-9-4
	Clause 5-9-8	For Use with Warranty Deed with Vendor's Lien . . . . .	5-9-4
	Clause 5-9-9	For Use with Warranty Deed with Vendor's Lien . . . . .	5-9-5
	Clause 5-9-10	For Use with Warranty Deed with Vendor's Lien . . . . .	5-9-5
	Clause 5-9-11	For Use with Warranty Deed with Vendor's Lien . . . . .	5-9-6
	Clause 5-9-12	Personal Property . . . . .	5-9-7
	Clause 5-9-13	Personal Property . . . . .	5-9-7
	Clause 5-9-14	Restrictive Covenants . . . . .	5-9-7
	Clause 5-9-15	Restrictive Covenants . . . . .	5-9-8
	Clause 5-9-16	Separate Property . . . . .	5-9-8
	Clause 5-9-17	Strips and Gores . . . . .	5-9-9
	Clause 5-9-18	Timber Deed—Property Description . . . . .	5-9-9
	Clause 5-9-19	Townhouse Deed . . . . .	5-9-9
	Clause 5-9-20	Townhouse Deed . . . . .	5-9-10
	Clause 5-9-21	Townhouse Deed . . . . .	5-9-10
	Clause 5-9-22	Transfer of Escrow and Insurance Policy . . . . .	5-9-11
	Clause 5-9-23	Vendor's Lien and Deed of Trust to Secure Assumption . . . . .	5-9-11
	Clause 5-9-24	Waiver of Implied Liens . . . . .	5-9-12
	Clause 5-9-25	Waiver of Implied Liens . . . . .	5-9-12
	Clause 5-9-26	Wraparound Lien [Deed Subject to] . . . . .	5-9-12
Form 5-10	Grantee's Acceptance of Deed . . . . .		5-10-1 to 5-10-2
Form 5-11	Owely of Partition Deed . . . . .		5-11-1 to 5-11-4
Form 5-12	Owely of Partition Agreement . . . . .		5-12-1 to 5-12-2
Form 5-13	Deed in Lieu of Foreclosure . . . . .		5-13-1 to 5-13-4

Form 5-14	[Administration/Guardianship] Deed . . . . .	5-14-1 to 5-14-2
Form 5-15	Blanket Bill of Sale . . . . .	5-15-1 to 5-15-4
Form 5-16	Bill of Sale . . . . .	5-16-1 to 5-16-2
Form 5-17	Transfer of Escrow Funds [and Hazard Insurance Policy]. . . . .	5-17-1 to 5-17-2
Form 5-18	Survivorship Agreement. . . . .	5-18-1 to 5-18-2
Form 5-19	Survivorship Agreement for Community Property . . . . .	5-19-1 to 5-19-2
Form 5-20	Community Interest Special Warranty Deed . . . . .	5-20-1 to 5-20-4
Form 5-21	Assignment and Assumption of Leases . . . . .	5-21-1 to 5-21-2
Form 5-22	Notice of Transfer of Security Deposit . . . . .	5-22-1 to 5-22-2
Form 5-23	Partition Deed. . . . .	5-23-1 to 5-23-4
Form 5-24	Correction Instrument [Nonmaterial Correction]. . . . .	5-24-1 to 5-24-2
Form 5-25	Revocable Transfer on Death Deed . . . . .	5-25-1 to 5-25-6
Form 5-26	Revocation of Transfer on Death Deed . . . . .	5-26-1 to 5-26-2
Form 5-27	Partial Revocation of Transfer on Death Deed . . . . .	5-27-1 to 5-27-2

*[Reserved]*



deed. *Houston Oil Co. of Texas v. Kirkindall*, 145 S.W.2d 1074, 1077 (Tex. 1941); *Chandler v. Hartt*, 467 S.W.2d 629, 634 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.). An involuntary partition arises when a cotenant exercises the statutory right to compel a partition. See Tex. Prop. Code §§ 23.001–.004. If property is partitioned involuntarily, a nonexclusive access easement may be required in limited circumstances. See Tex. Prop. Code § 23.006. An express agreement among joint owners not to partition is enforceable. *Lichtenstein v. Lichtenstein Building Corp.*, 442 S.W.2d 765, 769 (Tex. Civ. App.—Corpus Christi 1969, no writ).

Form 5-23 in this chapter is a partition deed for effectuating a voluntary partition. Often partition deeds are executed by family members who have inherited the co-owned properties. In this situation, a special warranty of title ordinarily will be preferred by the parties. Often no title search is obtained, and a party usually will not want to be responsible for warranting title to the land partitioned to the other family members (except as to that party's own acts). Accordingly, form 5-23 contains a special warranty of title. If a general warranty of title or deed without warranty is desired, form 5-23 may be adapted to provide for this. If no title search is performed in connection with a partition deed, the other parties may be unaware that one party's acts have given rise to a lien, such as a federal tax lien or child support lien. Knowledge of the existence of a lien before the partition deed is executed is desirable so that the lien may be addressed, as this is preferable to a claim for breach of warranty of title, whether special or general.

Partitions are not subject to the statute of frauds, making oral partitions enforceable (*Houston Oil Co. of Texas*, 145 S.W.2d at 1077), and partitions do not alter the character of property as either separate or community (*Westhoff v. Reitz*, 554 S.W.2d 1 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.)).

Owelty is the difference that is paid by one joint owner to another or a lien that arises for the purpose of equalizing the partition. In instances in which one joint owner is to receive owelty from another, see the discussion of owelty of partition in section 5.13:5 below.

If suit is filed to foreclose a tax lien, joint owners are entitled to partition their property and have the taxes apportioned pro rata. Tex. Tax Code § 33.46.

## § 5.11 Transfer on Death Deed

The Texas Real Property Transfer on Death Act authorizes an individual to execute and record a transfer on death deed to make a revocable transfer of the transferor's interest in real property to one or more designated beneficiaries, including alternate beneficiaries, effective at the transferor's death. See Tex. Est. Code ch. 114.

### § 5.11:1 Purpose and Effect

A transfer on death deed transfers a transferor's interest in real property to designated beneficiaries effective at the transferor's death. Tex. Est. Code § 114.051. As a transfer on death deed is nontestamentary, probate proceedings are not necessary to transfer the transferor's interest in the described real property to the designated beneficiaries. Tex. Est. Code § 114.053.

During the transferor's lifetime, a transfer on death deed does not affect any right, title, or interest of the transferor in the property, vest any legal or equitable title in a designated beneficiary, or subject the property to the claims of creditors of any designated beneficiary. Notwithstanding the recordation of a transfer on death deed, the transferor retains the right to transfer or encumber the property, any present or future homestead rights, and any present or future ad valorem tax exemptions to which the transferor is entitled. During the transferor's lifetime, a transfer on death deed does not affect

the rights of creditors of the transferor, secured or unsecured, and does not trigger any “due on sale” clause. Upon the death of the transferor a secured creditor’s rights are subject to the Texas Estates Code. A transfer on death deed does not affect the eligibility for public assistance of either the transferor or any designated beneficiary. Tex. Est. Code § 114.101.

At the death of the transferor, the transferor’s interest in the property is transferred to the designated beneficiaries in accordance with the deed. Tex. Est. Code § 114.103(a). A transfer under a transfer on death deed lapses as to a designated beneficiary that disclaims in the manner provided in chapter 122 of the Estates Code. Tex. Est. Code § 114.105. A transfer also lapses as to a designated beneficiary that does not survive the transferor by 120 hours. Lapsed transfers of concurrent interests pass in accordance with subchapter D of chapter 255 of the Estates Code. Except where chapter 255 applies, concurrent interests are transferred in equal, undivided interests with no right of survivorship, subject to the transferor’s option to provide alternative disposition of lapsed transfers. Tex. Est. Code § 114.103(a).

Even if the transfer on death deed provides otherwise, a transfer on death deed transfers title to a beneficiary without warranty of title. Tex. Est. Code § 114.103(d). A beneficiary under a transfer on death deed takes title to the property subject to all conveyances, liens, encumbrances and other rights enforceable against the property at the transferor’s death. Tex. Est. Code § 114.104. Although not considered a probate asset, claims against the transferor’s estate, expenses of administration, estate taxes, allowances in lieu of exempt property, and family allowances are enforceable against property transferred by a transfer on death deed. Tex. Est. Code § 114.106.

### § 5.11:2 Requirements Generally; Exceptions

A transfer on death deed must state that the transfer occurs at the transferor’s death, be properly executed by the transferor, be properly recorded before the transferor’s death, and contain the essential elements and formalities of deeds, except consideration, notice, delivery, or acceptance. Tex. Est. Code §§ 114.055, 114.056. No statutorily required notice or disclosure need be given in connection with a transfer on death deed. Tex. Est. Code § 114.101(6).

### § 5.11:3 Transferor Considerations

A transferor must have capacity to contract to make or revoke a transfer on death deed. Tex. Est. Code § 114.054(a). A transfer on death deed cannot be created under a power of attorney. Tex. Est. Code § 114.054(b).

### § 5.11:4 Proper Recordation

To be effective, a transfer on death deed must be recorded before the transferor’s death in the county where the property is located. Tex. Est. Code § 114.003. Likewise, an instrument revoking a transfer on death deed must be recorded before the transferor’s death. Tex. Est. Code § 114.057(a).

### § 5.11:5 Caution—Existing Rights of Survivorship

If a transferor is a joint owner with right of survivorship, a transfer on death deed will not be effective unless the transferor is the surviving joint owner. Tex. Est. Code § 114.103(b). A transfer on death deed made by joint owners with the right of survivorship can be revoked only by all living joint owners. Tex. Est. Code § 114.057(e).

### § 5.11:6 Revocation Generally

Even if the transfer on death deed provides otherwise, a transfer on death deed is revocable. Tex. Est. Code § 114.052. Revocation, in whole or in part, is effective upon the proper recordation before the transferor's death of a subsequent, inconsistent transfer on death deed, a subsequent instrument of revocation, a divorce decree dissolving the marital relationship between the transferor and a designated beneficiary, or a subsequent conveyance by the transferor. If the transfer on death deed is made by more than one transferor, a revocation is only effective as to the interest of the revoking transferor and does not affect the interests of the non-revoking transferors. Tex. Est. Code § 114.057.

### § 5.11:7 Revocation—Subsequent Transfer on Death Deed

A prior transfer on death deed is revoked on the recordation of a subsequently acknowledged transfer on death deed as to the interests that are expressly stated or are inconsistent with the subsequent deed. Tex. Est. Code § 114.057(a). Form 5-25 in this chapter provides optional clauses for revoking all or part of a prior transfer on death deed. Alternatively, form 5-26 or form 5-27 can be used to document the revocation of the prior transfer on death deed in whole or in part.

### § 5.11:8 Revocation—Subsequent Instrument of Revocation

A prior transfer on death deed is revoked upon the recordation of a subsequently acknowledged instrument of revocation, other than a will, that expressly revokes the prior deed, as to the beneficiaries and property designated in the instrument. Tex. Est. Code § 114.057(a). A subsequent will made by the transferor does not revoke nor supersede a transfer on death deed. Tex. Est. Code § 114.057(b).

Form 5-26 or form 5-27 in this chapter can be used to revoke a prior transfer on death deed in whole or in part.

### § 5.11:9 Revocation—Divorce

The recordation of a notice of a final decree of divorce dissolving the marital relationship between a transferor and a designated beneficiary revokes a transfer on death deed as to the divorced, designated beneficiary. Tex. Est. Code § 114.057(c).

### § 5.11:10 Revocation—Subsequent Conveyance; Protection of Purchasers

A subsequent, valid conveyance by the transferor during the transferor's lifetime renders a prior transfer on death deed void as to any interest in the property conveyed if the conveyancing instrument is properly recorded before the death of the transferor. Tex. Est. Code § 114.102.

Form 5-26 or form 5-27 in this chapter, as the circumstances dictate, will document the revocation of a prior transfer on death deed.

### § 5.11:11 Instructions for Completing Form

Form 5-25 in this chapter can be used to transfer to one or more designated beneficiaries, including alternative beneficiaries, the transferor's interest in real property effective at death of the transferor.

Although the transferor can rely upon the presumed anti-lapse provisions in chapter 114 of the Texas Estates Code, if the transferor intends to transfer the transferor's community property interest in property to a surviving spouse, or to the transferor's children if the transferor's spouse predeceases the transferor, it is recommended that the transferor's spouse be designated as the primary beneficiary and the

children designated as the alternate beneficiaries.

Caution should be employed in selecting the alternative clauses for disposition of the property where a named primary beneficiary does not survive the transferor as the alternative clause selected will determine whether the deceased primary beneficiary's share will pass to the other primary beneficiaries, the descendants of the deceased primary beneficiary, or named alternative beneficiaries. Alternative clauses are provided for the disposition of the property to the descendants of a deceased beneficiary or to the other named beneficiaries.

As consideration is not required for the validity of a transfer on death deed, and to avoid uncertainty about whether consideration was exchanged, references to recitations and confessions of consideration are intentionally omitted in form 5-25.

As there are no warranties of title under a transfer on death deed and, at the death of the transferor, title passes subject to all present and subsequent conveyances, liens, and other encumbrances, references to exceptions to conveyance and warranties are intentionally omitted in form 5-25.

Any interest that the transferor intends to reserve from the transfer on death deed should be properly described in the heading "Reservations from Transfer." See section 5.2:6 above for a discussion of reservations. Examples of common reservations are found in form 5-7.

Form 5-26 revokes a prior transfer on death deed in its entirety.

Form 5-27, depending on the options clause selected, partially revokes a prior transfer on death deed as to the property described either to all beneficiaries or only as to specifically named beneficiaries.

## § 5.12 Additional Clauses

Provisions other than the consideration clause, property description, reservations, and exceptions may be called for in some deeds. These clauses may be located in several different places in the deed. Use of some of these provisions is discussed in this section, and sample language is found in form 5-9 in this chapter.

### § 5.12:1 Waiver of Implied Liens

The implied vendor's lien should be negated if its existence is not intended by the parties. If the grantor who receives the full price for one parcel is to waive the implied lien on that parcel, the waiver in clause 5-9-24 in this chapter may be used. If an existing lien affects only a portion of the property conveyed by an assumption deed, the deed should contain an express waiver to avoid spreading the lien. Clause 5-9-25 is an example of an appropriate waiver for this purpose. If the parties exchanging property wish to waive the implied lien, the waiver in clause 5-6-7 may be used in the description of the consideration.

### § 5.12:2 Bill of Sale Combined

Many kinds of personal property, including items used in operating the improvements that can be removed without materially damaging the improvements, are often transferred as part of the sale of real property.

Personal property is not included in the real property description and thus is not transferred by the deed. Instead, personal property is transferred by bill of sale. The personal property transfer can be accomplished in a separate bill of sale or by including the bill of sale in the deed itself. A combined instrument has the benefit of reducing the number of documents to be signed at closing.

To add the personal property transfer to the deed, the drafter may use the clauses provided. See clauses 5-9-12 and 5-9-13 in this chapter.

### § 5.12:3 “As Is” Conveyance

If the conveyance is on an “as is” basis, the parties may evidence the basis of the bargain in the deed. See clause 5-9-1 in this chapter.

For a separate disclaimer form, see form 26-33 in this manual.

### § 5.12:4 Fee Simple Determinable

A fee simple determinable exists if a fee simple estate will terminate automatically and revert to the grantor on the occurrence of a stated event.

The phrase “as long as” has been recognized as evidencing a fee simple determinable estate. See *Clark v. Perez*, 679 S.W.2d 710, 712 (Tex. App.—San Antonio 1984, no writ). In addition, it is prudent practice to state an intent to create a fee simple determinable because of the presumption that a conveyance is a fee simple absolute (see Tex. Prop. Code § 5.001(a)) and the rule of interpretation construing provisions as covenants rather than conditions. *Schwarz-Jordan, Inc. v. Delisle Construction Co.*, 569 S.W.2d 878, 881 (Tex. 1978). See clause 5-9-7 in this chapter.

In some cases the event that would cause the fee simple determinable condition to be satisfied is not evident from an inspection of the property, which creates uncertainty concerning title. In those situations, it is suggested that the condition language include a provision for recording a document that establishes with certainty the satisfaction of the condition. For example, the suggested clause at 5-9-6 includes a provision allowing an affidavit to serve as evidence of the satisfaction of the condition, unless contradicted by another affidavit.

### § 5.12:5 Strips and Gores

For public policy reasons, a deed may be construed as including a small parcel of land in the conveyance of the larger tract if it is shown that the small parcel to be included (1) is small in comparison to the land conveyed, (2) is adjacent to or surrounded by the land conveyed, (3) belonged to the grantor at the time of the conveyance, and (4) was of no benefit or importance to the grantor. *Alkas v. United Savings Ass’n of Texas*, 672 S.W.2d 852, 857 (Tex. App.—Corpus Christi 1984, writ ref’d n.r.e.). This doctrine is called the “strip and gore doctrine.” Including a strips-and-gores provision in the deed is intended to ensure that the principle is applied in the transaction without the necessity of supplying proof of these elements. See clause 5-9-17 in this chapter for an example.

Because of the strip and gore doctrine, a conveyance of land bounded by a public highway carries with it the fee to the center of the road as part and parcel of the grant, even if the deed describes the abutting land by metes and bounds extending only to the edge of the highway. *State v. Williams*, 335 S.W.2d 834, 836 (Tex. 1960); *Krenek v. Texstar North America, Inc.*, 787 S.W.2d 566, 568–69 (Tex. App.—Corpus Christi 1990, writ denied). The doctrine does not apply if the grantor owns land on both sides of the strip. *Rio Bravo Oil Co. v. Weed*, 50 S.W.2d 1080, 1086 (Tex. 1932). Nor does the doctrine apply if the strip is larger and more valuable than the conveyed tract. *Angelo v. Biscamp*, 441 S.W.2d 524, 527 (Tex. 1969).

The strips-and-gores provision should be included in a deed conveyance form rather than a quitclaim to avoid the concerns about quitclaims stated in the commentary at section 5.6 above; however, the warranties should be eliminated in case no strips or gores exist.

When using the strips-and-gores provision, the attorney should review other provisions of the deed that describe the property, because the

strips and gores are discussed separately from the property. One suggestion is to add "and all strips and gores and appurtenances thereto" to the references to the property, other than in the warranty clause. Another option is to include strips and gores as a defined term within the definition of the property, then except the strips and gores out of the warranty in the express exclusion of warranties provisions.

### § 5.12:6 Wraparound Lien

If the seller agrees to continue to service an existing lien debt while the buyer executes a new note that is not reduced by the amount of the preexisting lien debt (commonly known as a wraparound transaction), the deed should be written to take exception to the preexisting lien to avoid breaching the warranty concerning encumbrances. The buyer should take title "subject to," and without assuming, the preexisting lien debt.

See clause 5-9-26 in this chapter. See also section 6.4:2 in this manual and sections 8.3 through 8.5:3.

### § 5.12:7 Transfer of Escrow and Insurance Policy

Lenders often establish an escrow for the payment of taxes and insurance relating to the property securing the loan. The escrow arrangement generally seeks to ensure that sufficient funds exist in the escrow to pay all real property ad valorem taxes when they come due and to pay the annual hazard insurance premium on its anniversary date.

If real property is transferred with the assumption of an existing lien debt or subject to a preexisting lien debt, regardless of whether the insurance and taxes are being prorated to the date of closing, it is customary for the seller to transfer the entire escrow fund to the buyer. It is generally considered simpler to prorate the

escrow balance to the date of closing through the closing settlement statement, rather than have the buyer send money to the lender and expect the lender to reimburse the seller for that exact amount out of the escrow. The transfer of the escrow fund is usually included in the deed, although this is not required. Additionally, some lenders require the signing of a separate transfer form before the escrow will be transferred to the buyer. The more cautious approach would be to include the transfer both in the deed and in a separate document.

The transfer of escrow often includes a transfer of the insurance policy to the buyer, if the seller has agreed that the policy will be transferred. If the buyer will not assume the existing coverage, the seller should keep the policy in order to be entitled to the refund of unearned premiums when the buyer's replacement policy is substituted for the seller's policy coverage. Several aspects of insurance are regulated by statute, such as the fee for substitution of coverage and the kind of insurance binder a mortgage company must accept. The statutes governing prohibited practices relating to property insurance are found in chapter 549 of the Texas Insurance Code. *See* Tex. Ins. Code ch. 549. Unless the drafting attorney knows the agreement concerning the transfer of the insurance policy, it is suggested the deed include either nothing concerning the insurance or a statement that any transfer of insurance will be handled between the buyer and seller by separate instrument.

Form 5-17 in this chapter is provided to accomplish the transfer of escrow by separate instrument. Clause 5-9-22 may be used to incorporate the transfer of escrow in the deed.

### § 5.12:8 Assumption of Liability Agreements for VA-Guaranteed Loans

If a loan guaranteed by the Department of Veterans Affairs (VA) is assumed, the VA has a num-

ber of requirements for the new loan. See 38 U.S.C. § 3714; 38 C.F.R. §§ 36.4300–4393; U.S. Dep't of Veterans Affairs, Veterans Benefits Administration, Lender's Handbook: VA Pamphlet 26-7, available at [http://benefits.va.gov/warms/pam26\\_7.asp](http://benefits.va.gov/warms/pam26_7.asp). Clause 5-9-2 in this chapter is based on the sample indemnity liability assumption clause in chapter 9 of VA Pamphlet 26-7.

### § 5.12:9 Restrictive Covenants

To be enforceable, restrictive covenants imposed by grant must satisfy certain requirements: (1) there must be privity of estate between the parties to the contract; (2) the restrictive covenants must relate to something in existence, or assignees must be named if they are to be bound by the restrictive covenants; (3) the restrictive covenants must touch or concern the land (that is, enhance or benefit it) (see *Homsey v. University Gardens Racquet Club*, 730 S.W.2d 763, 764 (Tex. App.—El Paso 1987, writ ref'd n.r.c.)); and (4) the original contracting parties must intend that the restrictive covenant run with the land. *Billington v. Riffe*, 492 S.W.2d 343, 346 (Tex. Civ. App.—Amarillo 1973, no writ). Further, the restrictive covenant must furnish adequate notice to the property owner of the specific restriction sought to be enforced. *Davis v. Huey*, 620 S.W.2d 561, 566 (Tex. 1981).

The restrictive covenants should make clear which lands are benefited by the covenants and that the owners thereby have standing to enforce the restrictive covenants. See clauses 5-9-14 and 5-9-15 in this chapter.

## § 5.13 Additional Documents

### § 5.13:1 Acceptance of Deed

Acceptance is necessary for a deed to be effective. *Robert Burns Concrete Contractors, Inc. v. Norman*, 561 S.W.2d 614, 618 (Tex. Civ.

App.—Tyler 1978, writ ref'd n.r.e.). Traditionally, the grantee's acceptance is implied. *Martin v. Uvalde Savings & Loan Ass'n*, 773 S.W.2d 808 (Tex. App.—San Antonio 1989, no writ). However, the parties may want written confirmation of the grantee's acceptance of the deed as to matters of form, substance, or both. Evidence of the grantee's acceptance may be needed to enforce the grantor's obligations under a deed, such as the promise to pay and the indemnity in the assumption or warranty deed. Confirmation can best be achieved by the grantee's signature on the deed, although a separate instrument may be used. See form 5-10 in this chapter.

### § 5.13:2 Deed in Lieu of Foreclosure

The term *deed in lieu of foreclosure* (or *deed in lieu*) describes a conveyance in which the consideration given by the grantee typically is the cancellation of the debt owed by the borrower, the release of the borrower from liability on the secured debt, and, in some cases, the release and discharge of the liens securing the debt. The deed in lieu does not have the same effect on title as a trustee's deed in a nonjudicial foreclosure because the deed in lieu does not relate back to the date the deed of trust was filed for record to extinguish exceptions or encumbrances filed after the deed of trust. Instead, the grantee takes the property subject to whatever encumbrances and other exceptions have been imposed on the property before the deed in lieu is recorded, as is the case with any other deed. *Flag-Redfern Oil Co. v. Humble Exploration Co.*, 744 S.W.2d 6, 9 (Tex. 1987).

If a holder of a debt secured by a deed of trust accepts title by a deed in lieu and later discovers that an encumbrance that was unknown to the holder and not disclosed by the debtor existed before the deed in lieu, the holder has four years to void the deed in lieu; further, the lien is restored to its former priority, and the holder

may proceed with a foreclosure under the deed of trust. *See* Tex. Prop. Code § 51.006.

See form 5-13 in this chapter for an example of a deed in lieu of foreclosure.

### § 5.13:3 Trustee's Deed in Nonjudicial Foreclosure

For commentary and a form, see section 14.6:4 and form 14-15 in this manual.

### § 5.13:4 Administration or Guardianship Deed

The Texas Estates Code governs the sale of property held by an estate. *See* Tex. Est. Code chs. 356, 1158. A court order is required for any sale of estate property unless otherwise provided by law. Tex. Est. Code §§ 356.001, 1158.001. Sales authorized by a will may be carried out by the executor without the need for a court order. Tex. Est. Code § 356.002. The administration or guardianship deed, form 5-14 in this chapter, is drafted to follow the format required by the Estates Code. *See* Tex. Est. Code §§ 356.557, 1158.557.

### § 5.13:5 Owelty of Partition Deed and Agreement

Owelty results from an unequal partition between joint owners of real property whether by court decree or contract. Because the tract partitioned does not lend itself to an equal division, the difference in value between the partitioned tracts is adjusted by payment from one joint owner to the other. This difference is known as owelty. Because owelty payments are in the nature of purchase money, a lien to secure a payment arises. Such a lien is a purchase-money lien and is valid against the homestead. *Sayers v. Pyland*, 161 S.W.2d 769, 772 (Tex. 1942).

In transactions in which one joint owner simply buys all of the interest of a fellow joint owner, the issue is less clear. Some decisions have determined that such a sale does not involve a true partition; therefore a lien securing the purchase may not encumber the entirety of the homestead. *In re Shults*, 97 B.R. 874 (Bankr. N.D. Tex. 1989). The Texas Constitution and the Texas Property Code provide that the homestead may be encumbered by "an owelty of partition imposed against the entirety of the property by a court order or by a written agreement of the parties to the partition, including a debt of one spouse in favor of the other spouse resulting from a division or an award of a family homestead in a divorce proceeding." Tex. Const. art. XVI, § 50(a)(3); Tex. Prop. Code § 41.001(b)(4). Even after this constitutional amendment, there has been question about whether the entirety of the homestead may be encumbered by an owelty lien in the absence of an actual partition in kind. Opinion predominates in favor of the validity of these liens to the extent that such liens are generally insurable encumbrances.

An owelty of partition transaction that is not based on a court order should be documented by both a deed and a separate written partition agreement (not by a purchase and sale agreement).

The owelty of partition deed, form 5-11 in this chapter, should refer either to the court order or to the separate agreement on which it is based. See form 5-12 for an owelty of partition agreement.

### § 5.13:6 Survivorship Agreement for Community and Noncommunity Property

Rights of survivorship will not be inferred from a joint tenancy in property that is not the community property of the tenants. Tex. Est. Code § 101.002. However, the joint tenants may agree



in writing to implement rights of survivorship. Tex. Est. Code § 111.001. Spouses may agree between themselves that all or part of their community property, then existing or to be acquired, will be owned with rights of survivorship. Tex. Est. Code § 112.051.

Rights of survivorship in community property are treated differently from rights of survivorship in other property. *See* Tex. Est. Code §§ 111.002, 112.052. However, whether the property is community or not, the agreement must be in writing. In the case of community property, both spouses must sign the agreement. Tex. Est. Code § 112.052. For property that is not community, it is suggested that all joint tenants sign the writing for it to qualify as an agreement that satisfies the statute. *See* Tex. Est. Code § 111.001(a). The phrases *with right of survivorship, will become the property of the survivor, will vest in and belong to the surviving spouse, or will pass to the surviving spouse* are suggested for inclusion in the agreement.

Rights of survivorship do not affect the community status of property or the rights of the spouses concerning management, control, and disposition, unless the agreement so provides. Tex. Est. Code § 112.151. On the death of a spouse, a transfer resulting from the right of survivorship is not considered a testamentary transfer. Tex. Est. Code § 112.052. An agreement between spouses may be revoked in accordance with the agreement's terms. If no provision is made for revocation, the agreement may be revoked by a written instrument signed by both spouses or by a written instrument signed by one spouse and delivered to the other spouse. Tex. Est. Code § 112.054(b). The disposition of property by one or both spouses will also revoke the agreement as to that property if the disposition is not inconsistent with the terms of the agreement and applicable law. Tex. Est. Code § 112.054(c). Although an agreement between spouses creating rights of survivorship is effective without court adjudication, the surviving spouse may

obtain such an adjudication by application to the court. *See* Tex. Est. Code §§ 112.053, 112.101. The agreement between spouses and any revocation should be recorded, and a copy provided to the personal representative of the deceased spouse's estate, to avoid the acquisition of good title by a buyer without actual notice of the agreement or the revocation under Tex. Est. Code §§ 112.201–.208. Community property subject to the sole or joint management, control, and disposition of a spouse during marriage continues to be subject to the liabilities of that spouse on death, regardless of the right of survivorship. *See* Tex. Est. Code §§ 112.251–.253.

See form 5-18 in this chapter for a survivorship agreement and form 5-19 for a survivorship agreement for community property.

### § 5.13:7 Community Interest Special Warranty Deed

The Texas Constitution and the Texas Family Code provide a method of converting title of real and personal property from separate to community property. *See* Tex. Const. art. XVI, § 15; Tex. Fam. Code §§ 4.201–.206. Before January 1, 2000, the effective date of these provisions, separate property could not be converted to community property because Texas is an inception of title state. The primary purpose of the community interest special warranty deed is to allow a surviving spouse, at the time of the other spouse's death, to obtain a nontaxable increase in the basis of the property for federal estate tax purposes. According to the Internal Revenue Code, all community property receives an increase in basis to the current market value at the death of the first spouse. *See* 26 U.S.C. § 1014(b)(6). Strict compliance with the provisions of the Family Code, including the use of bold-faced type, capital letters, or underlined warnings that must appear in the document, is necessary to convert the property to community property. *See* Tex. Fam. Code §§ 4.201–.206.

There are implications in this type of transaction for divorce, property management rights, and creditor claims, as described in section 4.205 of the Family Code. A separate agreement may be used to address personal-property or family-law issues. The form in this manual deals only with creating an effective conveyance of real property rights. See form 5-20 in this chapter for a community interest special warranty deed.

### § 5.13:8 Assignment and Assumption of Leases

The right to receive rent passes with title to real property, and the seller's tenant becomes the buyer's tenant as a matter of law. *Arredondo v. Mora*, 340 S.W.2d 322, 325 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.). Nevertheless, parties to a real estate sales contract often provide for a separate assignment and assumption agreement in which the seller assigns its rights in leases affecting the property and the buyer assumes the landlord's obligations under some or all of those leases. The assignment and assumption often contains indemnities by the parties covering their respective periods of responsibility for the landlord's obligations under the leases, including those for tenant improvements and brokerage commissions. The assignment and assumption of leases can be modified to include a general or special warranty of title. See form 5-21 in this chapter for an assignment and assumption of leases and form 5-22 for a notice of transfer of security deposit.

## § 5.14 General Considerations for Minerals

### § 5.14:1 Generally

Texas mineral law is complex and extensive, and a comprehensive review is beyond the scope of this manual. This commentary is intended to identify common conveyancing issues that arise

in transactions in which the primary focus is the surface estate, not the mineral estate. Attorneys who are not experienced in mineral law are urged to exercise caution and seek appropriate counsel when mineral law issues arise.

In Texas, the mineral estate may be severed from the surface estate. The mineral estate is the dominant estate and has five essential attributes: the right to explore and develop (ingress and egress); the right to lease (the executive right); the right to receive bonus payments; the right to receive delay rentals; and the right to receive royalty. *Day & Co. v. Texland Petroleum, Inc.*, 786 S.W.2d 667 (Tex. 1990); *Altman v. Blake*, 712 S.W.2d 117, 118 (Tex. 1986). The mineral estate, and each of its five separate attributes, may be held in undivided interests.

Grants and reservations in Texas are commonly styled "oil, gas, and other minerals" or "all minerals in and under the land." Although the meanings of "oil" and "gas" are usually clear, adjudication has been required to determine what minerals are included in a conveyance of "minerals." The Supreme Court of Texas has held that "a severance of minerals in an oil, gas and other minerals clause includes all substances within the ordinary and natural meaning of the word, whether their presence or value is known at the time of severance." *Moser v. U.S. Steel Corp.*, 676 S.W.2d 99, 102 (Tex. 1984). The *Moser* decision confirmed the court's previous holdings that, as a matter of law, certain substances belong to the surface estate: building stone, limestone, caliche, surface shale, water, sand, gravel, and near-surface lignite, iron, and coal. *Moser*, 676 S.W.2d at 102.

According to the common-law "greatest possible estate" rule, a conveyance will pass all of the estate owned by the grantor at the time of the conveyance unless the instrument states reservations that limit the estate being conveyed. *Cockrell v. Texas Gulf Sulphur Co.*, 299 S.W.2d 672, 675 (Tex. 1956). Thus, a conveyance without a

specific reservation of the minerals will convey the grantor's entire mineral estate. *Harris v. Currie*, 176 S.W.2d 302, 304 (Tex. 1943). A result of the "greatest possible estate" rule is found in the *Duhig* rule, which provides that an outstanding right in the mineral estate will be charged to the grantor's mineral estate reservation, unless a contrary intent is stated in the instrument. See *Duhig v. Peavy-Moore Lumber Co.*, 144 S.W.2d 878, 880 (Tex. 1940).

### § 5.14:2 Royalty

Royalty is the nonpossessory right to receive a cost-free share of production. It may be reserved in a lease or severed from the fee in a grant or reservation in a deed. An "overriding royalty" or "override" is carved out of the lessee's interest in the leasehold estate and, absent fraud, breach of fiduciary duty, or similar wrongdoing, terminates when the lease from which it was created terminates.

A royalty clause must be drafted carefully. For example, each of the following may have a different result: an undivided 1/8 royalty; an undivided 1/8 of the royalty; and an undivided 1/8 in a 1/8 royalty. See, e.g., *Winslow v. Acker*, 781 S.W.2d 322, 326-27 (Tex. App.—San Antonio 1989, writ denied); *Ray v. Truitt*, 751 S.W.2d 205, 207 (Tex. App.—El Paso 1988, no writ); *Tiller v. Tiller*, 685 S.W.2d 456, 458 (Tex. App.—Austin 1985, no writ); *Lane v. Elkins*, 441 S.W.2d 871, 874-75 (Tex. Civ. App.—Eastland 1969, writ ref'd n.r.e.).

### § 5.14:3 Surface Use

The right to develop the mineral estate includes the right to use the surface to the extent reasonably necessary for development purposes. *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 810 (Tex. 1972).

The surface owner whose land is to be developed for mineral purposes should be aware of

the line of Texas cases concerning surface damages that includes *Acker v. Guinn*, 464 S.W.2d 348 (Tex. 1971), *Reed v. Wylie*, 597 S.W.2d 743 (Tex. 1980), and *Moser v. U.S. Steel Corp.*, 676 S.W.2d 99 (Tex. 1984). In *Moser*, the Supreme Court of Texas confirmed that the mineral owner has the right to use the surface to develop the minerals, but within certain guidelines. For instruments executed before June 8, 1983, the mineral owner is liable for destruction of the surface only if the destruction is negligently inflicted, regardless of how the mineral is described in the severance. For instruments executed on or after June 8, 1983, however, the negligence rule applies only to minerals that are specifically conveyed or named in the instrument. If the mineral is not specifically conveyed or named in the instrument, the mineral owner must compensate the surface owner for surface destruction, whether the result of negligence or not. *Moser*, 676 S.W.2d at 103. In addition, the mineral owner must accommodate the surface owner's use of the land to the extent described in *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971), and *Sun Oil Co.*, 483 S.W.2d at 810-11.

The surface owner may want to protect the surface by contractual restrictions on mineral operations. Such protections may include limitations on areas that may be used for mineral operations, such as designation of drill sites and pipeline and access easements; alternatively, the surface owner may contract with the mineral owner for a complete prohibition of use of the surface by the mineral owner (a surface-use waiver by the mineral owner).

### § 5.14:4 Existing Mineral Lease

There are special drafting considerations if the land being conveyed is subject to an existing mineral lease. For example, the grantor and the grantee should include in the deed their agreement on how to allocate the benefits of an undisputed existing lease between them.

### § 5.14:5 Life Tenant's Right to Consume Royalty

Whether the life tenant, as the owner of a life estate, is entitled to consume the royalty from mineral production on the property depends on the circumstances. If, at the inception of the life estate, there exists either mineral production or a mineral lease, the "open mine" doctrine entitles the life tenant to consume the royalties. *Thompson v. Thompson*, 236 S.W.2d 779, 786-87 (Tex. 1951); *Youngman v. Shular*, 281 S.W.2d 373, 375 (Tex. Civ. App.—San Antonio 1955), *aff'd*, 288 S.W.2d 495 (Tex. 1956). Otherwise, the life tenant is not entitled to consume the royalty and must account for it to the remainderman. *Swayne v. Lone Acre Oil Co.*, 86 S.W. 740, 742 (Tex. 1905).

### § 5.14:6 Special Problem Areas

Although a discussion of all areas of concern encountered with mineral interests is beyond the scope of this manual, special consideration should be given to—

- land subject to the Texas Relinquishment Act, where the minerals are owned by the state of Texas and the surface owner acts as the agent for the state in leasing them (*see* Tex. Nat. Res. Code §§ 52.171-190);
- exploration by the owners of the right to develop the minerals without executing a mineral lease;
- discrimination by the owner of the executive right (right to lease) among the owners of the right to royalty, the right to delay rentals, and the right to bonus payments;
- ownership of mineral rights by more than one party; and
- severance of the mineral estate, limited by depth of the minerals or duration of the severance.

See clauses 5-7-8 through 5-7-14 in this chapter for reservation of minerals and clauses 5-8-34 through 5-8-36 for exceptions of minerals.

### § 5.15 General Considerations for Other Forms of Real Property

#### § 5.15:1 Timber

The right to harvest growing timber with the accompanying ingress and egress rights together constitutes an interest in real property, which must be conveyed by deed. *Burkitt v. Wynne*, 132 S.W. 816 (Tex. Civ. App. 1910, writ ref'd). See clause 5-9-18 in this chapter.

#### § 5.15:2 Easements

An easement is an interest in real property. *Settegast v. Foley Bros. Dry Goods Co.*, 270 S.W. 1014, 1016 (Tex. 1925). It gives the holder the right to use another's land for a specific purpose. *Lakeside Launches, Inc. v. Austin Yacht Club, Inc.*, 750 S.W.2d 868, 871 (Tex. App.—Austin 1988, writ denied). See clauses 5-7-1 through 5-7-4 and 5-8-14 through 5-8-25 in this chapter.

#### § 5.15:3 Condominiums

A description of a condominium unit constitutes a sufficient legal description of the unit and all rights, obligations, and interests appurtenant to the unit if the description contains (1) the name of the condominium; (2) the recording data for the declaration, including any amendments, plats, and plans; (3) the county in which the condominium is located; and (4) the identifying number of the unit. Tex. Prop. Code § 82.054. This requirement from the Texas Uniform Condominium Act (Texas Property Code chapter 82) applies to all condominiums. Tex. Prop. Code § 82.002(c).

Some pre-1994 condominium regimes describe apartments by reference to a unit number and building letter. *See* Tex. Prop. Code § 81.102(a)(2). It is suggested that condominiums operating under the prior Condominium Act (Texas Property Code chapter 81) continue to include the building letter for description. As a practical matter, if condominiums recorded before January 1, 1994, use identifying numbers for apartments that are repeated in each of the buildings (for example, each building includes apartments 1 through 10), a reference to the building letter will be needed to distinguish between like-numbered apartments. *See* clause 5-8-13 in this chapter for an exception for use in a condominium deed and clause 5-9-3 for a condominium deed property description. *See* also chapter 24 in this manual for additional information on condominiums.

#### § 5.15:4 Townhouse and Planned Unit Development Properties

The traditional townhouse project and planned unit developments (PUD) are similar in that both involve privately owned building sites with the common area owned by a separate association (usually a nonprofit corporation) whose members are the owners of the building sites. Easements are provided for access and utilities over the common area in both types of projects.

The description for a typical townhouse or lot within a PUD need not refer specifically to the common area if, as is customary, the common area is owned by the separate community association and ownership of the townhouses or lots in the PUD necessarily includes membership in the association and a pro rata ownership interest in the common area.

Deeds for either townhouses or PUD properties should except to the association restrictive covenants and the assessment lien. *See* clause 5-9-20 in this chapter for a property description

and clause 5-9-21 for exceptions typical of a townhouse deed.

Townhouses generally involve building sites that are the outline or footprint of the separately owned townhouse unit's perimeter walls, whereas PUDs usually involve one conventional city lot per unit, including a yard and other city lot features. Because townhouses are usually more limited in space, the concept of limited common area is popular for townhouses. Limited common area involves limited access areas, such as screened patios, that are part of the common area but that usually no other owners may trespass on.

#### § 5.15:5 Timeshare

A "timeshare estate" is an arrangement under which the purchaser receives the right to occupy a timeshare property and an estate interest in the real property. Tex. Prop. Code § 221.002(24). Once the timeshare plan is established, each timeshare interest may be separately conveyed or encumbered, and the title is recordable. Tex. Prop. Code § 221.012.

#### § 5.15:6 Manufactured Housing

The Texas Department of Housing and Community Affairs (TDHCA) administers manufactured housing according to the Texas Manufactured Housing Standards Act. Tex. Occ. Code ch. 1201. Forms pertaining to manufactured housing can be obtained from the TDHCA. Regulations have been promulgated to administer and enforce the Act in title 10, chapter 80, of the Texas Administrative Code. Ownership of a manufactured home is evidenced by the filing of a statement of ownership issued by the TDHCA. Tex. Occ. Code §§ 1201.003(30)(A), 1201.205. At the sale or transfer of manufactured home, ownership does not pass or vest until a completed application for the issuance of a statement of ownership is filed

with the TDHCA. Tex. Occ. Code § 1201.206(e).

A process exists that allows the owner of a manufactured home to elect to treat the home as real estate, making it a part of the real property. *See* Tex. Occ. Code §§ 1201.2055, 1201.2075, 1201.222; Tex. Prop. Code § 2.001(b).

The TDHCA is required to make available to the public through the department's website searchable and downloadable records regarding the ownership, liens, and installation of manufactured homes. Tex. Occ. Code §§ 1201.010, 1201.207(b).

The Texas Certificate of Title Act (Tex. Transp. Code ch. 501) governs "house trailers." The Act does not contain a mechanism for converting house trailers to real estate by affixing them to the real estate. House trailers are generally defined as trailers designed for human habitation, and they are treated differently from manufactured housing. *See* Tex. Transp. Code

§ 501.002(9); Tex. Occ. Code § 1201.003(12), (18), (20).

If the owner of the manufactured home has elected to treat the home as real property, a copy of the statement of ownership must be recorded in the real property records of the county where the manufactured home is located. Tex. Occ. Code § 1201.222; Tex. Prop. Code § 2.001(b).

Texas statutes address when a manufactured home is personal property and when it is real property. *See* Tex. Occ. Code § 1201.222; Tex. Prop. Code § 2.001(b). Ordinarily, a manufactured home is personal property. However, if the statement of ownership issued by the TDHCA reflects that the owner had elected to treat the home as real property and a certified copy of the statement of ownership has been recorded in the real property records of the county where the home is located, the manufactured home will be real property. Property Code chapter 63 clarifies the status of a lien on a manufactured home when it converts to real property. *See* Tex. Prop. Code ch. 63.

**Form 5-25**

This form is provided pursuant to the Texas Real Property Transfer on Death Act enacted as chapter 114 of the Texas Estates Code to transfer to one or more designated beneficiaries, including alternative beneficiaries, the transferor's interest in real property effective at death of the transferor. To be effective, this deed must be properly recorded before the death of the transferor.

---

**Revocable Transfer on Death Deed**

**Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.**

Date:

Transferor:

Transferor's Mailing Address:

Designated Beneficiary

Primary Beneficiary:

Primary Beneficiary's Mailing Address:

Include the following if applicable.

Designated Alternate Beneficiary

Alternate Beneficiary:

Alternate Beneficiary's Mailing Address:

Include the following if a prior transfer on death deed is being revoked in whole or in part.

Prior Transfer on Death Deed

Date:

Transferor:

Primary Beneficiary:

Alternate Beneficiary:

Recording Information:

Continue with the following.

Property (including any improvements):

Reservations from Transfer:

State "None" or, to create reservations of title, include the appropriate clauses from form 5-7.

Select one of the following alternative clauses.

*Surviving Primary Beneficiary*

Transferor, subject to the Reservations from Transfer, at Transferor's death, grants and conveys the Property to Primary Beneficiary, to have and hold forever, but if any Primary Beneficiary predeceases Transferor, Transferor, subject to the Reservations from Transfer, at Transferor's death, grants and conveys that deceased Primary Beneficiary's share in the Property to surviving Primary Beneficiary, to have and hold forever.

Or

*Anti-Lapse, Descendants of Deceased Primary Beneficiary*

Transferor, subject to the Reservations from Transfer, at Transferor's death, grants and conveys the Property to Primary Beneficiary, to have and hold forever, but if any Primary



Beneficiary predeceases Transferor and was a descendant of either of Transferor's parents, Transferor, subject to the Reservations from Transfer, at Transferor's death, grants and conveys that deceased Primary Beneficiary's share to the surviving descendants of that Primary Beneficiary, to have and hold forever.

Continue with the following.

Select one of the following alternative clauses.

*Anti-Lapse, Surviving Descendants of Primary Beneficiary*

If Transferor is not survived by any Primary Beneficiary, Transferor, subject to the Reservations from Transfer, at Transferor's death, grants and conveys the Property to the surviving descendants of the deceased Primary Beneficiary if the deceased Primary Beneficiary is a descendant of the Transferor or either of Transferor's parents or to Alternative Beneficiary if the deceased Primary Beneficiary is not a descendant of the Transferor or either of Transferor's parents, to have and hold forever.

Or

*Alternative Beneficiaries*

If Transferor is not survived by any Primary Beneficiary, Transferor, subject to the Reservations from Transfer, at Transferor's death, grants and conveys the Property to Alternate Beneficiary, to have and hold forever.

If one or more alternative beneficiaries are designated, select one of the following alternative clauses.

*Surviving Alternative Beneficiary*

If any Alternative Beneficiary predeceases Transferor, Transferor, subject to the Reservations from Transfer, at Transferor's death, grants and conveys that deceased Primary Beneficiary's share in the Property to surviving Alternative Beneficiary.

Or

*Anti-Lapse, Descendants of Deceased Alternative Beneficiary*

If any Alternative Beneficiary predeceases Transferor and that deceased Alternative Beneficiary was a descendant of either of Transferor's parents, Transferor, subject to the Reservations from Transfer, at Transferor's death, grants and conveys that deceased Alternative Beneficiary's share in the Property to the surviving descendants of the deceased Alternative Beneficiary.

If a prior transfer on death deed is being revoked in whole or in part, select one of the following alternative clauses.

*Revocation of Prior Transfer on Death Deed*

Transferor revokes the Prior Transfer on Death Deed.

Or

*Partial Revocation of Prior Transfer on Death Deed*

Transferor revokes the Prior Transfer on Death Deed as to all Beneficiaries but only to the Property.

Continue with the following.

When the context requires, singular nouns and pronouns include the plural.

\_\_\_\_\_  
[Name of transferor]

Include acknowledgment.

*[Reserved]*

*[Chapter 7 is reserved for expansion.]*



# **TEXAS REAL ESTATE FORMS MANUAL**

**Third Edition**

**Volume 2**

A project of the  
Real Estate Forms Committee  
of the  
State Bar of Texas



Austin 2017

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**Chapter 11**  
**Home Equity Loan Documents**

**I. Home Equity Loans Generally**

§ 11.1	General Considerations .....	11-1
§ 11.2	Property with an Agricultural Use Tax Exemption .....	11-4
§ 11.3	Authorized Lenders .....	11-4
§ 11.3:1	Financial Institutions .....	11-4
§ 11.3:2	HUD-Approved Mortgagees .....	11-5
§ 11.3:3	VA-Guaranteed Loans .....	11-5
§ 11.3:4	State-Regulated Lenders .....	11-5
§ 11.3:5	Mortgage Banker or Mortgage Company .....	11-5
§ 11.3:6	Loans by Relatives .....	11-5
§ 11.3:7	Redlining Restrictions .....	11-6
§ 11.4	Restriction on Loan-to-Value Ratio .....	11-6
§ 11.5	Restrictions on Open-End Credit .....	11-7
§ 11.6	Restriction on Fees .....	11-9
§ 11.6:1	Interest .....	11-10
§ 11.6:2	Voluntary Optional Fees .....	11-11
§ 11.6:3	Fees to Originate .....	11-11
§ 11.6:4	Fees Absorbed by Lender .....	11-11
§ 11.6:5	Fees to Evaluate .....	11-11
§ 11.6:6	Fees to Maintain .....	11-11
§ 11.6:7	Fees to Record .....	11-12
§ 11.6:8	Fees to Insure .....	11-12
§ 11.6:9	Fees to Service .....	11-12
§ 11.6:10	Escrow Funds .....	11-12
§ 11.6:11	Fees to Subdivide or Replat .....	11-12
§ 11.6:12	Subsequent Events .....	11-12
§ 11.6:13	Secondary Mortgage Loans .....	11-13
§ 11.7	Restriction against Recourse Debt .....	11-13
§ 11.8	Restriction against Prepayment Penalties .....	11-13
§ 11.9	Restriction against Additional Collateral .....	11-13

CHAPTER CONTENTS

§ 11.9:1	Incidental Collateral	11-14
§ 11.9:2	Guaranty	11-14
§ 11.9:3	Cross-Collateral Provisions	11-14
§ 11.9:4	Right of Offset	11-14
§ 11.9:5	Undivided Interest in Tenancy in Common	11-14
§ 11.9:6	Homestead Exceeding Maximum	11-14
§ 11.9:7	Options to Purchase	11-15
§ 11.9:8	Distinguishing Rural and Urban Homestead	11-15
§ 11.9:9	Distinguishing Family and Single Adult Homestead	11-15
§ 11.10	Restriction on Number of Home Equity Loans	11-16
§ 11.11	Restriction on Frequency of Home Equity Loans	11-16
§ 11.12	Restriction on Amortization of Home Equity Loans	11-17
§ 11.12:1	Subsequent Events	11-17
§ 11.12:2	Prepaid Interest	11-17
§ 11.13	Restriction on Interest	11-17
§ 11.13:1	Variable Rate Notes	11-17
§ 11.13:2	Interest Rate	11-17
§ 11.14	Restriction on Basis for Acceleration	11-18
§ 11.14:1	Decrease in Value	11-18
§ 11.14:2	Cross-Default	11-18
§ 11.15	Restriction against Confession of Judgment or Waiver of Citation	11-18
§ 11.16	Restriction against Assignment of Wages	11-18
§ 11.17	Restriction against Same Creditor Payoffs	11-18
§ 11.17:1	Required Payment of Debt Secured by Homestead	11-18
§ 11.17:2	Payoffs of Other Creditors	11-18
§ 11.17:3	Other Restrictions Prohibited	11-19
§ 11.17:4	Voluntary Payoffs to Same Creditor	11-19
§ 11.18	Required Preloan Disclosures	11-19
§ 11.18:1	Twelve-Day Disclosure for Home Equity Loans	11-19
§ 11.18:2	One-Day Disclosure	11-20
§ 11.18:3	Bona Fide Emergency	11-20
§ 11.18:4	Other Good Cause	11-20
§ 11.19	Borrower's Right of Rescission	11-20

§ 11.19:1	Calculation of Rescission Period	11-21
§ 11.19:2	Truth in Lending Act	11-21
§ 11.20	Requirements for Loan Documents	11-21
§ 11.20:1	Written Contract Required	11-21
§ 11.20:2	Required Loan Conditions	11-21
§ 11.20:3	Required Disclosure	11-22
§ 11.20:4	Restriction against Blanks Left in Instruments	11-22
§ 11.20:5	Required Copies	11-22
§ 11.20:6	Required Signatorics	11-22
§ 11.20:7	Junior-Lien Requirements	11-23
§ 11.20:8	Home Loans	11-23
§ 11.21	Restriction on Place of Closing	11-23
§ 11.21:1	Offices of Lender	11-24
§ 11.21:2	Offices of Title Company	11-24
§ 11.22	Restriction on Release or Transfer of Note	11-24
§ 11.23	Restriction on Refinancing	11-24
§ 11.24	Forfeiture Provision	11-25
§ 11.25	Cure Provisions	11-25
§ 11.25:1	Violation of Restriction on Fees, Restriction on Prepayment Penalties, or Restriction on Interest	11-25
§ 11.25:2	Violation of Restriction on Loan-to-Value Ratio	11-26
§ 11.25:3	Violation of Restriction against Additional Collateral or Restriction on Qualifying Agricultural Homestead (for Pre-2018 Loans)	11-26
§ 11.25:4	Violation of Restriction against Prohibited Amount, Percentage, Term, or Other Provision	11-26
§ 11.25:5	Violation of Requirement for Delivery of Documents	11-27
§ 11.25:6	Violation of Requirement for Acknowledgment of Fair Market Value of Homestead	11-27
§ 11.25:7	Violation of Restriction on Number of Home Equity Loans	11-27
§ 11.25:8	“Catch-All” Cure Provision	11-27
§ 11.25:9	Noncurable Violations	11-28
§ 11.25:10	Burden of Proof to Show Cure	11-28
§ 11.25:11	Timeliness of Cure	11-28
§ 11.25:12	Requirements for Borrower’s Notification of Lender’s Failure to Comply	11-28

§ 11.25:13 Statute of Limitations . . . . . 11-29

§ 11.26 Nonseverability Provision . . . . . 11-29

§ 11.27 Truth in Lending . . . . . 11-29

**II. Reverse Mortgage Loans**

§ 11.31 Overview . . . . . 11-29

§ 11.32 Consensual Homestead Lien by Senior Homeowner and Spouse . . . . . 11-31

§ 11.33 Nonrecourse Debt . . . . . 11-31

§ 11.34 Advances Based on Equity in Homestead . . . . . 11-31

§ 11.35 No Repayment until Maturity Event Occurs; Grounds for Foreclosure . . . . . 11-32

§ 11.36 Permitted Uses of Loan Funds . . . . . 11-32

§ 11.37 Foreclosure under Power of Sale and by Court Order . . . . . 11-33

§ 11.38 No Closing until Delivery of Twelve-Day Consumer Notice and Certification  
of Required Counseling . . . . . 11-34

§ 11.39 Advances According to Authorized Payment Plan (Including Line-of-Credit Method) . . . . . 11-34

§ 11.40 Prohibitions against Use of Credit Cards and Similar Devices, Transaction Fees,  
and Unilateral Amendments of Terms . . . . . 11-34

§ 11.41 Future Advances; Priority of Lien . . . . . 11-34

§ 11.42 Interest; Shared Appreciation . . . . . 11-35

§ 11.43 Reducing or Failing to Make Advances; Forfeiture . . . . . 11-35

§ 11.44 Preemptive Authority . . . . . 11-35

§ 11.45 Title Insurance Considerations . . . . . 11-35

§ 11.46 Truth-in-Lending Disclosure Considerations . . . . . 11-36

§ 11.47 Federal Home Equity Conversion Mortgage (HECM) Loan Program . . . . . 11-37

**III. General Instructions for Completing Forms**

§ 11.51 Introduction . . . . . 11-38

§ 11.52 Instructions for Completing Notice Concerning Extensions of Credit . . . . . 11-38

§ 11.53 Instructions for Completing Home Equity Extension of Credit (Promissory Note) . . . . . 11-38

§ 11.54 Instructions for Completing Deed of Trust (Home Equity Loan) . . . . . 11-39

§ 11.55 Instructions for Completing Home Equity Certificate and Agreement . . . . . 11-40

§ 11.56 Instructions for Completing Election Regarding Right of Rescission . . . . . 11-40

Additional Resources . . . . . 11-41

*Forms*

Form 11-1	Notice Concerning Extensions of Credit . . . . .	11-1-1 to 11-1-6
Form 11-2	Home Equity Extension of Credit [Promissory Note] . . . . .	11-2-1 to 11-2-8
Form 11-3	Deed of Trust [Home Equity Loan] . . . . .	11-3-1 to 11-3-10
Form 11-4	Additional Clauses for Deeds of Trust (Home Equity Loan). . . . .	11-4-1 to 11-4-6
Clause 11-4-1	Refinance and Extension of Existing Texas Home Equity Deed of Trust. . . . .	11-4-1
Clause 11-4-2	Extension of Mechanic's Lien Contract and Security for Cash Advanced . . . . .	11-4-1
Clause 11-4-3	To Pay Ad Valorem Taxes and Security for Cash Advanced . . . . .	11-4-2
Clause 11-4-4	To Pay Income Taxes and Security for Cash Advanced . . . . .	11-4-2
Clause 11-4-5	Tax and Insurance Reserve or Escrow Account . . . . .	11-4-3
Clause 11-4-6	Assignment of Insurance Policies . . . . .	11-4-4
Clause 11-4-7	Evidence of Payment of Taxes . . . . .	11-4-4
Clause 11-4-8	Consumer Credit Insurance Notice . . . . .	11-4-4
Clause 11-4-9	Due-on-Sale Clause . . . . .	11-4-5
Clause 11-4-10	Subordinate Lien Clause . . . . .	11-4-5
Clause 11-4-11	Subordinate Lien Clause . . . . .	11-4-6
Form 11-5	Home Equity Compliance Certificate and Agreement. . . . .	11-5-1 to 11-5-8
Form 11-6	Election Regarding Right of Rescission. . . . .	11-6-1 to 11-6-2
Form 11-7	Important Notice to Borrowers Related to Your Reverse Mortgage . . . . .	11-7-1 to 11-7-2
Form 11-8	Notice Concerning Refinance of Existing Home Equity Loan to Non-Home Equity Loan under Section 50(f)(2), Article XVI, Texas Constitution . . . . .	11-8-1 to 11-8-2
Form 11-9	Affidavit of Compliance (Pursuant to Section 50(f)(2), Article XVI, Texas Constitution) . . . . .	11-9-1 to 11-9-4

*[Reserved]*

## Chapter 11

### Home Equity Loan Documents

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#### I. Home Equity Loans Generally

##### § 11.1 General Considerations

Article XVI, section 50, of the Texas Constitution allows a lien on homestead property to secure a home equity loan. In a departure from prior Texas practice, the validity of such a lien is generally not dependent on the use to which the loan proceeds are applied. Constitutional provisions authorizing home equity lending continue, however, to reflect a strong public policy solicited of the homestead as the last shield against destitution. Home equity loans are authorized only on satisfaction of a number of significant constitutional safeguards and restrictions aimed at protecting homestead owners.

These restrictions are nonseverable and non-waivable. Each must be satisfied to create a valid lien. Strict compliance with the requirements of the Texas Constitution is required. *See Toler v. Fertitta*, 67 S.W.2d 229, 230 (Tex. Comm'n App. 1934, holding approved).

**Regulatory Commentary:** Regulations and official commentary pertaining to home equity lending are available from the following different sources.

**Interpretive Rules of Finance Commission and Credit Union Commission:** The constitution authorizes the legislature to delegate the authority to issue interpretations of the home equity lending provisions of the constitution. *See* Tex. Const. art. XVI, § 50(u). The legislature, acting pursuant to this amendment, delegated interpretive authority over the home equity provisions to the Finance Commission of

Texas and the Texas Credit Union Commission, which in turn have jointly issued interpretations of home equity lending law. *See* Tex. Fin. Code §§ 11.308, 15.413. The interpretive rules are codified in 7 Tex. Admin. Code ch. 153, which may be accessed at [http://texreg.sos.state.tx.us/public/readtac\\$ext.ViewTAC?tac\\_view=4&ti=7&pt=8&ch=153&rl=Y](http://texreg.sos.state.tx.us/public/readtac$ext.ViewTAC?tac_view=4&ti=7&pt=8&ch=153&rl=Y). *See* 7 Tex. Admin. Code §§ 153.1-.96.

**Special Note on 7 Tex. Admin. Code Ch. 153:** On November 7, 2017, Texas voters approved SJR 60, which proposed several amendments to article XVI, section 50 of the Texas Constitution relating to home equity loans. In order to implement the adopted constitutional provisions, the Finance Commission and Credit Union Commission proposed the following changes to title 7, chapter 153 of the Texas Administrative Code: amending sections 153.1, 153.5, 153.14, 153.17, 153.84, and 153.86; adding new section 153.45; and repealing section 153.87 ("Proposed Rule"). These proposed changes are expected to be effective in 2018 after the revision of this manual is published. Practitioners are advised to refer to the Texas Secretary of State's website for the most current version of the home equity lending interpretations.

1. Lenders authorized by the constitution to make home equity extensions of credit are afforded substantial protections when relying on these interpretations. No act or omission is deemed to violate a home equity constitutional provision if the act or omission con-

forms to an interpretation of the provision that is in effect at the time of the act or omission and made by a state agency to which the power of interpretation is delegated or by an appellate court of this state or the United States. Tex. Const. art. XVI, § 50(u). However, the validity of certain of the interpretations has been successfully attacked in *Texas Bankers Ass'n v. Ass'n of Community Organizations for Reform Now (ACORN)*, 303 S.W.3d 404 (Tex. App.—Austin 2010, pet. granted). As a result, 7 Tex. Admin. Code §§ 153.1(11), 153.5(3) (defining interest) and § 153.5(4), (6), (8), (9), (12) (incorporating that definition) have been held constitutionally invalid, and 7 Tex. Admin. Code §§ 153.13, 153.18, 153.20, 153.22, 153.84 have been revised by the commissions to rectify invalid provisions found by the lower court. The Supreme Court of Texas granted a petition for review of the decision to determine (1) whether deference to agency interpretations should be the standard for appellate review when state agencies, in this case the Finance Commission of Texas and the Credit Union Commission, have been delegated the authority to interpret constitutional home equity provisions by the constitution and statutes of this state; (2) whether the Finance Code's definition of "interest" was properly applied in agency interpretations for purposes of determining the constitutional 3 percent fee cap; and (3) whether agency interpretations should be upheld that allow the signing of an equity loan by power of attorney instead of a required signing by homeowners at locations specified by the constitution. On unopposed motion, the court also ordered ACORN dis-

missed as a party because of its intervening dissolution and ordered the style of the cause corrected to read *Finance Commission of Texas et al. v. Valerie Norwood et al.*, No. 10-0121, 54 Tex. Sup. Ct. J. 1077 (Tex. Feb. 25, 2011). In an opinion issued on June 21, 2013, the Texas Supreme Court decided (1) that agency interpretations are subject to the same standard of review as courts of appeals, which are reviewed, as a matter of law, *de novo*; (2) that the agency interpretation of the 3 percent fee cap, tying it to the meaning of the Finance Code definition of "interest," was invalid ("interest" as used in that provision means the amount determined by multiplying the loan principal by the interest rate); and (3) that execution of a power of attorney used in an equity loan transaction must occur only at the office of a lender, an attorney at law, or a title company. *Finance Commission of Texas v. Norwood*, 418 S.W.3d 566 (Tex. 2013). On January 24, 2014, on a motion for rehearing filed by the Texas Bankers Association, a supplemental opinion was issued to clarify that per diem interest and discount points were not subject to the 3 percent fee cap and to reaffirm the court's decision relating to the execution of a power of attorney used in an equity loan transaction. *Finance Commission of Texas*, 418 S.W.3d at 595–97.

2. **1998 OCCC Commentary:** On October 7, 1998, the Office of the Consumer Credit Commissioner (OCCC), the Texas Department of Banking, the Savings and Loan Department, and the Credit Union Department issued their joint Regulatory Commentary on Equity Lending Procedures to provide initial guidance to lenders and consumers concerning



the regulatory views of the participating agencies. This regulatory commentary is referred to in this chapter as the "1998 OCCC Commentary."

Though the 1998 OCCC Commentary has been supplanted by title 7, chapter 153, of the Texas Administrative Code (Home Equity Lending) (*see* 29 Tex. Reg. 84 (2004)), it retains vitality by helping practitioners understand home equity lending restrictions. The 1998 OCCC Commentary is accessible on the OCCC website at <http://occc.texas.gov>.

3. **Department of Insurance Procedural Rules:** The Texas Department of Insurance adopted title insurance coverages specifically for home equity loans along with accompanying procedural rules: (1) Equity Loan Mortgage Endorsement (T-42) and accompanying Procedural Rule P-44 and (2) Supplemental Coverage Equity Loan Mortgage Endorsement (T-42.1) and accompanying Procedural Rule P-47. These endorsements and procedural rules provide underwriting guidelines that interpret the constitutional requirements for a home equity lien.

**Limitation of Chapter:** The commentary and forms in this chapter are applicable to a first-lien home equity loan. Texas Finance Code chapter 342 imposes additional duties, prohibitions, and disclosure requirements in connection with secondary mortgage loans. Attorneys are cautioned that some forms in this chapter may require modification for use with a secondary mortgage loan transaction.

**Model Forms and Regulations:** Home equity loans regulated by the OCCC must be written in plain language designed to be easily understood by the average consumer and must be printed in an easily readable font and type size. Tex. Fin. Code § 341.502(a). The Finance Commission

has adopted rules governing loan contracts subject to Texas Finance Code section 341.502, including model loan contracts that in certain cases may be required for use. *See* 7 Tex.

Admin. Code ch. 90. Home equity loans that are regulated by the OCCC and therefore subject to these plain language and model form requirements include only loans that (1) provide for an interest rate exceeding 10 percent a year, (2) are extended primarily for personal, family, or household use, (3) are a secondary mortgage loan, and (4) are made by a person engaged in the business of making such loans licensed by the OCCC (other than a bank, savings and loan, or credit union). Tex. Fin. Code §§ 341.101, 341.102–103, 342.005; Tex. Att’y Gen. Op. No. JC-0513 (2002). These requirements do not apply to first-lien home equity loans or home equity loans made by traditional lenders.

**Changes Effective January 1, 2018:** There are significant changes for home equity loans closed on or after January 1, 2018. These changes are summarized below:

1. The 3 percent cap on fees is lowered to 2 percent.
2. Survey, appraisal and title premium/title search fees are excluded from the 2 percent fee cap calculation.
3. The prohibition against home equity loans on property with an agricultural use tax exemption is eliminated.
4. A home equity loan may now be refinanced into a conventional loan if (a) at least one year has elapsed since the home equity loan was closed; (b) there is no advance of new money (except closing costs); (c) the new principal loan balance does not exceed 80 percent of the property’s fair market value on the day of refinance; and (d) the owner is provided with a new disclosure twelve days prior to closing,

advising owner of the risks of refinancing into a non-home equity loan.

5. For a home equity line of credit (HELOC), the provision that prohibits additional advances after the initial advance if the loan balance exceeds 50 percent of the fair market value of the property at closing is eliminated.

Where applicable, this chapter will identify provisions affected by the changes. These changes only apply to home equity loans closed on or after January 1, 2018. A home equity loan closed before January 1, 2018, should be analyzed under the old rules.

### § 11.2 Property with an Agricultural Use Tax Exemption

Before January 1, 2018, a lender could not make a home equity loan secured by property with an agricultural use tax exemption (except for property used primarily for dairy production). The January 1, 2018, constitutional amendments eliminate this prohibition and now permit home equity loans on homestead property that has an agricultural use tax exemption. There is, however, an apparent conflict with the language of Tex. Tax Code § 23.42(a-1), which provides that “an individual is not entitled to have land designated for agricultural use if the land secures a home equity loan described by Section 50(a)(6), Article XVI, Texas Constitution.” This conflict between the Texas Constitution and the Texas Tax Code will need to be resolved.

### § 11.3 Authorized Lenders

The seven categories of lenders that may make home equity loans are—

1. a bank, savings and loan association, savings bank, or credit union doing business under Texas or federal law, including a subsidiary of a bank, sav-

ings and loan association, savings bank, or credit union;

2. a federally chartered lending instrumentality;
3. a person approved as a mortgagee by the United States government to make federally insured loans;
4. a person licensed to make regulated loans under Texas law;
5. a seller financing all or part of the homestead purchase;
6. a person related to the borrower within the second degree of affinity or consanguinity; or
7. a person regulated under Texas law as a mortgage banker or mortgage company.

Tex. Const. art. XVI, § 50(a)(6)(P). To qualify as a mortgage company under category 7 above, a lender must obtain a license under Texas Finance Code chapter 156, the Residential Mortgage Loan Company Licensing and Registration Act. To qualify as a mortgage banker under category 7 above, a lender must obtain a license under Texas Finance Code chapter 157, the Mortgage Banker Registration and Residential Mortgage Loan Originator License Act. 7 Tex. Admin. Code § 153.17(3).

### § 11.3:1 Financial Institutions

Some questions remain regarding the eligibility of a financial institution chartered in a foreign state to make a home equity loan. Such institutions are generally considered to be exempt from Texas usury law under 12 U.S.C. § 1831d. Such institutions may make loans to Texas residents under the usury laws of their home states. The 1998 OCCC Commentary recognizes that a financial institution chartered and doing business in a foreign state is not subject to licensure as a Texas-regulated lender but offers no direct opinion on whether such an institution would be

recognized under the Texas Constitution as an authorized home equity lender. 1998 OCCC Commentary, at 9.

### § 11.3:2 HUD-Approved Mortgagees

A person approved by the United States government as a mortgagee to make federally insured loans is an authorized home equity lender. The Department of Housing and Urban Development (HUD) approves lenders to make federally insured loans. Federal Housing Administration (FHA) and HUD direct endorsement or non-supervised mortgagees are eligible to make home equity loans. Correspondents to a HUD-approved mortgagee are not authorized to make home equity loans unless they qualify under another category of authorized lender. 7 Tex. Admin. Code § 153.17(2). Unless a HUD-approved mortgagee is also a bank, savings and loan association, or credit union, the mortgagee must obtain a license from the Office of Consumer Credit Commissioner to make junior-lien home equity loans. Tex. Fin. Code §§ 124.005, 339.005, 341.103-.104, 342.051.

### § 11.3:3 VA-Guaranteed Loans

VA-guaranteed loans are backed by a partial guaranty by the Department of Veterans Affairs (VA). *See* 38 U.S.C. § 3703. Though guaranteed, these loans are not technically “federally insured.” The eligibility of VA lenders to make home equity loans remains unclear.

### § 11.3:4 State-Regulated Lenders

A lender authorized under Texas Finance Code chapter 341 must still meet both constitutional and statutory qualifications to make a home equity loan. Generally, a nondepository lender that makes, negotiates, arranges, or transacts a secondary mortgage loan governed by Finance Code chapter 342 must comply with the licensing provisions of that chapter. *See* 7 Tex.

Admin. Code § 153.17(1), (3). Residential mortgage loan originators licensed under chapter 156 of the Finance Code, federal and state banks, savings banks, and savings and loan associations are expressly exempt from the licensing requirements of chapter 342. *See* Tex. Fin. Code § 342.051(c)(1), (f). Exempt lenders are nevertheless thought to be subject to the substantive provisions of that chapter applicable to secondary mortgage loans. However, chapter 342 and other chapters of subtitle B, title 4, of the Finance Code do not apply to a credit union’s extension of credit unless the agreement that evidences the transaction specifically provides otherwise. *See* Tex. Fin. Code § 124.005.

### § 11.3:5 Mortgage Banker or Mortgage Company

A person regulated by the state of Texas as a mortgage banker or mortgage company is authorized by the constitution to make a home equity loan. Tex. Const. art. XVI, § 50(a)(6)(P)(vi).

### § 11.3:6 Loans by Relatives

A person related to the borrower within the second degree of affinity or consanguinity may make a home equity loan. Tex. Const. art. XVI, § 50(a)(6)(P)(v). The Texas Government Code gives instructions for computing degrees of affinity and consanguinity. *See* Tex. Gov’t Code §§ 573.021-.025. Individuals also are exempt under licensing and registration requirements of Texas Finance Code chapter 180 when offering or negotiating a residential mortgage loan with, or on behalf of, an immediate family member of the individual. *See* Tex. Fin. Code § 180.003(2). An “immediate family member” for this purpose means the spouse, child, sibling, parent, grandparent, or grandchild of an individual. The term also includes a stepparent, stepchild, and step-sibling and a relationship established by adoption. *See* Tex. Fin. Code § 180.002(8).

### § 11.3:7 Redlining Restrictions

A lender otherwise authorized to make a home equity loan is ineligible to make such a loan if found by a federal regulatory agency to have engaged in the practice of refusing to make loans because the debtor resides or the property is located in a certain area. Tex. Const. art. XVI, § 50(a)(6)(P). No provision is made in the constitution to rehabilitate or requalify lenders who were once found to have done this.

### § 11.4 Restriction on Loan-to-Value Ratio

The principal amount of a home equity loan when added to the aggregate total of all other indebtedness secured by a lien against the homestead may not exceed 80 percent of the fair market value of the homestead on the date that the extension of credit is made. Tex. Const. art. XVI, § 50(a)(6)(B). For the purpose of this calculation, the principal amount of a home equity loan is the sum of cash advances and charges made at the inception of the loan to the extent that the charges are financed in the principal amount of the note. 7 Tex. Admin. Code § 153.3(1). The 80 percent limit applies to the principal balance of all outstanding debt secured by the homestead on the date that the extension of credit is made. 7 Tex. Admin. Code § 153.3(2). The principal amount of a home equity loan does not include interest accrued after the date that the extension of credit is made (other than any interest capitalized and added to the principal balance on the date that the extension of credit is made) or amounts advanced by the lender after closing as the result of default, including, for example, ad valorem taxes, hazard insurance premiums, and authorized collection costs, including attorney's fees. 7 Tex. Admin. Code § 153.3(3). With a closed-end multiple advance loan, the principal balance includes contractually obligated future advances not yet disbursed. 7 Tex. Admin. Code § 153.3(4).

**Valuation:** To establish the fair market value of the homestead, the lender and owner must sign a written acknowledgment establishing its value on the date that the loan is made. Tex. Const. art. XVI, § 50(a)(6)(Q)(ix). A lender or assignee for value may conclusively rely on the fair market value established by this written acknowledgment if that value is established by appraisal or evaluation prepared in accordance with any applicable state or federal requirement and the lender or assignee has no actual knowledge at the time that the loan is made that the fair market value established by the written acknowledgment is incorrect. Tex. Const. art. XVI, § 50(h). The appraisal or evaluation should be attached to the written acknowledgement of value executed by the borrower at closing. *See* Procedural Rule P-47, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*.

Federal banking regulators have issued regulations establishing the minimum criteria for valuations of real estate. An "appraisal" by a state certified or licensed appraiser is generally required for transactions valued at more than \$250,000. An "evaluation" is required for transactions of \$250,000 and less. *See* 12 C.F.R. §§ 34.43(a), (b), 225.63(a), (b), 323.3(a), (b), 564.3(a), (b).

Federal Financial Institutions Examination Council Interagency Appraisal Evaluation Guidelines issued by federal banking regulators provide further specifications for an evaluation. The evaluation must (1) be written; (2) include the preparer's name, address, signature, and date of the evaluation; (3) describe the collateral, its condition, and its current and projected use; (4) describe the source of information used in the analysis; (5) describe the analysis and supporting information; and (6) provide an estimate of the real estate's market value, with any limiting conditions. *Interagency Appraisal and Evaluation Guidelines in Commercial Real Estate and Construction Lending*, Comptroller's Hand-

book, Appendix E (Comptroller of the Currency, November 1995), available at <https://www.occ.gov/publications/publications-by-type/comptrollers-handbook/index-comptrollers-handbook.html>. Qualifying evaluations and appraisals may be performed by lender employees or agents as long as the appraiser or evaluator is independent from the loan decision. Home equity loans made by FDIC-insured institutions must be supported by an appraisal or evaluation complying with these federal requirements.

In some cases, constitutional restrictions against additional collateral for home equity loans may require the partition, subdivision, and replatting of a tract into separate homestead and nonhomestead parcels. The proper apportioning of value between the homestead tract and the nonhomestead tract is essential to compliance with loan-to-value limits. This apportionment of value should take into account that the partitioned unsecured tract may have critical value to the homestead because it provides access to a public street or, conversely, it may have no value save in conjunction with the disposition of the entire property. *See In re Tinsley*, 217 B.R. 188 (Bankr. N.D. Tex. 1997).

### § 11.5 Restrictions on Open-End Credit

A home equity loan must be for a definite original principal amount. The credit may not be in the form of an open-end account that may be debited from time to time or from which credit may be extended from time to time *unless* the open-end account qualifies as a home equity line of credit. Tex. Const. art. XVI, § 50(a)(6)(F).

The 1998 OCCC Commentary provides that open-end credit is defined by Tex. Rev. Civ. Stat. art. 5069-1B.002(14) (since codified as Tex. Fin. Code § 301.002(a)(14)) as an account under a written contract between a creditor and an obligor in connection with which—

1. the creditor reasonably contemplates repeated transactions and the obligor is authorized to make purchases or borrow money;
2. interest may be charged from time to time on an outstanding unpaid balance; and
3. the amount of the credit that may be extended during the term of the account is generally made available to the extent that any outstanding balance is repaid.

1998 OCCC Commentary, at 5.

The 1998 OCCC Commentary provides that amounts advanced by the lender after closing as a result of default for ad valorem taxes, hazard insurance premiums, and authorized collection costs, including reasonable attorney's fees, are not contemplated repeated transactions that render the loan an open-end account. 1998 OCCC Commentary, at 5.

**Home Equity Line of Credit (HELOC):** A home equity loan may be of the open-end account type if it qualifies as a home equity line of credit or HELOC. Tex. Const. art. XVI, § 50(a)(6)(F). A HELOC is a form of open-end account that may be debited from time to time, under which credit may be extended from time to time, and under which the borrower requests advances, repays money, and reborrows money. 7 Tex. Admin. Code § 153.82. To qualify as a HELOC, a home equity loan must meet eight additional constitutional requirements:

1. **Borrower-Requested Advances.** With a HELOC, credit may be extended to the borrower from time to time. However, any advances must be borrower-requested. Tex. Const. art. XVI, § 50(t)(1). Only a borrower named in the HELOC may request an advance. An owner may request an advance only if also named as a borrower. A

HELOC may contain provisions that restrict which borrowers may request an advance or may require that all borrowers consent to the advance. 7 Tex. Admin. Code § 153.82.

2. **Minimum Advances.** No single debit or advance on a HELOC may be for less than \$4,000. Tex. Const. art. XVI, § 50(t)(2).
3. **Restriction against Credit/Debit Cards or Preprinted Checks Not Solicited by Borrower.** Advances on a HELOC may not be made by credit card, debit card, or similar device or by preprinted check unsolicited by a borrower. Tex. Const. art. XVI, § 50(t)(3). A borrower may from time to time specifically request preprinted checks for use in obtaining a HELOC advance but may not request the lender to periodically send preprinted checks to the borrower. A borrower may use a check reorder form, which may be included with preprinted checks, as a means of requesting a specific number of preprinted checks. 7 Tex. Admin. Code § 153.84(2).

A lender may offer one or more non-prohibited devices or methods for a borrower to request a HELOC loan advance. 7 Tex. Admin. Code § 153.84(1). The request may be made in person, but this is not required. 7 Tex. Admin. Code § 153.84(3). Permissible advance requests may be made by contacting the lender directly, by telephonic fund transfers, and by electronic fund transfers. Examples of devices to obtain a HELOC advance that are not "prohibited similar devices" to those specifically prohibited by the constitution include prearranged drafts, preprinted checks requested by the borrower, or written

transfer instructions. 7 Tex. Admin. Code § 153.84(1).

4. **Restriction on Fees.** The restriction on closing expenses generally applicable to home equity loans is equally applicable to HELOCs. All such fees must be charged or collected only at the time of the initial extension of credit. No fee may be charged or collected in connection with any subsequent debit or advance. Tex. Const. art. XVI, § 50(t)(4). For the purpose of this restriction, the date of the initial extension of credit is the closing date of the HELOC. 7 Tex. Admin. Code § 153.85(b).
5. **Restriction on Loan-to-Value Ratio.** The 80 percent restriction on loan-to-value generally applicable to home equity loans also applies to HELOCs. The maximum principal amount that may be extended under the line of credit, when added to the aggregate total of the outstanding principal balances of all indebtedness secured by the homestead on the date of the extension of credit, may not exceed the 80 percent loan-to-value limit. Tex. Const. art. XVI, § 50(t)(5). The maximum principal amount that may be outstanding on a HELOC at any time is determined as of the date of loan closing and does not change during the term of the HELOC. 7 Tex. Admin. Code § 153.86(3). The following amounts, when added together, must be equal to or less than 80 percent of the fair market value of the property: (1) the amount of the advance; (2) the principal amount of the HELOC at the time of the advance; and (3) the principal balance outstanding on all other debts secured by the homestead calculated as of the

date of closing of the HELOC. 7 Tex. Admin. Code § 153.86(1), (4).

6. **Loan-to-Value Limit on Additional Advances.** For HELOCs closed before January 1, 2018, no additional advances may be made if the total principal amount outstanding exceeds an amount equal to 50 percent of the fair market value of the homestead as determined on the date of the original extension of credit. Tex. Const. art. XVI, § 50(t)(6); 7 Tex. Admin. Code § 153.87. To calculate the total principal amount outstanding for the purposes of determining the 50 percent threshold, the following amounts are added: (1) the principal amount of the HELOC at the time of the proposed advance and (2) the principal balance outstanding on all other debts secured by the homestead calculated as of the date of closing of the HELOC. 7 Tex. Admin. Code § 153.86(1), (4). If the total principal amount of the HELOC exceeds the 50 percent limitation but then is paid down to an amount equal to or less than 50 percent of the fair market value, subsequent advances are permitted subject to all other HELOC restrictions (for example, minimum advance limit and loan-to-value limit). For HELOCs closed on or after January 1, 2018, this 50 percent loan-to-value restriction on additional advances is not applicable.
7. **Restriction against Unilateral Lender Amendments.** A lender or holder of a HELOC may not unilaterally amend the extension of credit. Tex. Const. art. XVI, § 50(t)(7).
8. **Restriction on Amortization.** A HELOC must be repayable in regular periodic installments. The installments must be repayable not more often than

every fourteen days and not less often than monthly. The installments must commence not later than two months from the date of the extension of credit. During the period in the loan term during which the borrower may request advances, the amount of each installment must be at least equal to the accrued interest on the loan. During the period in the loan term after which the borrower may not request additional advances, the amount of the installments must be substantially equal and sufficient to retire the indebtedness over the remaining term of the loan. Tex. Const. art. XVI, § 50(t)(8).

While installments on a HELOC are required to begin not later than two months from the date of the extension of credit, this does not apply when no advance is made at the time of closing. If no advance is made at closing, the repayment period is not required to begin until after the first advance. 7 Tex. Admin. Code § 153.88(b). While HELOC borrowers cannot be *required* to make loan installments more frequently than every fourteen days, this does not prohibit a borrower from voluntarily making payments on a schedule that is more frequent than that required by the lender. 7 Tex. Admin. Code § 153.88(e).

## § 11.6 Restriction on Fees

For home equity loans closed on or after January 1, 2018, closing expenses, other than interest or bona fide discount points used to buy down the interest rate, may not exceed 2 percent of the original principal amount of the loan. Loan closing expenses subject to this restriction include any fees paid to anyone to originate, evaluate, maintain, record, insure, or service the extension of credit, excluding fees for:

- (i) an appraisal performed by a third party appraiser;

- (ii) a property survey performed by a state registered or licensed surveyor;
- (iii) a state base premium for a mortgagee policy of title insurance with endorsements established in accordance with state law; or
- (iv) a title examination report if its cost is less than the state base premium for a mortgagee policy of title insurance without endorsements established in accordance with state law.

Tex. Const. art. XVI, § 50(a)(6)(E).

For home equity loans closed before January 1, 2018, closing expenses, other than interest, may not exceed 3 percent of the original principal amount of the loan. Appraisal fees, survey fees, title insurance premiums, and title search fees are included in the 3 percent loan fee calculation.

The 2 percent (3 percent for pre-2018 loans) fee limit applies only to charges, other than interest, that are required by the lender to be paid by the borrower or the borrower's spouse at the inception of the loan. Charges after loan closing for such matters as contractually permitted force-placed insurance premiums, returned check fees, late fees, and debt collection and foreclosure costs are subsequent events that are not subject to the 2 percent (3 percent for pre-2018 loans) fee limitation. *See* 7 Tex. Admin. Code § 153.5(15).

### § 11.6:1 Interest

Interest is specifically excluded from the 2 percent (3 percent for pre-2018 loans) fee limitation. Tex. Const. art. XVI, § 50(a)(6)(E). "Interest" had been interpreted by the Texas Finance Commission and Credit Union Com-

mission in 2004 for purposes of the 2 percent (3 percent for pre-2018 loans) fee limitation to mean interest as defined by Tex. Fin. Code § 301.002(a)(4) and as interpreted by Texas courts. *See* 7 Tex. Admin. Code §§ 153.1(11), 153.5(3). Finance Code section 301.002, which is located in the subtitle of the Code governing usury, defines interest in pertinent part as "compensation for the use, forbearance, or detention of money." *See* Tex. Fin. Code § 301.002(a)(4). However, the supreme court invalidated this broad interpretation of interest as contrary to the intent and meaning of the constitution in *Finance Commission of Texas v. Norwood*, 418 S.W.3d 566 (Tex. 2013). The case reached the supreme court on petition for review of *Texas Bankers Ass'n v. Ass'n of Community Organizations for Reform Now (ACORN)*, 303 S.W.3d 404 (Tex. App.—Austin 2010, pet. granted), which was so styled and popularly referred to as the "ACORN" case before the supreme court ordered ACORN to be dismissed as a party because of its intervening dissolution and the style of the cause corrected to read *Finance Commission of Texas et al. v. Valerie Norwood et al.*, No. 10-0121, 54 Tex. Sup. Ct. J. 1077 (Tex. Feb. 25, 2011).

By adopting a definition of interest that is tied to a statute that can be amended by the legislature from time to time, the supreme court found that the commission's interpretation "utterly defeats the clear purpose of constitutionalizing it, which was to place the [fee] limitation beyond the Legislature's power to change without ratification by the voters." *Finance Commission of Texas*, 418 S.W.3d at 587. Moreover, the supreme court found implausible that the legislature intended that the same definition of interest that applies to and strengthens the consumer protections of usury would be applied to determining the constitutional fee limitation, which it weakens, although both are intended as consumer protections. Instead, the court adopted what it characterized as a narrower and "well-understood meaning of 'interest': the amount



equal to the loan principal multiplied by the interest rate.” *Finance Commission of Texas*, 418 S.W.3d at 587. The court concluded that “consistent with the [legislative] history, purpose, and text of Section 50(a)(6)(E), ‘interest’ as used in that provision means the amount determined by multiplying the loan principal by the interest rate.” *Finance Commission of Texas*, 418 S.W.3d at 588. The court noted, however, that “this narrower definition of interest does not limit the amount a lender can charge for a loan, but instead limits only what part of the total charge can be paid in front-end fees rather than interest paid over time.” *Finance Commission of Texas*, 418 S.W.3d at 588 n.104.

Per diem interest and discount points are considered “interest” and not subject to the constitutional 2 percent (3 percent for pre-2018 loans) fee cap. *Finance Commission of Texas*, 418 S.W.3d at 596; 7 Tex. Admin. Code § 153.1(11). Discount points, to be excluded from the 2 percent (3 percent for pre-2018 loans) fee cap, must truly correspond to a reduced interest rate. Tex. Const. art. XVI, § 50(a)(6)(E).

#### § 11.6:2 Voluntary Optional Fees

Optional charges not required by the lender but paid at the sole discretion of the borrower are not fees subject to the 2 percent (3 percent for pre-2018 loans) limit. 7 Tex. Admin. Code § 153.5(1). If the borrower chooses to pay premiums for certain insurance coverage (for example, credit life, credit accident, or health insurance coverage), the premiums are not included within the 2 percent (3 percent for pre-2018 loans) limit. If the lender required these same coverages, the premiums would be fees subject to the 2 percent (3 percent for pre-2018 loans) limit.

#### § 11.6:3 Fees to Originate

Fees to originate a home equity loan are subject to the 2 percent (3 percent for pre-2018 loans)

limit. 7 Tex. Admin. Code § 153.5(6). Fees required to be paid by the borrower to third parties for separate and additional consideration for activities relating to originating the loan are fees subject to the 2 percent (3 percent for pre-2018 loans) limit. Attorney’s fees for document preparation and broker’s fees are considered fees to originate a loan. However, charges for loan origination that third parties absorb and do not require the borrower or borrower’s spouse to pay are not fees subject to the 2 percent (3 percent for pre-2018 loans) limit. 7 Tex. Admin. Code § 153.5(7).

#### § 11.6:4 Fees Absorbed by Lender

Charges that the lender absorbs that might otherwise be paid by the borrower or borrower’s spouse are not fees subject to the 2 percent (3 percent for pre-2018 loans) limit. 7 Tex. Admin. Code § 153.5(5).

#### § 11.6:5 Fees to Evaluate

Fees to evaluate the credit decision for a home equity loan are subject to the 2 percent (3 percent for pre-2018 loans) limit. This includes fees collected to cover the expenses of a credit report, flood zone determination, tax certificate, or inspection. 7 Tex. Admin. Code § 153.5(8).

For home equity loans closed on or after January 1, 2018, appraisal fees, survey fees, and title report fees are excluded from the 2 percent fee limit. Tex. Const. art. XVI, § 50(a)(6)(E)(i)–(iv). For home equity loans closed prior to January 1, 2018, appraisal fees, survey fees, and title report fees are included in the 3 percent fee limit.

#### § 11.6:6 Fees to Maintain

Fees to maintain a home equity loan are subject to the 2 percent (3 percent for pre-2018 loans) limit. Fees paid at the inception of the loan as compensation for performing a service for the life of the loan (for example, flood zone deter-

mination fee or tax service fee) are subject to the 2 percent (3 percent for pre-2018 loans) limit. Also included in the 2 percent (3 percent for pre-2018 loans) limit are fees to maintain the loan customarily paid at the inception of the home equity loan but deferred for later payment. 7 Tex. Admin. Code § 153.5(9).

### § 11.6:7 Fees to Record

Fees paid to public officials and others for the purposes of recording public documents evidencing the lien are fees subject to the 2 percent (3 percent for pre-2018 loans) limit. 7 Tex. Admin. Code § 153.5(10).

### § 11.6:8 Fees to Insure

For home equity loans closed on or after January 1, 2018, a mortgagee's title insurance premium with endorsements is excluded from the 2 percent fee limit. Tex. Const. art. XVI, § 50(a)(6)(E)(iii).

For home equity loans closed prior to January 1, 2018, premiums to insure a home equity loan (for example, title insurance) are fees subject to the 3 percent limit.

Premiums that the borrower or borrower's spouse are required to pay to purchase homeowner's insurance are not fees subject to the 2 percent (3 percent for pre-2018 loans) limit. This includes fire and extended coverage insurance and flood insurance. Though the failure to maintain insurance is generally an event of default on the home equity loan, it is not a condition to the extension of the credit. A lender may collect and escrow premiums for this insurance and include the premium in the periodic payment amount or principal amount. If the lender sells insurance to the borrower, the lender must also comply with all applicable law concerning the sale of insurance in connection with a mortgage loan. 7 Tex. Admin. Code § 153.5(16).

### § 11.6:9 Fees to Service

Any fee charged to or paid by an owner at the inception of the loan transaction to service a home equity loan is a fee subject to the 2 percent (3 percent for pre-2018 loans) limit. Also, subject to the 2 percent (3 percent for pre-2018 loans) limit are fees to service a loan customarily paid at the inception of the home equity loan but deferred for later payment. 7 Tex. Admin. Code § 153.5(12).

### § 11.6:10 Escrow Funds

A lender may provide escrow services in a home equity loan transaction. Funds deposited by the borrower into the escrow account for the payment of taxes, insurance premiums, maintenance or homeowner's association assessments, or similar purposes remain the property of the borrower and are not considered fees subject to the 2 percent (3 percent for pre-2018 loans) limit. However, a lender must not contract for a right of offset against escrow funds. This would result in a violation of prohibitions against additional collateral. 7 Tex. Admin. Code § 153.5(14).

### § 11.6:11 Fees to Subdivide or Replat

In some situations constitutional restrictions against additional collateral for a home equity loan may require the subdivision or replatting of a tract into separate homestead and non-homestead parcels. Fannie Mae policy for the purchase of home equity loans suggests that all lender-required costs incurred by the borrower to resurvey, subdivide, or replat the property are fees subject to the 2 percent (3 percent for pre-2018 loans) limit. Fannie Mae Lender Letter LL02-98 (May 28, 1998).

### § 11.6:12 Subsequent Events

The 2 percent (3 percent for pre-2018 loans) fee limit applies only to fees contracted for or paid

by an owner or owner's spouse at the inception of the loan. If the owner fails to perform covenants in the credit documents resulting in the lender's later assessment of costs to the owner, such postclosing costs are not subject to the 3 percent limit. Examples of these costs include lender-acquired homeowner's insurance, late charges, returned check fees, collection costs, and foreclosure costs. 7 Tex. Admin. Code § 153.5(15). However, if the loan is subsequently modified, the original loan and its subsequent modification are regarded as a single transaction for purposes of calculating the 2 percent (3 percent for pre-2018 loans) fee limitation (that is, any fees paid in connection with the loan modification when added to fees charged at loan closing cannot exceed the 2 percent (3 percent for pre-2018 loans) limitation). A modification for this purpose occurs when one or more terms of the loan are amended by written agreement between the lender and owner in which the original promissory note is not satisfied and replaced with a new debt instrument. *See* 7 Tex. Admin. Code § 153.14(2)(D).

#### § 11.6:13 Secondary Mortgage Loans

A secondary mortgage loan as defined by Tex. Fin. Code § 342.001(4) is subject to certain statutory fee limitations. *See* Tex. Fin. Code §§ 342.307, 342.308, 342.502. A home equity loan also constituting a secondary mortgage loan must comply with both the constitutional and statutory fee limitations. 7 Tex. Admin. Code § 153.5(13).

#### § 11.7 Restriction against Recourse Debt

A home equity loan must be a nonrecourse loan with no personal liability against the owner or the owner's spouse. Tex. Const. art. XVI, § 50(a)(6)(C). The lender may look to recover only against the homestead property and not pursue a deficiency judgment against any owner

or any owner's spouse. 7 Tex. Admin. Code § 153.4(2). If the owner or the spouse of the owner cosigns the home equity loan or consents to the home equity lien, the loan must not give the lender personal recourse against either the owner or the spouse. 7 Tex. Admin. Code § 153.4(1).

**Fraud:** The lender may have recourse against the owner or owner's spouse if the owner or spouse obtains the extension of credit by actual fraud. Tex. Const. art. XVI, § 50(a)(6)(C). Actual fraud requires a showing of dishonesty of purpose or intentional breach of duty that is designed to injure another or to gain an undue or unconscientious advantage. 7 Tex. Admin. Code § 153.4(3).

#### § 11.8 Restriction against Prepayment Penalties

Home equity loans must be capable of being paid in advance without penalty or other charge. Tex. Const. art. XVI, § 50(a)(6)(G). A lockout provision in a loan contract prohibiting a buyer from paying early is considered a prepayment penalty. 7 Tex. Admin. Code § 153.7(2).

There is no express constitutional prohibition against note provisions applying principal prepayment to the last of the principal payments becoming due or providing that any partial prepayment would not alter the amount or timing of scheduled monthly payments. 1998 OCCC Commentary, at 5.

#### § 11.9 Restriction against Additional Collateral

The homestead is the only collateral that may secure a home equity loan. The constitution expressly prohibits the credit from being secured by any other real or personal property. *See* Tex. Const. art. XVI, § 50(a)(6)(H).

**§ 11.9:1 Incidental Collateral**

A lender and an owner may enter into an agreement whereby a lender may acquire a security interest in items “incidental” to the homestead collateral. Items not considered additional real or personal property collateral are—

1. escrow funds for the payment of taxes and insurances;
2. an undivided interest in a condominium unit, a planned unit development, or the right to use and enjoy certain property owned by an association;
3. insurance proceeds related to the homestead;
4. condemnation proceeds;
5. fixtures; or
6. easements necessary or beneficial to the use of the homestead including access easements for ingress and egress.

7 Tex. Admin. Code § 153.8(1).

**§ 11.9:2 Guaranty**

A guaranty or obligation of a cosigner or surety is considered additional collateral not permissible in connection with a home equity loan. A guaranty of a home equity loan is also deemed inconsistent with Tex. Const. art. XVI, § 50(a)(6)(C) (prohibition against personal recourse). 7 Tex. Admin. Code § 153.8(2).

**§ 11.9:3 Cross-Collateral Provisions**

If the borrower has other loans with the home equity lender secured by nonhomestead property (for example, a loan to purchase a car or boat), the security documents on these other loans may sometimes provide that this other collateral secures all debt of the borrower with that lender.

Such a cross-collateral provision violates the constitutional prohibition against other collateral for a home equity loan. 7 Tex. Admin. Code § 153.8(4).

**§ 11.9:4 Right of Offset**

A contractual right of offset is prohibited additional collateral to a home equity loan. 7 Tex. Admin. Code § 153.8(3).

**§ 11.9:5 Undivided Interest in Tenancy in Common**

A debtor’s undivided interest in a tenancy in common will sustain a homestead claim. *See Laster v. First Huntsville Properties Co.*, 826 S.W.2d 125, 131 (Tex. 1991).

**§ 11.9:6 Homestead Exceeding Maximum**

An urban homestead consists of not more than ten contiguous acres of land located in a city, town, or village, together with improvements thereon. Rural homesteads may be up to one hundred acres for single adults and two hundred acres for a family. Tex. Const. art. XVI, §§ 50, 51; Tex. Prop. Code § 41.002. For a homestead established on a tract that exceeds the maximum allowable land area, the excess is considered additional real property, which may not secure a home equity loan. 7 Tex. Admin. Code § 153.8(5).

The inclusion of nonhomestead acreage may invalidate a home equity lien. Tex. Const. art. XVI, § 50(a)(6)(H). Procedural Rule P-47 requires as a condition to insuring a home equity lien against invalidity for inclusion of additional collateral that each owner execute an affidavit stating that (1) all the property is the homestead of the owner and owner’s spouse; (2) no portion of the property is nonhomestead; and (3) the owner and spouse claim no other property as homestead except as described in the affidavit.

Procedural Rule P-47, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*.

There is no provision in Tex. Const. art. XVI, § 50, upholding the validity of a home equity lien if the collateral includes only de minimus acreage in excess of the maximum acreage. Procedural Rule P-47 requires, as a condition to insuring against invalidity for inclusion of excess acreage, that the insured obtain a surveyor's certificate or letter stating the exact acreage or square footage of the collateral or that a computation of the acreage be made by a software program designed to compute acreage and generate drawings of land from the entry of boundary description calls.

#### § 11.9:7 Options to Purchase

If the home equity lien extends to the maximum permitted acreage, lenders may risk invalidating the lien by taking an option to purchase an adjacent property deemed necessary to realize full value for the collateral. Fannie Mae policy for the purchase of home equity loans prohibits the lender taking such an option on adjacent acreage under circumstances in which such an interest could be construed as additional collateral. Fannie Mae Lender Letter LL02-98 (May 28, 1998).

#### § 11.9:8 Distinguishing Rural and Urban Homestead

A home equity loan secured by property exceeding ten acres must be secured by a rural homestead. The proper classification of the homestead as rural or urban in certain cases is critical to the validity of the home equity lien.

Whether a homestead is urban or rural is a question of fact. The Texas legislature in 1999 enacted a detailed test for classifying homesteads as urban or rural. Tex. Prop. Code § 41.002(c). If a homestead does not meet the statutory definition of urban, it is classified as

rural. The statute is the exclusive vehicle for distinguishing between rural and urban homesteads. *In re Bouchie*, 324 F.3d 780 (5th Cir. 2003).

A homestead is considered to be urban if, at the time the designation is made, the property is—

- (1) located within the limits of a municipality or its extraterritorial jurisdiction or a platted subdivision; and
- (2) served by police protection, paid or volunteer fire protection, and at least three of the following services provided by a municipality or under contract to a municipality:
  - (A) electric;
  - (B) natural gas;
  - (C) sewer;
  - (D) storm sewer; and
  - (E) water.

Tex. Prop. Code § 41.002(c).

#### § 11.9:9 Distinguishing Family and Single Adult Homestead

A rural single adult homestead is limited to one hundred acres. A rural family homestead may include up to two hundred acres. Tex. Const. art. XVI, §§ 50, 51; Tex. Prop. Code § 41.002. Thus, a home equity loan secured by property exceeding one hundred acres may be secured by a family rural homestead only. The proper classification of the property in such cases as a family or single adult homestead is critical to the validity of the home equity lien.

No definition of the word *family* is supplied by the constitution. Case authorities provide that a family consists of (1) a group of people having the social status of a family living subject to one

domestic government; (2) with the head of the family legally or morally obligated to support at least one other family member; and (3) a corresponding dependence by the other family members for this support. *NCNB Texas National Bank v. Carpenter*, 849 S.W.2d 875, 879–80 (Tex. App.—Fort Worth 1993, no writ).

A married person with a living spouse can have only a family homestead interest. The spouses in a marriage together enjoy the benefits of the family homestead exemption. The constitution gives each spouse a separate and undivided possessory interest in the homestead, which may be lost only by death or abandonment and may not be compromised by either his heirs or the other spouse. Abandonment by one spouse of his homestead interest does not affect the character of the property as family homestead or the protection of the family homestead from judgment creditors as long as the other spouse occupies the property as a home. *Salomon v. Lesay*, 369 S.W.3d 540 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

### § 11.10 Restriction on Number of Home Equity Loans

There may be only one home equity loan or reverse mortgage on the owner's homestead at any given time regardless of the aggregate total outstanding debt against the homestead. There is no corresponding restriction on the number of purchase-money, improvement, tax, or owelty liens on the same homestead. Tex. Const. art. XVI, § 50(a)(6)(K); 7 Tex. Admin. Code § 153.10(1). If the property ceases to be the homestead of the owner, the lender may treat a previous home equity lien as a nonhomestead lien for the purposes of this restriction. 7 Tex. Admin. Code § 153.10(2).

### § 11.11 Restriction on Frequency of Home Equity Loans

Home equity loans cannot be closed more frequently than one year after the closing date of the last such loan made on the same property. Tex. Const. art. XVI, § 50(a)(6)(M)(iii). A home equity loan cannot be refinanced until the expiration of one year after its original closing date. 7 Tex. Admin. Code § 153.14(1)(A). A new home equity loan cannot be made before the expiration of one year even if the previous home equity loan has been paid in full. 7 Tex. Admin. Code § 153.14(1)(B).

**Effect of State of Emergency:** A home equity loan may be closed before the first anniversary date of a prior home equity loan on the same property if the owner on oath requests an earlier closing due to a state of emergency that (1) has been declared by the President of the United States or governor as provided by law and (2) applies to the area where the homestead is located. Tex. Const. art. XVI, § 50(a)(6)(M)(iii).

**Modification of Home Equity Loans:** A home equity loan may be modified before the expiration of one year from the date of the original closing. A modification is a transaction in which one or more terms of the home equity loan are modified but the note is not satisfied and replaced. 7 Tex. Admin. Code § 153.14(2). Any modification of a home equity loan must be agreed to in writing by both the borrower and lender unless the law otherwise requires. An example of a modification that is not required to be in writing is the modification required under the Servicemembers Civil Relief Act. 7 Tex. Admin. Code § 153.14(2)(A). Any modification of a home equity loan may not include the advance of additional funds nor include new terms that would not have been permitted by applicable law on the date of the original loan closing. 7 Tex. Admin. Code § 153.14(2)(B), (C). Any fees paid by the borrower for the mod-

ification are fees subject to the 2 percent (3 percent for pre-2018 loans) limit. 7 Tex. Admin. Code § 153.14(2)(D).

### § 11.12 Restriction on Amortization of Home Equity Loans

No balloon payments are allowed with closed-end home equity loans. The loan must be scheduled to be repaid in substantially equal periodic installments. The installments must be payable not more often than every fourteen days or any less often than monthly. The installments must begin no later than two months from closing. Each installment payment must equal or exceed the amount of accrued interest on the note as of the date of that installment and contribute to the repayment of some amount of principal. A home equity loan may not contain a “negative amortization” feature, in which scheduled payments in the early years of the loan are in an amount less than the accruing interest and the resulting interest deficits are capitalized into the loan principal. Tex. Const. art. XVI, § 50(a)(6)(L); 7 Tex. Admin. Code §§ 153.11, 153.16(2).

There are special amortization rules for home equity loans qualifying as a home equity line of credit. *See* Tex. Const. art. XVI, § 50(a)(6)(L)(ii). *See* section 11.5 above.

#### § 11.12:1 Subsequent Events

The constitutional restriction on amortization does not preclude a lender’s recovery of amounts made necessary by the borrower’s failure to perform loan covenants such as taxes, adverse liens, insurance premiums, collections costs, and similar items. 7 Tex. Admin. Code § 153.11(4).

#### § 11.12:2 Prepaid Interest

Scheduled periodic payments must begin no later than two months from the date that the extension of credit is made. This effectively lim-

its prepaid interest to a maximum of one period’s interest (first scheduled periodic payment would include interest in arrears for the preceding period). Tex. Const. art. XVI, § 50(a)(6)(L). Nothing in this provision limits or otherwise affects a lender’s ability to charge or collect mortgage discount points with a corresponding interest rate reduction.

### § 11.13 Restriction on Interest

Interest on a home equity loan may be for any fixed or variable rate authorized by statute. Tex. Const. art. XVI, § 50(a)(6)(O).

#### § 11.13:1 Variable Rate Notes

A home equity loan may be made on a variable interest rate tied to an external index. 7 Tex. Admin. Code § 153.16(3). If a variable interest rate is used, payment adjustments must be regularly made in amounts sufficient to fully amortize the outstanding loan balance in substantially equal successive payments between interest rate adjustments. 7 Tex. Admin. Code § 153.16(4)(A). The scheduled payment amount between each payment change date should be substantially equal and the amount of the payment should equal or exceed the amount of interest scheduled to accrue between each payment date and retire a portion of the principal. 7 Tex. Admin. Code § 153.16(4)(B). A home equity loan may contain an adjustable rate of interest that provides a maximum fixed interest rate pursuant to a schedule of stepped or tiered rates or provides a lower initial interest rate through the use of a discounted rate at the beginning of the loan. 7 Tex. Admin. Code § 153.16(5).

#### § 11.13:2 Interest Rate

Interest rates on home equity loans must comply with all applicable constitutional and statutory provisions. 7 Tex. Admin. Code § 153.16(1). Tex. Const. art. XVI, § 11, permits interest rates

of 10 percent or less on credit transactions unless alternative interest rates are specified by the legislature by statute. Interest rates of first-lien mortgages are nominally controlled by Tex. Fin. Code tit. 4, subtit. A. However, Congress by the enactment of the Depository Institutions Deregulation and Monetary Control Act of 1980 (12 U.S.C. § 1735f-7a) and the Alternative Mortgage Transaction Parity Act (12 U.S.C. §§ 3801-3806) preempted state interest rate limitations on first-lien residential mortgage loans. Secondary mortgage loans that exceed the constitutional rate of 10 percent are controlled by Texas Finance Code chapter 342, subchapter G. Chapter 124 of the Code and federal law provide for maximum rates on certain loans by credit unions. *See* 7 Tex. Admin. Code § 153.16(1).

#### **§ 11.14      Restriction on Basis for Acceleration**

The maturity of a home equity loan may not be accelerated because of a decrease in the market value of the homestead or the owner's default under some other indebtedness not secured by a prior valid encumbrance against the homestead. Tex. Const. art. XVI, § 50(a)(6)(J).

##### **§ 11.14:1    Decrease in Value**

The constitution does not prohibit the acceleration of a home equity loan because of a default by the owner of covenants contained in the loan, including covenants not to commit waste or remove property that indirectly bears on the market value of the homestead. 7 Tex. Admin. Code § 153.9(1).

##### **§ 11.14:2    Cross-Default**

A home equity loan can contain a cross-default provision only if the lien associated with the home equity loan is subordinate to the lien that is referenced by the cross-default clause. 7 Tex. Admin. Code § 153.9(2).

#### **§ 11.15      Restriction against Confession of Judgment or Waiver of Citation**

A home equity borrower may not be required to sign any confession of judgment or power of attorney allowing a confession of judgment or appearance for the debtor by a third party in a judicial proceeding. Tex. Const. art. XVI, § 50(a)(6)(Q)(iv); Tex. Civ. Prac. & Rem. Code § 30.001.

#### **§ 11.16      Restriction against Assignment of Wages**

A borrower may not be required to make an assignment of wages as security for a home equity loan. Tex. Const. art. XVI, § 50(a)(6)(Q)(ii).

#### **§ 11.17      Restriction against Same Creditor Payoffs**

A lender may not require a borrower to apply the loan proceeds of a home equity loan to pay off any other extension of credit by that same lender except one already validly secured by the homestead. Tex. Const. art. XVI, § 50(a)(6)(Q)(i). This provision precludes a creditor from demanding a security interest in the debtor's homestead as a condition for granting a forbearance, rearrangement, or recasting of an indebtedness not already secured by the homestead.

##### **§ 11.17:1    Required Payment of Debt Secured by Homestead**

A lender may require a debt secured by the homestead to be paid by the proceeds of a home equity loan. 7 Tex. Admin. Code § 153.18(2).

##### **§ 11.17:2    Payoffs of Other Creditors**

An owner is generally entitled to use the loan proceeds of a home equity loan for any lawful



purpose at the owner's discretion. The lender may require that the loan proceeds be used to pay off, prepay, or reduce existing debt to another lender (for example, if underwriting guidelines based on earnings require that the debtor's monthly obligations be reduced to qualify for a loan). *See* 7 Tex. Admin. Code § 153.18(2).

### § 11.17:3 Other Restrictions Prohibited

Other than requiring loan proceeds to be paid on debt secured by the homestead or requiring payment of debt to another lender, the home equity lender may not otherwise specify or restrict the use of the loan proceeds. 7 Tex. Admin. Code § 153.18(1).

### § 11.17:4 Voluntary Payoffs to Same Creditor

The constitution prohibits the home equity lender only from *requiring* the debtor to pay off existing nonhomestead debt to that same lender. An owner is not precluded from voluntarily paying off existing nonhomestead debt to the home equity lender. 7 Tex. Admin. Code § 153.18.

## § 11.18 Required Preloan Disclosures

### § 11.18:1 Twelve-Day Disclosure for Home Equity Loans

The Texas Constitution requires a preloan disclosure specifying certain restrictions on home equity lending. Tex. Const. art. XVI, § 50(g). The required disclosure is reproduced as form 11-1 in this chapter. The text of the preloan disclosure is intended as a summary of the borrower's rights under the constitution. In case of any conflict between the substantive provisions of Tex. Const. art. XVI, § 50, and the text of the preloan disclosure, the substantive provisions are controlling. A lender may supplement the consumer disclosure to clarify any discrepancies

or inconsistencies. Tex. Const. art. XVI, § 50(g); 7 Tex. Admin. Code § 153.51(2).

A home equity loan may not be closed before the twelfth calendar day after the later of the date that the borrower submits a loan application to the lender or the date that the lender provides the borrower with a preloan disclosure in a separate instrument. Tex. Const. art. XVI, § 50(g). 7 Tex. Admin. Code §§ 153.12, 153.51.

If the discussions with the borrower are conducted primarily in a language other than English, the lender must provide the borrower with an additional copy of the notice, before the loan closing, that is translated in the written language in which the discussions were conducted. Tex. Const. art. XVI, § 50(g). The Office of the Consumer Credit Commissioner has provided a Spanish language translation of the notice on its website at <http://occc.texas.gov>.

If the owner has executed a power of attorney in the manner described by title 7, section 153.15(2), of the Texas Administrative Code, then the lender may provide the consumer disclosure to the attorney-in-fact instead of providing it to the owner. 7 Tex. Admin. Code § 153.51(5).

**Computation of Time:** In computing the expiration of the twelve-day cooling-off period, the date that the disclosure is made is not counted. The twelve-day cooling-off period commences on the day after the lender provides the required preloan disclosure. The loan may be closed at any time on the twelfth day of the notice period. 7 Tex. Admin. Code § 153.12. The lender may establish verifiable procedures to ensure that the owner receives the required notice within the required time frame. 7 Tex. Admin. Code § 153.51(3).

The constitution does not prohibit the required notice being delivered by mail. Government regulations adopted a "mailbox rule." If a lender mails the notice to the borrower, a reasonable

period of time should be allowed for delivery. A three-calendar-day period not including Sundays and federal legal public holidays constitutes a rebuttable presumption for sufficient mailing and delivery. 7 Tex. Admin. Code § 153.51(1).

The required notice should be delivered to each owner and each owner's spouse. If delivery is on different dates, the twelve-day cooling-off period should be calculated from the last delivered notice.

**Loan Application:** An application is sufficient if submitted to an agent acting on behalf of a lender. 7 Tex. Admin. Code § 153.12(1). An application may be taken orally or electronically. It does not have to be in writing. 7 Tex. Admin. Code § 153.12(2).

### § 11.18:2 One-Day Disclosure

A home equity loan must not be closed until one business day after the owner of the homestead receives a copy of the final loan application, if not previously provided, and a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing. Tex. Const. art. XVI, § 50(a)(6)(M)(ii). The home equity loan may be closed at any time during normal business hours on the next business day following the calendar day on which the borrower receives the one-day preloan disclosure or any date thereafter. 7 Tex. Admin. Code § 153.13(6). A lender may satisfy this disclosure requirement by delivery to the borrower of a properly completed closing disclosure for a closed-end home equity loan. 7 Tex. Admin. Code § 153.13(3)(A). For an HELOC, a lender may satisfy this disclosure requirement by delivery to the borrower of a properly completed account-opening disclosure under Regulation Z. 12 C.F.R. § 1026.6(a).

### § 11.18:3 Bona Fide Emergency

If a bona fide emergency or other good cause exists and the lender obtains the written consent of the owner, the lender may provide the documentation to the owner or the lender may modify previously provided documentation on the day of closing. Tex. Const. art. XVI, § 50(a)(6)(M)(ii). The bona fide emergency must occur before the closing date. A home equity loan secured by a homestead in an area designated by the Federal Emergency Management Agency (FEMA) as a disaster area is an example of a bona fide emergency if the homestead is damaged during FEMA's declared incident period. 7 Tex. Admin. Code § 153.13(4).

### § 11.18:4 Other Good Cause

A condition that would cause the owner "financial impact or an adverse consequence" is an example of other good cause that would allow the required one-day preloan disclosure to be given or modified on the day of closing. 7 Tex. Admin. Code § 153.13(5)(A)(i). Another example of good cause occurs when the modified disclosure contains only a de minimus variance from the prior disclosure. To qualify as a de minimus variance, one or more of the actual disclosed fees, costs, points, and charges must be less than the initial preloan disclosure or, if greater than the amounts given in the initial preloan disclosure, not vary by the greater of \$100 or 0.125 percent of the principal amount of the home equity loan at closing. 7 Tex. Admin. Code § 153.13(5)(B)(i).

### § 11.19 Borrower's Right of Rescission

The homestead owner or the owner's spouse may rescind a home equity loan transaction without penalty or charge within three days after the date that the extension of credit is made. Tex. Const. art. XVI, § 50(a)(6)(Q)(viii). The borrower's spouse has this right of rescission

even if the spouse has no record title to or community property interest in the homestead. 7 Tex. Admin. Code § 153.25(1). Funding of a home equity loan should be delayed until after the expiration of the rescission period.

### § 11.19:1 Calculation of Rescission Period

The rescission period begins at closing (the signing of the loan documents) and continues for three calendar days. If the third calendar day falls on a Sunday or federal legal public holiday, the right of rescission is extended to the next calendar day that is not a Sunday or a federal legal public holiday. 7 Tex. Admin. Code § 153.25(2). Loan proceeds may be disbursed on the day following the expiration of the rescission period.

### § 11.19:2 Truth in Lending Act

A home equity loan transaction may be subject to the provisions of the Truth in Lending Act and Regulation Z, which permit the borrower three business days to rescind a mortgage loan in applicable transactions. For a complete discussion of right of rescission procedures under the Truth in Lending Act and Regulation Z, see chapter 12 in this manual. A lender's compliance with the right of rescission procedures of the Truth in Lending Act and Regulation Z will satisfy the requirements of the constitution for a home equity loan if the notices are given to all owners of the homestead and to each spouse of an owner. 7 Tex. Admin. Code § 153.25(3).

## § 11.20 Requirements for Loan Documents

### § 11.20:1 Written Contract Required

A home equity lien must be a voluntary lien created under a written agreement. Tex. Const. art. XVI, § 50(a)(6)(A).

### Plain Language and Font Requirements:

A home equity loan contract for a home equity loan regulated by the Office of the Consumer Credit Commissioner (OCCC) must be written in plain language designed to be easily understood by the average consumer and must be printed in an easily readable font and type size. See the discussion in section 11.1 above.

**Model Forms:** In addition to requiring plain-language contracts, the Finance Code empowers the Finance Commission to adopt rules governing loan contracts subject to that section and to adopt model loan contracts. Tex. Fin. Code § 341.502(b). A lender may use either a model contract or its own nonstandard contract if the nonstandard contract has been submitted to, but not disapproved by, the OCCC. See the discussion in section 11.1 above.

### § 11.20:2 Required Loan Conditions

The constitution states that a home equity loan is an extension of credit made on specified conditions. Some of the conditions are self-actuating. *See* Tex. Const. art. XVI, § 50(a)(6)(Q). Tex. Const. art. XVI, § 50(a)(6)(Q)(vi), requires that "the security instruments securing the extension of credit contain a disclosure that the extension of credit is the type of credit defined by Section 50(a)(6), Article XVI, Texas Constitution." Practitioners differ as to whether the remaining conditions listed at Tex. Const. art. XVI, § 50(a)(6)(Q), must be included in the home equity loan documents. The home equity extension of credit, form 11-2 in this chapter, includes the conditions. In the absence of definitive authority on this question, the attorney is cautioned to exercise professional judgment regarding the inclusion of these conditions. If the conditions are included in the home equity extension of credit, the conditions may affect the negotiability of the instrument under chapter 3 of the Texas Business and Commerce Code. However, there is some dated authority that a nonrecourse note is by its very nature nonnego-

tiable. *Hinckley v. Eggers*, 587 S.W.2d 448, 450 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

### § 11.20:3 Required Disclosure

The security documents for a home equity loan must disclose that the credit is an equity loan subject to Tex. Const. art. XVI, § 50(a)(6). This disclosure should appear in the mortgage instrument bold-faced, capitalized, underlined, or otherwise conspicuously set out from the surrounding material. 1998 OCCC Commentary, at 10.

### § 11.20:4 Restriction against Blanks Left in Instruments

The borrower in a home equity loan transaction may not sign any instrument in which blanks for substantive terms of agreement are left to be filled in. Tex. Const. art. XVI, § 50(a)(6)(Q)(iii). The prohibited blanks refer to loan contract terms and not signature blocks that must be signed to execute the document. 7 Tex. Admin. Code § 153.20. No guidance is provided regarding blanks for recording information unknown at the time of closing.

The constitution does not specify the instruments to which this restriction applies. Procedural Rule P-47 requires, as a condition to insuring a home equity lien against invalidity for impermissible blanks, that no such blanks appear in (1) the written acknowledgement of the fair market value, (2) the insured mortgage, (3) the promissory note, or (4) any affidavits of compliance with Tex. Const. art. XVI, § 50(a)(6). See Procedural Rule P-47, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*.

### § 11.20:5 Required Copies

The borrower at closing must receive a copy of the final loan application and all executed documents signed by the borrower at closing and

related to the extension of credit. Tex. Const. art. XVI, § 50(a)(6)(Q)(v). It is not required that signed copies be provided as long as the copies accurately reflect the documents that the borrower actually signed at closing. *Pelt v. U.S. Trust N.A.*, 359 F.3d 764, 768 (5th Cir. 2004).

Except for the requirement that the borrower receive a copy of the final loan application, the constitution does not require the lender to provide copies of documents signed by the borrower before closing but related to the extension of credit. See 7 Tex. Admin. Code § 153.22.

### § 11.20:6 Required Signatories

A written instrument creating a home equity lien must be signed by each owner and each owner's spouse (regardless of whether the spouse claims ownership or other interest in the property or is liable on the debt). Tex. Const. art. XVI, § 50(a)(6)(A). A spouse or owner who is not a maker of the note may consent to the lien by signing a written consent to the mortgage instrument. The consent may be included in the mortgage instrument or a separate document. 7 Tex. Admin. Code § 153.2(2).

A lender, at the lender's option, may require each owner and each owner's spouse to consent to the home equity loan. This is in addition to the consent required for the lien. 7 Tex. Admin. Code § 153.2(3).

A trustee may sell or encumber a homestead property for which the trustee holds title in a "qualifying trust" without the joinder of either spouse with a beneficial interest in the trust unless expressly prohibited by the instrument or court order creating the trust. A married person who transfers homestead property to the trustee of a qualifying trust, however, must comply with the requirements relating to the joinder of the person's spouse as provided by chapter 5 of the Texas Family Code. Tex. Prop. Code § 41.0021.

### § 11.20:7 Junior-Lien Requirements

If a home equity loan is subordinate to another lien on the property, the loan may also be governed by Texas Finance Code chapter 342 unless the interest rate is 10 percent per year or less. See Tex. Fin. Code §§ 342.001(4), 342.005. The loan documents must comply with the requirements applicable to secondary mortgage loans. 1998 OCCC Commentary, at 4–5. If the mortgagee has a license from the Office of Consumer Credit Commissioner, both the home equity extension of credit (promissory note) (form 11-2 in this chapter) and deed of trust (home equity loan) (form 11-3) must contain the name, mailing address, and telephone number of the OCCC. Tex. Fin. Code § 14.104. See clause 8-9-24 in this manual for an example of such a disclosure. Additionally, the printed language in the home equity extension of credit and the deed of trust must be modified slightly. In the deed of trust, in paragraph B.4., the phrase “in a form acceptable to Lender” must be struck so that the obligation reads “maintain an insurance policy that . . . .” This change is necessary because Finance Code sections 342.404, 342.405, and 342.413 prohibit a lender from approving the selection of insurance. See Tex. Fin. Code §§ 342.404, 342.405, 342.413. Also, Finance Code section 342.404 provides that if insurance is required in connection with a loan made under that chapter, the lender must furnish the borrower a statement like clause 11-4-8, which may be added to the home equity deed of trust as a numbered paragraph under “General Provisions.” See Tex. Fin. Code § 342.404.

The same chapter imposes other requirements if the mortgagee sells or procures insurance related to the loan at a rate not fixed or approved by the State Board of Insurance. See Tex. Fin. Code § 342.405.

Finance Code section 342.307 limits the enforcement fees that may be included in secondary mortgage loan documents. To comply

with this section for a home equity loan that is also a secondary mortgage loan, in the home equity extension of credit (promissory note) (form 11-2), the alternative indicated attorney’s fee provision should be used. In the deed of trust (form 11-3), in paragraph E.10., after the words “the hands of an attorney” add “who is not an employee of Lender.”

If the prior lien instrument contains a due-on-sale clause, the home equity deed of trust may violate the due-on-sale clause.

### § 11.20:8 Home Loans

A home equity loan may also be subject to the requirements of Texas Finance Code chapter 343, regulating certain types of “home loans.” See section 10.14 in this manual.

### § 11.21 Restriction on Place of Closing

A home equity loan may be closed only at the offices of the lender, an attorney at law, or a title company. Tex. Const. art. XVI, § 50(a)(6)(N). The place of closing must be the permanent physical address of the office or branch office of the lender, attorney, or title company so that the closing occurs in an authorized physical location other than the homestead. 7 Tex. Admin. Code § 153.15(1). This provision is intended to protect homeowners from coercive conduct in an equity loan closing conducted at the “kitchen table” of one’s home.

“Closing” as construed by the Texas Supreme Court in *Finance Commission of Texas v. Norwood*, 418 S.W.3d 566 (Tex. 2013), is a process that includes not just the final action of executing documents and funding the loan but also the initial action of obtaining required consents. Accordingly, the supreme court concluded that a homeowner’s executing a required consent or a power of attorney is part of the closing process and also must occur only at one of the locations

authorized by Tex. Const. art. XVI, § 50(a)(6)(N). *Finance Commission of Texas*, 418 S.W.3d at 588; *see also* 7 Tex. Admin. Code § 153.15(3). The court further concluded that the commission's interpretations of section 50(a)(6)(N) (which in part authorized a lender to accept a properly executed power of attorney allowing the attorney-in-fact to execute loan documents on behalf of the homeowner or to receive consents of the homeowner required under section 50(a)(6)(A) by mail or other delivery of the homeowner's signature) contradict the intent and purpose of the text of the provision and are therefore invalid. *Finance Commission of Texas*, 418 S.W.3d at 588–89. Although Fannie Mae generally allows a duly appointed attorney-in-fact to sign the security instrument or note on the borrower's behalf when certain conditions are met, its Selling Guide has been updated with respect to loans purchased on or after February 1, 2014, to prohibit the use of a power of attorney in cash-out refinance transactions and other transactions in connection with Texas section 50(a)(6) mortgage loans. *See* Fannie Mae, Selling Guide Announcement SEL-2013-08 (Oct. 22, 2013).

### § 11.21:1 Offices of Lender

A home equity loan may not be closed in the offices of a mere loan broker. To qualify as a lender, the party must advance funds directly to the borrower or be identified as the payee of the note. 7 Tex. Admin. Code § 153.15.

### § 11.21:2 Offices of Title Company

The offices of a title company include the leased or owned Texas office location of a title insurance company or (1) a direct operation, (2) a title insurance agent, or (3) an attorney conducting the attorney's business in the name of the title insurance company, direct operation, or title insurance agent (if the attorney or the attorney's bona fide employees are escrow officers under Tex. Ins. Code § 2501.003(4)). Procedural Rule

P-44, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*. The phrase *title company* refers to an agent of a title insurance company. A company merely performing title abstractions is not within the definition of a title company. *Rooms With A View, Inc. v. Private National Mortgage Ass'n, Inc.*, 7 S.W.3d 840, 846–47 (Tex. App.—Austin 1999, pet. denied).

### § 11.22 Restriction on Release or Transfer of Note

Within a reasonable time after repayment of a home equity loan, the lender must cancel and return the promissory note to the borrower and deliver in a recordable form a release of lien. If the loan is being refinanced, a lender may deliver an endorsement and assignment of the lien. Tex. Const. art. XVI, § 50(a)(6)(Q)(vii). The lender is required to provide these copies without charge. 7 Tex. Admin. Code § 153.24(1). The lender is not required, however, to record or pay for the recording of the release of lien. 7 Tex. Admin. Code § 153.24(2). Thirty days is a reasonable time for the lender to perform the duties required by this section. 7 Tex. Admin. Code § 153.24(3). An affidavit of lost note or imaged note, or equivalent, may be returned to the owner in lieu of the original note if the original note has been lost or imaged. 7 Tex. Admin. Code § 153.24(4).

### § 11.23 Restriction on Refinancing

The refinancing of a debt, any portion of which is secured by a home equity lien, may be made only by an extension of credit meeting all of the constitutional requirements of a home equity loan or reverse mortgage, unless the refinancing meets all of the following conditions of Tex. Const. art. XVI, § 50(f)(2):

1. **One-Year Prohibition.** The refinance is not closed before the first anniversary of the date the extension of credit was

- closed. Tex. Const. art. XVI, § 50(f)(2)(A).
2. **Prohibition on Additional Funds.** The refinanced extension of credit does not include the advance of any additional funds other than (a) funds advanced to refinance a debt described by Tex. Const. art. XVI, § 50(a)(1)–(7); or (b) actual costs and reserves required by the lender to refinance the debt.
  3. **Eighty Percent Loan-to-Value Limitation.** The refinance is of a principal amount that, when added to the aggregate total of all indebtedness secured by the homestead, does not exceed 80 percent of the fair market value of the homestead on the date of the refinance.
  4. **Twelve-Day Notice.** The lender provides the owner the notice contained in form 11-8 of this chapter within three business days of loan application and at least twelve days before the refinance is closed. Tex. Const. art. XVI, § 50(f)(2)(D).
  5. **Affidavit of Compliance.** An affidavit executed by the owner or the owner's spouse acknowledging that the requirements of Tex. Const. art. XVI, § 50(f)(2) have been met conclusively establishes that the requirements of Tex. Const. art. XVI, § 50(a)(4) have been met. See form 11-9 for a sample affidavit.

Additionally, any refinance of a debt against homestead to secure a debt for purchase money, taxes, owelty of partition, federal tax lien, or improvements that includes the advance of additional funds may not be secured by a valid lien against the homestead unless (1) the additional funds advanced are to pay taxes, an owelty of partition, or improvements, (2) the new loan is made as a home equity loan or reverse mortgage, or (3) the additional funds are for reason-

able costs necessary to refinance such debt. Tex. Const. art. XVI, § 50(e); see 7 Tex. Admin. Code § 153.41.

### § 11.24 Forfeiture Provision

Constitutional provisions for home equity lending contain a forfeiture provision for loans failing to meet constitutional requirements. If a lender or holder fails to comply with the lender's or holder's constitutionally mandated obligations within sixty days after notice of the violation by the borrower, the lender or holder forfeits all principal and interest on the note. Tex. Const. art. XVI, § 50(a)(6)(Q)(x). Only a violation of a constitutionally mandated provision in the extension of credit will trigger a forfeiture. *Vincent v. Bank of America*, 109 S.W.3d 856 (Tex. App.—Dallas 2003, no pet.) (citing an earlier version of Tex. Const. art. XVI, § 50(a)(6)(Q)(x)).

### § 11.25 Cure Provisions

If a lender fails to comply with constitutional restrictions on home equity lending, the lender may avoid a forfeiture of all principal and interest and enforce an otherwise invalid lien by timely curing the failure in the manner specified by the Texas Constitution. Constitutional curative measures are equally available to cure lender noncompliance in an original home equity loan or in the refinance of a home equity loan. Tex. Const. art. XVI, § 50(a)(6)(Q)(x); 7 Tex. Admin. Code § 153.95(a); *In re Adams*, 307 B.R. 549, 553–54 (Bankr. N.D. Tex. 2004). Cure procedures are specific to certain identified home equity lending violations:

#### § 11.25:1 Violation of Restriction on Fees, Restriction on Prepayment Penalties, or Restriction on Interest

In the event of a violation of the constitutional restrictions found at Tex. Const. art. XVI,

§ 50(a)(6)(E) (restriction on fees), Tex. Const. art. XVI, § 50(a)(6)(G) (restriction on prepayment penalties), or Tex. Const. art. XVI, § 50(a)(6)(O) (restriction on interest), the lender may cure the violation by refunding the borrower the amount of any overcharge. *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(a). The cure is effective when the lender credits the borrower's account with a refund, places the refund in the mail or other delivery carrier, or delivers the refund in person. A cure may also be made using any other delivery method agreed to by the borrower in writing after the lender receives notice of the lender's failure to comply. 7 Tex. Admin. Code § 153.94(a).

### **§ 11.25:2 Violation of Restriction on Loan-to-Value Ratio**

In the event of a violation of the constitutional restriction found at Tex. Const. art. XVI, § 50(a)(6)(B) (restriction on loan-to-value ratio), the lender may cure the violation by sending the borrower written acknowledgment that the lien is valid only to the extent that the loan amount does not exceed the loan-to-value restriction. *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(b). The cure is effective when the lender places the acknowledgment in the mail or other delivery carrier or delivers the acknowledgment in person. A cure may also be made using any other delivery method that the borrower agrees to in writing after the lender receives notice of the lender's failure to comply. 7 Tex. Admin. Code § 153.94(a).

### **§ 11.25:3 Violation of Restriction against Additional Collateral or Restriction on Qualifying Agricultural Homestead (for Pre-2018 Loans)**

In the event of a violation of the constitutional restrictions found at Tex. Const. art. XVI,

§ 50(a)(6)(H) (restriction against additional collateral), or Tex. Const. art. XVI, § 50(a)(6)(I) (restriction on qualifying agricultural homestead), the lender may cure the violation by sending the borrower an acknowledgment that the home equity loan is not secured by the prohibited additional collateral or nonqualifying agricultural property (for pre-2018 loans). *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(b). The cure is effective when the lender places the acknowledgment in the mail or other delivery carrier or delivers the acknowledgment in person. A cure may also be made using any other delivery method that the borrower agrees to in writing after the lender receives notice of the lender's failure to comply. 7 Tex. Admin. Code § 153.94(a).

### **§ 11.25:4 Violation of Restriction against Prohibited Amount, Percentage, Term, or Other Provision**

In the event of a violation involving some other prohibited amount, percentage, term, or other provision, the lender may cure the violation by sending written notice to the borrower amending the prohibited provision and adjusting the account of the borrower to ensure that the borrower is not required to pay more than an amount permitted by the constitution or that the borrower is not subject to any other term or provision prohibited by the constitution. *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(c). The cure is effective when the lender makes the necessary adjustment to the borrower's account and places the required notice in the mail or other delivery carrier or personally delivers the notice to the borrower. A cure may also be made using any other delivery method agreed to by the borrower in writing after the lender receives notice of the lender's failure to comply. 7 Tex. Admin. Code § 153.94(a).



### § 11.25:5 Violation of Requirement for Delivery of Documents

In the event of a violation of the constitutional restriction found at Tex. Const. art. XVI, § 50(a)(6)(Q)(v) (requirement for delivery to the borrower of copies of all documents signed by the borrower), the lender may cure the violation by delivering the required documents to the borrower. *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(d). The cure is effective when the lender delivers the required documents by placing them in the mail or other delivery carrier or by personally delivering the documents to the borrower. A cure may also be made using any other delivery method agreed to by the borrower in writing after the lender receives notice of the lender's failure to comply. 7 Tex. Admin. Code § 153.94(a).

### § 11.25:6 Violation of Requirement for Acknowledgment of Fair Market Value of Homestead

In the event of a violation of the constitutional restriction found at Tex. Const. art. XVI, § 50(a)(6)(Q)(ix) (requirement that lender and borrower sign a written acknowledgment of the fair market value of the homestead), the lender may cure the violation by obtaining the appropriate signatures on the required acknowledgment of fair market value. *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(d).

### § 11.25:7 Violation of Restriction on Number of Home Equity Loans

In the event of a violation of the restriction found at Tex. Const. art. XVI, § 50(a)(6)(K) (antistacking provision allowing only one home equity loan on a homestead at a time), the lender may cure the violation by sending the borrower a written acknowledgment that the accrual of interest and all of the borrower's obligations under the extension of credit are abated while

any prior lien remains secured by the homestead. *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(e). The cure is effective when the lender places the acknowledgment in the mail or other delivery carrier or personally delivers the acknowledgment to the debtor. A cure may also be made using any other delivery method agreed to by the borrower in writing after the lender receives notice of the lender's failure to comply. 7 Tex. Admin. Code § 153.94(a).

### § 11.25:8 "Catch-All" Cure Provision

In the event of a violation of constitutional restrictions on home equity lending that cannot be cured by any of the above cure provisions, the lender may cure the violation by refunding or crediting the borrower \$1,000 and offering to refinance the extension of credit for the borrower for the remaining term at no cost to the borrower, on the same terms, including interest, as the original extension of credit together with any modifications necessary to comply with the constitution. *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(f). The lender must make a \$1,000 refund or give a \$1,000 credit. 7 Tex. Admin. Code § 153.96(b)(1). Additionally, the lender must either modify or refinance. If modification is elected, the modification may be made without completing the requirements of a refinance. If a refinance is elected, the refinance must meet all constitutional requirements for a home equity loan. 7 Tex. Admin. Code § 153.96(b).

The catch-all cure provision presupposes the debtor's compliance and cooperation with the lender's attempted cure. The debtor may not block the lender's cure by the debtor's refusal to cooperate. The cure protection afforded the lender is complete on the refund or credit of the \$1,000 and the timely delivery of an offer to modify or refinance. 7 Tex. Admin. Code § 153.96; *In re Adams*, 307 B.R. 549, 560 (Bankr. N.D. Tex. 2004). The offer to modify or

refinance is delivered by placing the offer in the mail or with other delivery carriers or by personal delivery to the borrower. 7 Tex. Admin. Code § 153.96(a)(2). After the borrower accepts an offer to modify or refinance, the lender or holder must complete, or make a good-faith effort to complete, the modification or refinance with a reasonable time not to exceed ninety days. 7 Tex. Admin. Code § 153.96(d).

### § 11.25:9 Noncurable Violations

Any violation of Tex. Const. art. XVI, § 50(a)(6)(P) (prohibition against home equity loans made by an unauthorized lender), or Tex. Const. art. XVI, § 50(a)(6)(A) (requirement that home equity liens be created by written agreement with the consent of each owner and each owner's spouse), are noncurable and result in the forfeiture of all principal and interest on the home equity loan. An exception to this rule applies in the case in which one spouse fails to consent by signature to the home equity loan but subsequently does consent. *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(xi).

### § 11.25:10 Burden of Proof to Show Cure

The lender bears the burden of showing the lender's compliance with any cure provision relied on by the lender to cure a violation. 7 Tex. Admin. Code §§ 153.94(b), 153.96(c).

### § 11.25:11 Timeliness of Cure

To timely cure a violation of a home equity lending restriction, the lender must comply with the cure provisions within sixty days after the lender is notified of the violation by the borrower. Tex. Const. art. XVI, § 50(a)(6)(Q)(x). The sixty-day cure period begins the day after the lender or holder receives the borrower's notification to the lender or holder. If the borrower mails the notification to the lender or holder, a rebuttable presumption arises that the

delivery date is the date indicated on the certified mail receipt or other carrier-delivery receipt signed by the lender or holder. This does not preclude other methods of delivering the notification. However, with other methods of delivery, the borrower has the burden of proving delivery. *See* 7 Tex. Admin. Code §§ 153.92, 153.93. After the commencement of the sixty-day cure period, all calendar days are counted up to day sixty. If day sixty falls on a Sunday or a federal legal public holiday, the cure period is extended to include the next day that is not a Sunday or a federal legal public holiday. 7 Tex. Admin. Code § 153.92(a). If a borrower provides inadequate notice of the alleged violation, the sixty-day cure period does not begin to run. 7 Tex. Admin. Code § 153.92(b).

If a lender or holder appropriately cures the violation before receiving notice of the violation from the borrower, the cure is as effective as if the lender or holder had timely cured the violation after receiving notice from the borrower. 7 Tex. Admin. Code § 153.95(b).

### § 11.25:12 Requirements for Borrower's Notification of Lender's Failure to Comply

The borrower notifies the lender or holder of an alleged failure to comply with an obligation by taking reasonable steps to give notice of the failure. The notification must include an identification of the borrower, an identification of the loan, and a description of the alleged failure to comply. The notice need not cite the section of the constitution allegedly violated. 7 Tex. Admin. Code § 153.91.

To designate a point of contact for receipt of notice of failure to comply, the lender or holder may make at closing a reasonably conspicuous designation in writing of a location where the borrower may deliver written or oral notice of violation of home equity restrictions. The designation may include a mailing address, a physical

address, telephone number, e-mail, or other point of contact. The lender or holder may change this point of contact by conspicuous written notice to the borrower. The change is effective when sent by the lender or holder. 7 Tex. Admin. Code § 153.93.

The four-year residual limitations period of Tex. Civ. Prac. & Rem. Code § 16.051 applies to constitutional infirmities under section 50(a)(6). See *Priester v. JP Morgan Chase Bank*, 708 F.3d 667 (5th Cir. 2013). Because cure provisions exist in the Texas Constitution, the court concluded that homestead liens that are constitutionally defective are voidable rather than void ab initio. To the extent that a claim under the Texas Constitution renders a defective homestead lien voidable, rather than void, once the limitations period has passed the lien is no longer voidable and is then valid.

### § 11.25:13 Statute of Limitations

The Texas Supreme Court ruled in 2016 that the four-year residual limitations period of Tex. Civ. Prac. & Rem. Code § 16.051 does not apply to constitutional infirmities under Tex. Const. art. XVI, § 50(a)(6). *Wood v. HSBC Bank USA, N.A.*, 505 S.W.3d 542 (Tex. 2016). Consequently, a borrower may bring an action against his home equity lender for constitutional violations at any time during the life of the loan if the lender fails to correct the alleged defects after

notification of the defect. This Texas Supreme Court decision reversed the precedent set in *Priester v. JP Morgan Chase Bank*, 708 F.3d 667 (5th Cir. 2013), which applied the four-year residual limitations period to home equity loan violations.

### § 11.26 Nonseverability Provision

Home equity lending is authorized only on condition that none of the constitutional restrictions ever be preempted by federal law. To this end, Tex. Const. art. XVI, § 50(j), contains a “poison pill” provision that all home equity provisions are nonseverable and that none would have been enacted without the other. If any home equity provision is held to be preempted by federal law, all home equity lending provisions are rendered invalid. In such a case, a savings provision upholds the validity of home equity loans made before the decision holding any aspect of home equity lending preempted by federal law. Tex. Const. art. XVI, § 50(j).

### § 11.27 Truth in Lending

A home equity loan may be subject to the Truth in Lending Act and its accompanying Regulation Z. See the discussion of this subject in section 11.19:2 above and chapter 12 in this manual.

*[Sections 11.28 through 11.30 are reserved for expansion.]*

## II. Reverse Mortgage Loans

### § 11.31 Overview

Reverse mortgage loans secured on Texas homestead properties were first authorized by constitutional amendment effective January 1, 1998.

Tex. Const. art. XVI, § 50(a)(7), authorizes reverse mortgages, and Tex. Const. art. XVI, § 50(k)–(r), (v), defines and governs them. There are currently no enabling statutes that implement these constitutional provisions or

interpretive rule making, although the power to interpret constitutional reverse mortgage provisions has been expressly delegated to the Texas Finance Commission and the Texas Credit Union Commission. *See* Tex. Fin. Code §§ 11.308, 15.413.

Reverse mortgages are a type of home equity loan for which only senior homeowners, age sixty-two or older, are eligible. Tex. Const. art. XVI, § 50(k)(2). The loans are meant to provide senior homeowners the resources needed to remain in their homes for their remaining lives, if they so desire, by converting their home equity into annuity-like periodic payments, or advances, to the homeowners for life (referred to as a "tenure" option) or, if preferred, a term of years (referred to as a "term" option) that may be used to pay for housing costs, medical care, and other costs of living. A homeowner under a reverse mortgage may also elect to receive a single advance at loan settlement (referred to as a "lump sum" option) or multiple unscheduled advances under a line of credit. Tex. Const. art. XVI, § 50(p).

A reverse mortgage is a nonrecourse obligation generally based on an owner's equity in the owner's homestead property, and the owner is not required to demonstrate general creditworthiness or a source of income or other assets with which to repay the loan. Any Texas resident age sixty-two or older who owns and occupies as a principal dwelling a single-family home, a qualified condominium unit or townhouse, or a permanently attached and qualified manufactured home in which there is sufficient appraised home equity should qualify for a reverse mortgage. *See* Tex. Const. art. XVI, § 50(k)(2), (4). Home equity means the appraised market value of the homestead property minus the outstanding balance of all mortgages and liens secured on the homestead property. *See* Tex. Const. art. XVI, § 50(a)(6)(B).

An owner generally is not obligated to make any repayments of principal or interest during the term of a reverse mortgage as long as the owner continues to occupy the home as a principal residence and keeps property tax and insurance payments current. Tex. Const. art. XVI, § 50(k)(6). Advances made to a homestead owner under a reverse mortgage accrue interest, including interest on interest, until the occurrence of a maturity event, when the full loan balance of principal and interest is repaid to the lender in one final lump-sum payment, typically from sales proceeds when the homestead property is sold by the owner or by the owner's estate after the owner dies. Maturity events are strictly limited by the constitution. A reverse mortgage generally cannot be called due and payable until (1) the homeowner sells or transfers the homestead property; (2) the homeowner permanently abandons the property for twelve consecutive months without obtaining the lender's prior approval or, if the loan is used for the purchase of a homestead property, the borrower fails to timely occupy the homestead property as the borrower's principal residence within a specified period after loan closing stipulated in the written loan agreement; or (3) the homeowner (or, if married, the last of the homeowners) dies. Tex. Const. art. XVI, § 50(k)(6)(A)–(C). The lender in some cases may, however, call the loan due if discovering the owner has committed actual fraud in obtaining the loan; has defaulted on contractual obligations in the deed of trust to repair and maintain, pay taxes and assessments on, or insure the homestead property; or has failed to maintain the lender's first-lien priority on the homestead property. Tex. Const. art. XVI, § 50(k)(6)(D).

Texas procedural rules provide the authority for title insurance companies to insure the validity of reverse mortgage liens and for lenders to foreclose reverse mortgage liens under conditions permitted by the Texas Constitution. Specifically, the Texas Commissioner of Insurance

has adopted a reverse mortgage endorsement (T-43) to the standard mortgagee's form of title insurance policy in Procedural Rule P-45, and the Supreme Court of Texas has adopted revisions to rules 735 and 736 of the Texas Rules of Civil Procedure to provide for an expedited procedure for foreclosing reverse mortgage loans requiring a court order as a condition to foreclosure. *See* Tex. R. Civ. P. 735–736; Procedural Rule P-45, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*.

Although the Texas reverse mortgage is a particular type of home equity loan, it is important to note that the numerous conditions imposed on home equity loans under section 50(a)(6) described in part I. of this chapter are inapplicable to reverse mortgages authorized by section 50(a)(7). The limitations under section 50(a)(6), for example, restricting the permitted loan-to-value ratio (80 percent) and fees and charges (3 percent) and imposing cooling off and rescission rights and numerous other conditions, are not carried over to the reverse mortgage provisions. Reverse mortgages nevertheless have their own subset of consumer protections spelled out in subsections 50(k)–(p) and 50(v), all of which must be strictly observed to create a valid and enforceable lien on a homestead property.

### § 11.32 Consensual Homestead Lien by Senior Homeowner and Spouse

A reverse mortgage loan may be made only to, and only with the consent of, a person who is, or whose spouse is, sixty-two years of age or older. It may be secured by only a voluntary lien on the owner's homestead property created by a written agreement between the lender, each owner of the homestead property, and the spouse of each owner. Each owner's spouse must consent to the lien securing a reverse mortgage regardless of whether the spouse claims an ownership interest in the property or is an applicant for, or obligor

on, the debt. Any homestead property, urban or rural, is eligible as security for a reverse mortgage (with no disqualifying exception for homestead property designated for agricultural use for property tax purposes, unlike Tex. Const. art. XVI, § 50(a)(6), home equity loans). Tex. Const. art. XVI, § 50(k)(1), (2).

### § 11.33 Nonrecourse Debt

A reverse mortgage must be made without recourse for personal liability against any owner or the spouse of any owner. Tex. Const. art. XVI, § 50(k)(3). A reverse mortgage is typically repaid from sales proceeds on the sale of the homestead property by the borrower or the sale by the borrower's estate after the borrower, or the last of the borrowers, dies. If a reverse mortgage is not paid when due, the lender or note holder must look to recovery against the homestead property under its security interest as its exclusive remedy. The homeowner, therefore, will never owe more than the loan balance or the value of the homestead property, whichever is less, and no assets other than the homestead property may be used to repay the debt. Neither the borrower's estate nor the heirs of the estate have any liability for any deficiency that may result from the sale of the homestead property. Tex. Const. art. XVI, § 50(k)(3).

### § 11.34 Advances Based on Equity in Homestead

Advances under a reverse mortgage must be based on the equity in the owner's homestead property or the equity the owner will invest when purchasing a homestead property that the borrower will occupy as a principal residence. Tex. Const. art. XVI, § 50(k), was amended effective January 1, 2014, to authorize a reverse mortgage to be used to finance the purchase of a Texas homestead, and thereby to qualify Texas homeowners for the first time to participate in

the Federal Housing Administration's "HECM for Purchase" loan program. *See* Tex. S.J. Res. 18, 83d Leg., R.S., 2013 Tex. Gen. Laws Pamph. 3, at A-7. Owners are not disqualified for a reverse mortgage because they lack income or other assets for repaying the loan. Tex. Const. art. XVI, § 50(k)(4). For purposes of determining eligibility under any state statute relating to payments, allowances, benefits, or services on a "means-tested" basis (including expressly supplemental security income, low-income energy assistance, property tax relief, medical assistance, and general assistance), reverse mortgage advances made to the borrower are considered loan proceeds and not income, and undisbursed funds under a reverse mortgage loan are considered equity in the home and not loan proceeds. Tex. Const. art. XVI, § 50(o).

**§ 11.35      No Repayment until  
Maturity Event Occurs;  
Grounds for Foreclosure**

The borrower must have no legal obligation to repay a reverse mortgage, or any portion of its principal or interest, until the loan balance is due on the occurrence of one of the following maturity events: (1) the last surviving borrower dies, (2) the homestead property is sold or transferred, or (3) all borrowers cease occupying the homestead property as their principal residence for twelve consecutive months (without the lender's prior written approval) or, if the loan is used for the purchase of a homestead property, the borrower fails to timely occupy the homestead property as the borrower's principal residence within a specified period after loan closing stipulated in the written agreement creating the lien on the property. The lender may also require payment of all principal and interest if the borrower commits actual fraud in connection with the loan; defaults on an obligation provided for in the loan documents to repair and maintain, pay taxes and assessments on, or insure the homestead property; or fails to maintain the pri-

ority of the lender's lien on the homestead property. Tex. Const. art. XVI, § 50(k)(6)(A)–(D).

A reverse mortgage debt may be accelerated and declared due and payable only after the occurrence of one of the foregoing constitutional grounds for foreclosure, notice by the lender to the borrower of a claimed ground for foreclosure, and an opportunity for the borrower to remedy the claimed ground for foreclosure in the manner and within a period stipulated by the Texas Constitution. The lender must first give written notice to the borrower that one of these grounds for foreclosure exists and give the borrower an opportunity to cure the ground for foreclosure. Notice must be given in the same manner provided for a notice by mail related to the foreclosure of liens for home equity loans under section 50(a)(6). The owner must be given at least thirty days to either (1) remedy the condition creating the ground for foreclosure, (2) pay the reverse mortgage debt secured by the homestead property from proceeds of the sale of the homestead property or from any other sources, or (3) convey the homestead property to the lender by deed in lieu of foreclosure. A cure period of only twenty days must be given the owner if the claimed ground for foreclosure is a failure of the borrower to maintain the priority of the reverse mortgage lien under section 50(k)(6)(D)(iii). Tex. Const. art. XVI, § 50(k)(10).

**§ 11.36      Permitted Uses of Loan  
Funds**

Proceeds from a reverse mortgage may be used by senior homeowners for any purpose, although most often loan proceeds are regarded as a supplement to Social Security benefits and pension payments and used by homeowners to maintain their homes in a good state of repair, pay property taxes and insurance when due, and defray medical and other ordinary costs of living. Significantly, advances under a reverse mortgage are not taxable as income and gener-

ally do not affect senior homeowners' eligibility for Social Security or Medicare benefits. *See* Tex. Const. art. XVI, § 50(o). (However, senior homeowners electing a lump-sum advance of proceeds should seek counseling regarding their continued eligibility for Medicaid benefits if retaining the advance as a liquid asset.)

### § 11.37 Foreclosure under Power of Sale and by Court Order

Foreclosure based on either of the grounds set out in Tex. Const. art. XVI, § 50(k)(6)(A), (B), that all borrowers have died or that the homestead property securing the loan has been sold or otherwise transferred, may be carried out under the power of sale contained in the deed of trust securing the loan and the requirements of section 51.002 of the Texas Property Code, pertaining to contractual liens. Tex. Const. art. XVI, § 50(k)(11).

If the foreclosure is for any other ground, however, a reverse mortgage lien may be foreclosed on only by court order pursuant to rules 735 and 736 of the Texas Rules of Civil Procedure. Tex. Const. art. XVI, § 50(k)(11). Rule 735 provides several judicial foreclosure options for a lender foreclosing a reverse mortgage on grounds other than under section 50(k)(6)(A) or (B). Under rule 735, the lender may file (1) a suit seeking judicial foreclosure, (2) a suit or counterclaim seeking a final judgment that includes an order allowing foreclosure under the security instrument, or (3) an application for an order allowing foreclosure under rule 736 pertaining to expedited foreclosure proceedings. Tex. R. Civ. P. 735. Under the expedited procedures of rule 736, a lender may file a verified application in the district court of the county in which the homestead property is located seeking a court order allowing a foreclosure in accordance with the power of sale under the security instrument and section 51.002 of the Property Code. Under the rule, if no response is timely made, the court

must grant the application without further notice or hearing if the application complies in form and content with the requirements of the rule and a copy of the notice and certificate of service has then been on file with the clerk of the court for at least ten days. If a response is made, however, a hearing on the application must be set promptly after reasonable notice to the parties and, in any case, not later than ten business days after a request for hearing by either party. The rule calls for a streamlined hearing in which no discovery is allowed and the court's action in granting or denying the order may not be appealed. On hearing, if the court determines that the applicant has proved that a valid debt exists that is secured by a valid lien on the homestead property created under Texas Constitution, article XVI, section 50(a)(7), the court must grant the application and issue an order to proceed with foreclosure pursuant to the power of sale. Tex. R. Civ. P. 736.

A four-year limitations period applies to actions to foreclose a reverse mortgage lien on a homestead property once a ground for foreclosure has occurred. On the expiration of the four-year limitations period, the real property lien and a power of sale to enforce it become void. *See* Tex. Civ. Prac. & Rem. Code § 16.035(a), (d). Practitioners are cautioned that the accrual date for such an action is not the date that the reverse mortgage debt is accelerated and declared due and payable, but instead the lender's cause of action to enforce a reverse mortgage lien accrues when one or more of the constitutional conditions to foreclosure has occurred. If the ground for foreclosure is the death of the last surviving borrower, the cause of action accrues on the date of that death—a fact that could be undiscovered by the lender for some extended period of time. *See Financial Freedom Senior Funding Corp. v. Horrocks*, 294 S.W.3d 749 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

**§ 11.38 No Closing until Delivery of Twelve-Day Consumer Notice and Certification of Required Counseling**

A reverse mortgage may not be closed before the twelfth calendar day after the date the lender provides to the prospective borrower a statutory notice on a separate instrument, which the lender or originator and the borrower must sign for the notice to take effect. See form 11-7 in this chapter for the text of the notice.

Furthermore, a reverse mortgage may not be closed until the prospective borrower and the spouse of the prospective borrower attest in writing that the prospective borrower and the spouse of the prospective borrower received counseling regarding the advisability and availability of reverse mortgages and other financial alternatives that was completed not earlier than the 180th day nor later than the fifth day before the date the extension of credit is closed. See Tex. Const. art. XVI, § 50(k)(8), (9).

**§ 11.39 Advances According to Authorized Payment Plan (Including Line-of-Credit Method)**

The proceeds of a reverse mortgage must be disbursed to the borrower in one or more payments of principal, generally referred to as advances, according to an agreed payment plan. The total loan obligation, generally referred to as the balance, is the sum of all advances due at loan maturity (including any amounts advanced to cover closing and other costs) plus accrued interest, including interest on interest, and other finance charges, such as mortgage insurance premiums and servicing fees. Line-of-credit advances under a Texas reverse mortgage were first authorized effective November 8, 2005. Tex. S.J. Res. 7, 79th Leg., R.S., 2005 Tex. Gen. Laws Pamph. 1, at A-1. As amended, Tex. Const. art. XVI, § 50(p), expressly permits a

line-of-credit method of advances in which an initial advance may be made at any time and future advances may be made at times and in amounts requested by the borrower until the credit limit established by the loan documents is reached (and, thereafter, subsequent advances may be made at times and in amounts requested by the borrower to the extent that the outstanding balance is repaid). Tex. Const. art. XVI, § 50(p)(2)-(4).

In addition, if the borrower fails to timely pay any of the following for which the borrower is obligated under the loan documents, the lender may at any time, to the extent necessary to protect the lender's interest in or the value of the homestead property, advance amounts on behalf of the borrower to pay (1) property taxes, (2) assessments, (3) insurance, (4) costs of repairs and maintenance (when performed by persons who are not employed by or affiliated with the lender), or (5) any lien that has or may obtain priority over the reverse mortgage lien. Tex. Const. art. XVI, § 50(p)(6).

**§ 11.40 Prohibitions against Use of Credit Cards and Similar Devices, Transaction Fees, and Unilateral Amendments of Terms**

A reverse mortgage must provide that (1) an owner may not use a credit card, debit card, pre-printed solicitation check, or similar device to obtain an advance; (2) a lender may not charge a transaction fee after closing solely in connection with any debit or advance; and (3) a lender or holder of the reverse mortgage may not unilaterally amend the terms of the extension of credit. Tex. Const. art. XVI, § 50(v).

**§ 11.41 Future Advances; Priority of Lien**

Advances made and to be made in the future under a recorded reverse mortgage, and interest



on those advances, have lien priority over any subsequently filed lien. Therefore, future advances under a reverse mortgage recorded in the real property records of the county in which the homestead property is located will have lien priority over any other lien filed for record after the reverse mortgage instrument has been recorded. Tex. Const. art. XVI, § 50(l).

#### § 11.42 Interest; Shared Appreciation

Interest may be charged on a reverse mortgage loan at any fixed or adjustable rate that the parties may agree on (and which, if secured by other than a first lien, does not exceed the maximum lawful rate under the Texas Finance Code), and interest may accrue and be compounded during the term of the loan according to the terms of the loan agreement. Furthermore, interest expressly may be contingent on appreciation in the fair market value of the homestead property, apparently allowing for lenders to charge "equity share" fees based on the appreciation of appraised value of the homestead when the loan matures. Tex. Const. art. XVI, § 50(m).

#### § 11.43 Reducing or Failing to Make Advances; Forfeiture

If an adjustable rate of interest is charged, the lender under a reverse mortgage is expressly prohibited from reducing the amount or number of advances made to the borrower because of an adjustment in the interest rate. Tex. Const. art. XVI, § 50(k)(5). The lender is obligated to make loan advances as required by the loan documents under the penalty of forfeiture. If the lender fails for any reason to make loan advances according to the terms of the loan documents and, after notice from the borrower, fails to cure the default as required in the loan documents, the constitution provides that the lender forfeits all principal and interest on the reverse mortgage. This forfeiture provision does not apply, however, when a governmental agency,

such as the Federal Housing Administration under its Home Equity Conversion Mortgage reverse mortgage insurance, takes an assignment of the loan to cure the default. Tex. Const. art. XVI, § 50(k)(7).

#### § 11.44 Preemptive Authority

Texas reverse mortgage law as authorized and effected by the constitution expressly supersedes any statutes, including the Texas Property Code, that purport to limit encumbrances that may be fixed on homestead property. Furthermore, a reverse mortgage may be made without regard to any other conflicting state law, including any purported limitations on future advances; any requirement that a maximum loan amount be stated in the reverse mortgage loan documents or that a percentage of reverse mortgage proceeds be advanced before the assignment of the reverse mortgage; or any prohibition on balloon payments, compound interest or interest on interest, or contracting for, charging, or receiving any rate of interest authorized by Texas law. Tex. Const. art. XVI, § 50(q).

#### § 11.45 Title Insurance Considerations

The Texas Reverse Mortgage Endorsement (T-43) and Procedural Rule P-45, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*, insure against claims of lien invalidity of a covered reverse mortgage arising out of a lender's failure to satisfy certain of the constitutional conditions. See Procedural Rule P-45, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*.

The Texas Reverse Mortgage Endorsement (T-43) to the Mortgagee Policy of Title Insurance (T-2) excludes from coverage any loss or damage based on usury or on any consumer credit protection or truth-in-lending law or violation of any subsections of Tex. Const. art.

XVI, § 50(k)(3)-(11), (m), (p), (v), and any regulatory or statutory requirements for a mortgage made pursuant to Tex. Const. art. XVI, § 50(a)(7), *except as expressly provided in paragraph 3 of the endorsement*. Form T-43, in paragraphs 1 and 2, insures the validity of future advances made under a reverse mortgage, with certain exceptions, up to the outstanding aggregate amount of loan proceeds actually disbursed and the amount of its unpaid, accrued interest as of the time a loss occurs under the policy. In paragraph 3, form T-43 expressly insures against loss sustained by the lender under the mortgagee policy because of invalidity or unenforceability of the reverse mortgage lien by reason of any of the following: (1) the failure of the insured mortgage to be created under a written agreement with the consent of each owner of the insured homestead property and each owner's spouse; (2) the failure of the insured mortgage to be made to a person who is, or whose spouse is, sixty-two years of age or older; (3) the failure of the written document purporting to be made pursuant to Tex. Const. art. XVI, § 50(k)(8), to be executed by the homeowner on the date that the insured mortgage and promissory note it secures are executed by the owner (provided that the policy does not insure that the document itself complies with section 50(k)(8)); and (4) the failure of the title company or its agents to furnish the homeowner a copy of written notice purporting to be made pursuant to Tex. Const. art. XVI, § 50(k)(9), on the date that the owner executed the insured mortgage and promissory note it secures (provided that the policy does not insure that the written document itself complies with section 50(k)(9)).

While attachment of the T-43 endorsement to any mortgagee policy of title insurance issued in connection with a reverse mortgage loan is mandatory, under Procedural Rule P-45 the issuing agency may delete any of these four subdivisions of paragraph 3 if it does not consider the additional risk insurable and must delete all four subdivisions if the promissory note and the

insured mortgage instrument for the loan are not executed by the borrower at the office of the title company. Furthermore, the insuring agency must delete the second subdivision of paragraph 3 if the age of the owner or spouse is not verifiable "with government issued photographic identification" furnished the title agency and must delete the second and fourth subdivisions if the related documents furnished by the insured are not executed by the homeowner at the office of the title company on the date that the insured mortgage and promissory note it secures are executed. Procedural Rule P-45, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*.

#### § 11.46 Truth-in-Lending Disclosure Considerations

Reverse mortgage loans are subject to the federal Truth in Lending Act, 15 U.S.C. §§ 1601-1667f, and its Regulation Z, 12 C.F.R. pt. 1026. In addition to other consumer disclosures required under the Truth in Lending Act, the lender in a reverse mortgage is required to provide the borrower written disclosures under 12 C.F.R. § 1026.33 of the total annual loan cost of credit in the form of appendix K, paragraph (d), of Regulation Z. Generally referred to as the "Total Annual Loan Cost Rate Disclosure," or "TALC," this disclosure contains (1) a statement that the borrower is not obligated to complete the transaction merely because the borrower has received the disclosures or has signed an application for a reverse mortgage loan; (2) a good-faith projection of the total cost of the credit expressed as a table of "Total Annual Loan Cost Rates," using that term, that reflects (a) costs and charges to the borrower, (b) payments (advances) to, or for the benefit of, the borrower, (c) additional compensation to the lender (such as shared appreciation the lender is entitled to), (d) any limitations on the borrower's liability (such as nonrecourse limits), (e) assumed appreciation rates for the dwelling securing the loan at rates of 0 percent, 4 percent, and 8 percent, and

(f) assumed loan periods, alternatively, of two years, the actuarial life expectancy of the borrower (or youngest of the borrowers), and that same life expectancy multiplied by a factor of 1.4 and rounded to the nearest full year (and, at the option of the borrower, that same actuarial life expectancy multiplied by a factor of 0.5 and rounded to the nearest full year); (3) an itemization of loan terms, charges, the age of the youngest borrower, and the appraised property value; and (4) an explanation of the total annual loan cost rates as provided in the model form. 12 C.F.R. § 1026.33, pt. 1026 app. K(d).

### § 11.47 Federal Home Equity Conversion Mortgage (HECM) Loan Program

More than 90 percent of all reverse mortgage loan originations nationwide are made under the Home Equity Conversion Mortgage (HECM) program insured by the Federal Housing Administration (FHA) under the Department of Housing and Urban Development (HUD). The HECM program in Texas is regulated by HUD Handbook 4235.1 Rcv-1, as supplemented and amended from time to time, and mortgagee letters ML 00-09 and ML 00-10, each dated March 8, 2000; ML 00-34, dated August 30, 2000 (supplementing ML 00-09); ML 00-39, dated November 7, 2000 (supplementing ML 00-09, ML 00-10, and ML 00-34); and ML 06-06, dated March 17, 2006 (in part replacing the guidance set out in ML 00-09, ML 00-34, and ML 00-39). Regulations for the HECM program are codified in 24 C.F.R. pt. 206. Effective January 1, 2014, Tex. Const. art. XVI, § 50(k), was amended to authorize a reverse mortgage also to be used to finance the purchase of a Texas homestead. Texas homeowners are now able to participate in the FHA's "HECM for Purchase" loan program for the first time. *See* Tex. S.J. Res. 18, 83d Leg., R.S., 2013 Tex. Gen. Laws Pamph. 3, at A-7.

Model forms set out in full and attached to ML 00-39 replaced earlier versions of Texas model forms published in ML 00-09 and ML 00-34, which at that time constituted the only forms approved by HUD for use to document an HECM loan in Texas. These model forms included Texas forms of a home equity conversion loan agreement, an adjustable rate deed of trust, an adjustable rate note, an adjustable rate second deed of trust, an adjustable rate second note, and a repair rider. With the adoption of the 2005 constitutional amendment authorizing line-of-credit advances under a Texas reverse mortgage loan, however, HUD chose not to publish revised model forms and instead imposed on approved mortgagees the obligation, in consultation with their attorneys, to adapt all forms to ensure compliance with FHA requirements and the Texas Constitution and statutes. These requirements are set forth in ML 06-06, issued March 17, 2006, which authorizes Texas borrowers to choose a line-of-credit payment option, a modified tenure option (a combination of tenure and line-of-credit payment options), or a modified term option (a combination of term and line-of-credit payment options) and provides guidance regarding such matters as the adaptation and preparation of the form of loan documents, including the repair rider, the timing of loan closings and disbursements by the lender, the conditions under which the loan may be accelerated under applicable Texas law, and procedures to be followed under Texas law to conduct foreclosures. ML 06-06 expressly replaces guidance previously issued in ML 00-09, ML 00-34, and ML 00-39 on the same topics.

Model Texas forms were set out as attachments to HUD ML 00-39, dated November 7, 2000, with such adaptations by counsel as may be necessary to conform the instruments to state or local requirements. When adapting these model forms to Texas law and practices, counsel must consult the footnotes to each model form regarding state-specific modifications; instructions in

chapter 6 to Handbook 4235.1 Rev-3; Handbook 4165.1 Rev-1 Chg-3, issued November 30, 1995, regarding model mortgage and note forms; ML 97-15; ML 00-09 regarding Texas

modifications of the loan agreement form and repair rider; and ML 06-06 regarding line-of-credit terms and other provisions of the 2005 constitutional amendment.

*[Sections 11.48 through 11.50 are reserved for expansion.]*

### III. General Instructions for Completing Forms

#### § 11.51 Introduction

For information about completing forms generally, see chapter 3 in this manual. In most forms the information that the attorney must provide is listed at the beginning of the form. Of course, the attorney may add other specific provisions, references, exhibits, and riders as necessary for each specific transaction.

The forms in this chapter are applicable to a first-lien home equity loan. Tex. Fin. Code ch. 342 imposes additional duties, prohibitions, and disclosure requirements in connection with secondary mortgage loans. Attorneys are cautioned that some forms in this chapter may require modification for use with a secondary mortgage loan transaction.

A home equity loan transaction may require documentation in addition to that provided by this chapter. For example, a "loan agreement" as defined in Texas Business and Commerce Code section 26.02 requires the notice prescribed therein. Form 10-14 in this manual, notice of final agreement, may be modified for use in a home equity transaction. Each transaction is unique, and the practitioner must use individual judgment in ensuring that all required documentation has been adequately prepared.

A home equity loan transaction must be closed at the offices of the lender, an attorney at law, or a title company. Tex. Const. art. XVI, § 50(a)(6)(N). The owner may not be required to sign any instrument in which blanks are left to

be filled in. Tex. Const. art. XVI, § 50(a)(6)(Q)(iii). The lender must provide copies of all instruments related to the loan to the homestead owner at the time of closing. Tex. Const. art. XVI, § 50(a)(6)(Q)(v).

#### § 11.52 Instructions for Completing Notice Concerning Extensions of Credit

The notice concerning extensions of credit (form 11-1 in this chapter) defined by section 50(a)(6), article XVI, of the Texas Constitution is the preloan disclosure required to be given to the homestead owner under Tex. Const. art. XVI, § 50(g). The home equity loan cannot be closed until the twelfth day after the notice is given. If discussions with the borrower are conducted primarily in a language other than English, the lender must provide the owner with an additional copy of the notice translated into the written language in which discussions were conducted. The Office of the Consumer Credit Commissioner has provided a Spanish language translation of the notice on its website at <http://occc.texas.gov>. No foreign-language translations of forms are included in this manual.

#### § 11.53 Instructions for Completing Home Equity Extension of Credit (Promissory Note)

The form for the home equity extension of credit (form 11-2 in this chapter) is principally adapted from form 6-1 (promissory note) in this manual

and is redesignated to conform with the terminology used in Tex. Const. art. XVI, § 50(a)(6). The attorney is referred to chapter 6 in this manual for general commentary and instructions for completing promissory notes.

Note that the extension of credit makes no provision for late charges. The attorney is referred to section 6.4:3 and the clauses referenced therein for commentary and instructions on late charges.

As reflected in the “Terms of Payment” paragraph, the home equity extension of credit must be repaid in substantially equal successive periodic installments. Tex. Const. art. XVI, § 50(a)(6)(L). The installments must begin not later than two months from the date of the instrument. Each installment must equal or exceed the amount of accrued interest as of the date of the scheduled installment.

The home equity extension of credit can be converted for a variable rate of interest by deleting the heading for “Annual Interest Rate” and modifying the heading “Terms of Payment” to read “Terms of Payment, Including Variable Interest Rate on Unpaid Principal.” A variable rate interest clause appears at clause 6-2-18.

The security for payment for a home equity extension of credit is fixed by Tex. Const. art. XVI, § 50(a)(6)(A), (H). The home equity extension of credit may be secured only by a lien on the borrower’s homestead. Additional collateral is prohibited. The home equity extension of credit has no provision referring to a guaranty or guarantor. A guaranty is construed as prohibited additional collateral.

As required by Tex. Const. art. XVI, § 50(a)(6)(C), the home equity extension of credit is a nonrecourse obligation. In addition, the home equity extension of credit contains many other limitations and restrictions unique to home equity lending and required by Tex. Const. art. XVI, § 50(a)(6). These restrictions

are discussed in detail in the commentary in this chapter. A lender forfeits all principal and interest if the lender fails to cure a failure to comply with constitutional restrictions on home equity lending after sixty days’ notice of the violation given by the borrower. Tex. Const. art. XVI, § 50(a)(6)(Q)(x). These cure provisions are discussed in detail in section 11.25 above.

If the lender of a home equity extension of credit has a license from the Office of Consumer Credit Commissioner, the home equity extension of credit must contain the name, mailing address, and telephone number of the OCCC. Tex. Fin. Code § 14.104. Additionally, if the home equity loan is a secondary mortgage loan, the alternative attorney’s fee provision should be used. See section 8.4 for a discussion of secondary mortgage loans and see the discussion in section 11.20:7 above concerning alternative provisions.

### § 11.54 Instructions for Completing Deed of Trust (Home Equity Loan)

The form for the deed of trust (form 11-3 in this chapter) is adapted from form 8-1 in this manual. The attorney is referred to chapter 8 for general commentary and instructions for completing deeds of trust.

A lien securing a home equity loan may be foreclosed only after court order. Tex. Const. art. XVI, § 50(a)(6)(D). The power of sale of the deed of trust (home equity loan) is conditioned on the lender obtaining a court order allowing foreclosure under any proceeding authorized by the Texas Rules of Civil Procedure and other applicable law.

A question remains whether the assignment of rents in a deed of trust securing a home equity loan constitutes prohibited additional collateral under Tex. Const. art. XVI, § 50(a)(6)(H). The deed of trust (home equity loan) does not con-

tain an assignment of rents clause. In the absence of definitive authority on this question, the attorney is cautioned to exercise professional judgment regarding this provision.

If the home equity extension of credit is a junior lien and if the lender is a bank, savings and loan association, credit union, or lender with a license from the Office of Consumer Credit Commissioner, the deed of trust (home equity) should be modified as discussed in section 11.20:7 above to comply with requirements applicable to secondary mortgage loans governed by Texas Finance Code chapter 342.

The deed of trust (home equity loan) also contains a notice of confidentiality rights as required by Tex. Prop. Code § 11.008(b). See section 3.16 in this manual.

#### **§ 11.55      Instructions for Completing Home Equity Certificate and Agreement**

The home equity certificate and agreement contains a written acknowledgment of the fair market value of the homestead as required by Tex. Const. art. XVI, § 50(a)(6)(Q)(ix). The acknowledgment of value is necessary to assure compliance with the 80 percent loan-to-value restriction of Tex. Const. art. XVI, § 50(a)(6)(B). The acknowledgment is conclu-

sive evidence of the fair market value of the homestead if the acknowledgment is made under the conditions set out at Tex. Const. art. XVI, § 50(h). To comply with restrictions against additional collateral, the home equity compliance certificate and agreement (form 11-5 in this chapter) contains a waiver by the lender of cross-collateral provisions contained in other debt instruments. In addition, the form contains other representations and warranties to be made by the borrower at closing, evidencing compliance with certain constitutional requirements for creating a valid home equity lien.

The home equity certificate and agreement must be signed on the date that the extension of credit is made. Tex. Const. art. XVI, § 50(a)(6)(Q)(ix).

#### **§ 11.56      Instructions for Completing Election Regarding Right of Rescission**

The election regarding right of rescission (form 11-6 in this chapter) confirms the borrower's election to rescind or decline to rescind the home equity extension of credit under Tex. Const. art. XVI, § 50(a)(6)(Q)(viii). For married couples, a separate notice of right of rescission should be given by each spouse. Funding of the home equity loan should be delayed until the rescission period has expired.

## Additional Resources

- Alsup, J. Alton. "Documenting Compliance with the New Texas Home Equity Reform Amendment." In *Advanced Real Estate Drafting Course, 2005*. Austin: State Bar of Texas, 2005.
- . "Lines of Credit under Texas Home Equity and Reverse Mortgage Law." In *Advanced Real Estate Law Course, 2006*. Austin: State Bar of Texas, 2006.
- Baggett, W. Mike. "Foreclosure Update Including Foreclosing Home Equity Loans." In *Advanced Real Estate Strategies Course, 2008*. Austin: State Bar of Texas, 2008.
- Baird, Morton W. II, and Michael F. Baird. "Issues in Home Equity Financing." In *Advanced Real Estate Law Course, 2015*. Austin: State Bar of Texas, 2015.
- Beyer, Gerry W. *Real Property*. 2nd ed. West's Texas Forms 13–15. St. Paul, MN: West, 2001. Supplement 2014.
- Cockerell, Perry. "Developments in Texas Home Equity Litigation in Bankruptcy Court." In *Advanced Real Estate Law Course, 2016*. Austin: State Bar of Texas, 2016.
- St. Claire, Frank A., and William V. Dorsaneo III. *Texas Real Estate Guide*. New York: Matthew Bender & Co., 2001.

*[Reserved]*



Form 11-1

**Notice Concerning Extensions of Credit**

NOTICE CONCERNING EXTENSIONS OF CREDIT DEFINED BY  
SECTION 50(a)(6), ARTICLE XVI, TEXAS CONSTITUTION:

SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION ALLOWS CERTAIN LOANS TO BE SECURED AGAINST THE EQUITY IN YOUR HOME. SUCH LOANS ARE COMMONLY KNOWN AS EQUITY LOANS. IF YOU DO NOT REPAY THE LOAN OR IF YOU FAIL TO MEET THE TERMS OF THE LOAN, THE LENDER MAY FORECLOSE AND SELL YOUR HOME. THE CONSTITUTION PROVIDES THAT:

(A) THE LOAN MUST BE VOLUNTARILY CREATED WITH THE CONSENT OF EACH OWNER OF YOUR HOME AND EACH OWNER'S SPOUSE;

(B) THE PRINCIPAL LOAN AMOUNT AT THE TIME THE LOAN IS MADE MUST NOT EXCEED AN AMOUNT THAT, WHEN ADDED TO THE PRINCIPAL BALANCES OF ALL OTHER LIENS AGAINST YOUR HOME, IS MORE THAN 80 PERCENT OF THE FAIR MARKET VALUE OF YOUR HOME;

(C) THE LOAN MUST BE WITHOUT RECOURSE FOR PERSONAL LIABILITY AGAINST YOU AND YOUR SPOUSE UNLESS YOU OR YOUR SPOUSE OBTAINED THIS EXTENSION OF CREDIT BY ACTUAL FRAUD;

(D) THE LIEN SECURING THE LOAN MAY BE FORECLOSED UPON ONLY WITH A COURT ORDER;

(E) FEES AND CHARGES TO MAKE THE LOAN MAY NOT EXCEED 2 PERCENT OF THE LOAN AMOUNT, EXCEPT FOR A FEE OR CHARGE FOR AN APPRAISAL PERFORMED BY A THIRD-PARTY APPRAISER, A PROPERTY SURVEY PERFORMED BY A STATE-REGISTERED OR LICENSED

SURVEYOR, A STATE BASE PREMIUM FOR A MORTGAGEE POLICY OF TITLE INSURANCE WITH ENDORSEMENTS, OR A TITLE EXAMINATION REPORT;

(F) THE LOAN MAY NOT BE AN OPEN-END ACCOUNT THAT MAY BE DEBITED FROM TIME TO TIME OR UNDER WHICH CREDIT MAY BE EXTENDED FROM TIME TO TIME UNLESS IT IS A HOME EQUITY LINE OF CREDIT;

(G) YOU MAY PREPAY THE LOAN WITHOUT PENALTY OR CHARGE;

(H) NO ADDITIONAL COLLATERAL MAY BE SECURITY FOR THE LOAN;

(I) (REPEALED);

(J) YOU ARE NOT REQUIRED TO REPAY THE LOAN EARLIER THAN AGREED SOLELY BECAUSE THE FAIR MARKET VALUE OF YOUR HOME DECREASES OR BECAUSE YOU DEFAULT ON ANOTHER LOAN THAT IS NOT SECURED BY YOUR HOME;

(K) ONLY ONE LOAN DESCRIBED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION MAY BE SECURED WITH YOUR HOME AT ANY GIVEN TIME;

(L) THE LOAN MUST BE SCHEDULED TO BE REPAYED IN PAYMENTS THAT EQUAL OR EXCEED THE AMOUNT OF ACCRUED INTEREST FOR EACH PAYMENT PERIOD;

(M) THE LOAN MAY NOT CLOSE BEFORE 12 DAYS AFTER YOU SUBMIT A LOAN APPLICATION TO THE LENDER OR BEFORE 12 DAYS AFTER YOU RECEIVE THIS NOTICE, WHICHEVER DATE IS LATER AND MAY NOT WITHOUT YOUR CONSENT CLOSE BEFORE ONE BUSINESS DAY AFTER THE DATE ON WHICH YOU RECEIVE A COPY OF YOUR LOAN APPLICATION IF NOT PREVIOUSLY PROVIDED AND A FINAL ITEMIZED DISCLOSURE OF THE ACTUAL FEES, POINTS, INTERESTS, COSTS, AND CHARGES THAT WILL BE CHARGED AT CLOSING; AND IF YOUR HOME WAS SECURITY FOR THE SAME TYPE OF LOAN WITHIN THE PAST YEAR, A NEW LOAN SECURED BY THE SAME PROPERTY MAY NOT CLOSE BEFORE ONE YEAR HAS PASSED FROM THE CLOSING

DATE OF THE OTHER LOAN, UNLESS ON OATH YOU REQUEST AN EARLIER CLOSING DATE DUE TO A DECLARED STATE OF EMERGENCY;

(N) THE LOAN MAY CLOSE ONLY AT THE OFFICE OF THE LENDER, TITLE COMPANY, OR AN ATTORNEY AT LAW;

(O) THE LENDER MAY CHARGE ANY FIXED OR VARIABLE RATE OF INTEREST AUTHORIZED BY STATUTE;

(P) ONLY A LAWFULLY AUTHORIZED LENDER MAY MAKE LOANS DESCRIBED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION;

(Q) LOANS DESCRIBED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION MUST:

(1) NOT REQUIRE YOU TO APPLY THE PROCEEDS TO ANOTHER DEBT EXCEPT A DEBT THAT IS SECURED BY YOUR HOME OR OWED TO ANOTHER LENDER;

(2) NOT REQUIRE THAT YOU ASSIGN WAGES AS SECURITY;

(3) NOT REQUIRE THAT YOU EXECUTE INSTRUMENTS WHICH HAVE BLANKS FOR SUBSTANTIVE TERMS OF AGREEMENT LEFT TO BE FILLED IN;

(4) NOT REQUIRE THAT YOU SIGN A CONFESSION OF JUDGMENT OR POWER OF ATTORNEY TO ANOTHER PERSON TO CONFESS JUDGMENT OR APPEAR IN A LEGAL PROCEEDING ON YOUR BEHALF;

(5) PROVIDE THAT YOU RECEIVE A COPY OF YOUR FINAL LOAN APPLICATION AND ALL EXECUTED DOCUMENTS YOU SIGN AT CLOSING;

(6) PROVIDE THAT THE SECURITY INSTRUMENTS CONTAIN A DISCLOSURE THAT THIS LOAN IS A LOAN DEFINED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION;

(7) PROVIDE THAT WHEN THE LOAN IS PAID IN FULL, THE LENDER WILL SIGN AND GIVE YOU A RELEASE OF LIEN OR AN ASSIGNMENT OF THE LIEN, WHICHEVER IS APPROPRIATE;

(8) PROVIDE THAT YOU MAY, WITHIN 3 DAYS AFTER CLOSING, RESCIND THE LOAN WITHOUT PENALTY OR CHARGE;

(9) PROVIDE THAT YOU AND THE LENDER ACKNOWLEDGE THE FAIR MARKET VALUE OF YOUR HOME ON THE DATE THE LOAN CLOSES; AND

(10) PROVIDE THAT THE LENDER WILL FORFEIT ALL PRINCIPAL AND INTEREST IF THE LENDER FAILS TO COMPLY WITH THE LENDER'S OBLIGATIONS UNLESS THE LENDER CURES THE FAILURE TO COMPLY AS PROVIDED BY SECTION 50(a)(6)(Q)(x), ARTICLE XVI, OF THE TEXAS CONSTITUTION; AND

(R) IF THE LOAN IS A HOME EQUITY LINE OF CREDIT:

(1) YOU MAY REQUEST ADVANCES, REPAY MONEY, AND REBORROW MONEY UNDER THE LINE OF CREDIT;

(2) EACH ADVANCE UNDER THE LINE OF CREDIT MUST BE IN AN AMOUNT OF AT LEAST \$4,000;

(3) YOU MAY NOT USE A CREDIT CARD, DEBIT CARD, OR SIMILAR DEVICE, OR PREPRINTED CHECK THAT YOU DID NOT SOLICIT, TO OBTAIN ADVANCES UNDER THE LINE OF CREDIT;

(4) ANY FEES THE LENDER CHARGES MAY BE CHARGED AND COLLECTED ONLY AT THE TIME THE LINE OF CREDIT IS ESTABLISHED AND THE LENDER MAY NOT CHARGE A FEE IN CONNECTION WITH ANY ADVANCE;

(5) THE MAXIMUM PRINCIPAL AMOUNT THAT MAY BE EXTENDED, WHEN ADDED TO ALL OTHER DEBTS SECURED BY YOUR HOME, MAY NOT EXCEED 80 PERCENT OF THE FAIR MARKET VALUE OF YOUR HOME ON THE DATE THE LINE OF CREDIT IS ESTABLISHED;

(6) IF THE PRINCIPAL BALANCE UNDER THE LINE OF CREDIT AT ANY TIME EXCEEDS 80 PERCENT OF THE FAIR MARKET VALUE OF YOUR HOME, AS DETERMINED ON THE DATE THE LINE OF CREDIT IS ESTABLISHED, YOU MAY NOT CONTINUE TO REQUEST ADVANCES UNDER THE LINE OF CREDIT UNTIL THE BALANCE IS LESS THAN 80 PERCENT OF THE FAIR MARKET VALUE; AND

(7) THE LENDER MAY NOT UNILATERALLY AMEND THE TERMS OF THE LINE OF CREDIT.

THIS NOTICE IS ONLY A SUMMARY OF YOUR RIGHTS UNDER THE TEXAS CONSTITUTION. YOUR RIGHTS ARE GOVERNED BY SECTION 50, ARTICLE XVI, OF THE TEXAS CONSTITUTION, AND NOT BY THIS NOTICE.

---

I have received a copy of this notice concerning extensions of credit defined by section 50(a)(6), article XVI, of the Texas Constitution.

---

[Name of borrower]

Date:

*[Reserved]*

## Form 11-4

**Additional Clauses for Deeds of Trust (Home Equity Loan)***Refinance and Extension of Existing Texas Home Equity Deed of Trust***Clause 11-4-1**

The Note secured by this Security Instrument is given to refinance and extend the amount left owing and unpaid by Grantor upon that one certain Promissory Note in the original principal amount of [amount] DOLLARS (\$[amount]), which is dated [date], executed by [name], and payable to the order of [name], secured by a Texas Home Equity Security Instrument from [name] to [name], dated [date] and recorded in [recording data] of the real property records of [county] County, Texas against the Property. Lender is subrogated to all rights and remedies of the holder of the obligations. The lien is hereby refinanced, extended and continued in full force and effect to secure the payment of the Note secured by this Security Instrument. The lien is a lien described in section 50(a)(4), article 16, of the Texas Constitution.

*Extension of Mechanic's Lien Contract and Security for Cash Advanced***Clause 11-4-2**

The Home Equity Extension of Credit renews and extends the balance of [amount] DOLLARS (\$[amount]) that Grantor owes on a prior note in the original principal amount of [amount] DOLLARS (\$[amount]), which is dated [date], executed by [name], and payable to the order of [name]. The prior note is secured by a mechanic's lien contract creating a lien on the Property, dated [date] and recorded in [recording data] of the real property records of [county] County, Texas. [Include if applicable: The prior note and the lien securing it

have been transferred to Lender.] The Home Equity Extension of Credit also represents [amount] DOLLARS (\$[amount]) in cash that Lender advanced to Grantor on [date] at Grantor's request. Grantor acknowledges that the lien securing the prior note is valid, that it subsists against the Property, and that by this deed of trust it is renewed and extended in full force until the Home Equity Extension of Credit is paid.

*To Pay Ad Valorem Taxes and Security for Cash Advanced*

**Clause 11-4-3**

The Home Equity Extension of Credit represents [amount] DOLLARS (\$[amount]) in cash that, at Grantor's request, Lender advanced to pay the following taxes [include if applicable: , including penalties, interest, and collection expenses,] assessed and owed on the Property, which Grantor now owns: [amount] DOLLARS (\$[amount]) to [county] County in payment of taxes for the years [specify]; and [amount] DOLLARS (\$[amount]) to the city of [city] in payment of taxes for the years [specify]. The Home Equity Extension of Credit also represents [amount] DOLLARS (\$[amount]) in cash that Lender advanced to Grantor on [date] at Grantor's request.

*To Pay Income Taxes and Security for Cash Advanced*

**Clause 11-4-4**

The Home Equity Extension of Credit includes [amount] DOLLARS (\$[amount]) that, at Grantor's request, Lender advanced to the United States Internal Revenue Service to discharge federal tax lien number [number], which is recorded in [recording data] of the federal tax lien records of [county] County, Texas. Grantor acknowledges this federal tax lien to be valid and sub-



sisting, and the same is renewed and extended by this deed of trust until the Home Equity Extension of Credit is fully paid. This Home Equity Extension of Credit also represents [amount] DOLLARS (\$[amount]) in cash that Lender advanced to Grantor on [date] at Grantor's request.

*Tax and Insurance Reserve or Escrow Account*

**Clause 11-4-5**

Grantor agrees to make an initial deposit in a reasonable amount to be determined by Lender and then make periodic payments to a fund for taxes and insurance premiums on the Property. Periodic payments will be made on the payment dates specified in the Home Equity Extension of Credit, and each payment will be in an amount that Lender estimates will be sufficient to pay taxes and insurance premiums. The fund will accrue no interest, and Lender will hold it without bond in escrow and use it to pay the taxes and insurance premiums. If Grantor has complied with the requirements of this paragraph, Lender must pay taxes before [the end of the calendar year/delinquency].

Grantor agrees to make additional deposits on demand if the fund is ever insufficient for its purpose. If an excess accumulates in the fund, Lender may either credit it to future periodic deposits until the excess is exhausted or refund it to Grantor. When Grantor makes the final payment on the Home Equity Extension of Credit, Lender will credit to that payment the whole amount then in the fund [include if applicable: or, at Lender's option, refund it after the Home Equity Extension of Credit is paid]. If this deed of trust is foreclosed, any balance in the fund over that needed to pay taxes, including taxes accruing but not yet payable, and to pay insurance premiums will be paid under section D., "Trustee's Rights and Duties." [Include if applicable: If the Property is transferred, any balance then in the fund will still be subject to the provisions of this

paragraph and will inure to the benefit of the transferee.] Deposits to the fund described in this paragraph are in addition to the periodic payments provided for in the Home Equity Extension of Credit.

### *Assignment of Insurance Policies*

#### **Clause 11-4-6**

If the Property is transferred by foreclosure, the transferee will acquire title to all insurance policies on the Property.

### *Evidence of Payment of Taxes*

#### **Clause 11-4-7**

Clause 11-4-7 should not be used if the escrow clause at 11-4-5 is used.

Grantor agrees to furnish on Lender's request evidence satisfactory to Lender that all taxes and assessments on the Property have been paid when due.

### *Consumer Credit Insurance Notice*

#### **Clause 11-4-8**

GRANTOR MAY FURNISH ANY INSURANCE REQUIRED BY THIS DEED OF TRUST EITHER THROUGH EXISTING POLICIES OWNED OR CONTROLLED BY GRANTOR OR THROUGH EQUIVALENT COVERAGE FROM ANY INSURANCE COMPANY AUTHORIZED TO TRANSACT BUSINESS IN TEXAS.

*Due-on-Sale Clause***Clause 11-4-9**

If Grantor transfers any part of the Property without Lender's prior written consent, Lender may declare the debt secured by this deed of trust immediately payable and invoke any remedies provided in this deed of trust for default. If the Property is residential real property containing less than five dwelling units or a residential manufactured home occupied by Grantor, exceptions to this provision are limited to (a) a subordinate lien or encumbrance that does not transfer rights of occupancy of the Property; (b) creation of a purchase-money security interest for household appliances; (c) transfer by devise, descent, or operation of law on the death of a co-Grantor; (d) grant of a leasehold interest of three years or less without an option to purchase; (e) transfer to a spouse or children of Grantor or between co-Grantors; (f) transfer to a relative of Grantor on Grantor's death; and (g) transfer to an inter vivos trust in which Grantor is or remains a beneficiary and occupant of the Property.

*Subordinate Lien Clause***Clause 11-4-10**

The lien created by this deed of trust is subordinate to the lien securing payment of a note, and any renewals, extensions, and modifications thereof, in the original principal amount of [amount] DOLLARS (\$[amount]), which is dated [date], executed by [name], payable to the order of [name], and more fully described in a deed of trust recorded in [recording data] of the real property records of [county] County, Texas. If default occurs in payment of any part of principal or interest of that \$[amount] note or in observance of any cov-

enants of the deed of trust securing it, the entire debt secured by this deed of trust will immediately become payable at the option of Lender.

Or

**Clause 11-4-11**

If Grantor fails to pay any part of principal or interest secured by a prior lien or liens on the Property when it becomes payable or defaults on any prior lien instrument, the entire debt secured by this deed of trust will immediately become payable at the option of Lender.

Form 11-5

Home Equity Compliance Certificate and Agreement

Basic Information

Date:

Borrower:

[Borrower's Spouse:]

Borrower's Mailing Address:

[Borrower's Spouse's Mailing Address:]

Lender:

Lender's Mailing Address:

Home Equity Extension of Credit (Promissory Note)

Date:

Original principal amount:

Maturity date:

Property (including any improvements):

Fair Market Value of the Property:

**A. Agreement of Parties**

*A.1.* Borrower and Lender acknowledge and agree on the Fair Market Value of the Property and have signed a written acknowledgment of the Fair Market Value of Property on the date the Home Equity Extension of Credit is made.

*A.2.* The Home Equity Extension of Credit is not secured by any additional real or personal property other than the Property. Any provision contained in any other agreement between the Parties or any third party that gives Lender a security interest in any personal or real property other than the Property will not apply to the Home Equity Extension of Credit.

**B. Representation and Warranties of Borrower**

Borrower represents and warrants the following:

*B.1.* The Fair Market Value of the Property is an accurate value estimate based on an appraisal or evaluation not disputed by Borrower.

*B.2.* The original principal amount of the Home Equity Extension of Credit, when added to the aggregate total of the outstanding principal balances of any other indebtedness secured by valid encumbrances of record against the Property, does not exceed 80 percent of the Fair Market Value of the Property.

*B.3.* Borrower has not been required to pay, in addition to any interest, fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the Home Equity Extension of Credit that exceed, in the aggregate, 3 percent of the original principal amount of the Home Equity Extension of Credit.

*B.4.* The lien securing the Home Equity Extension of Credit is a voluntary lien on the Property created with the consent of all owners and their spouses.

B.5. The Home Equity Extension of Credit is not secured by any additional property other than the collateral.

Select one of the following.

B.6. The Home Equity Extension of Credit is the only debt secured by the Property.

Or

B.6. The Home Equity Extension of Credit is the only loan made pursuant to section 50(a)(6) of article 16 of the Texas Constitution and the only debt secured by the Property except the debts and liens described in the following documents: **[specify]**.

Continue with the following.

B.7. The closing of the Home Equity Extension of Credit did not occur before the twelfth day after the later of the date that Borrower submitted a loan application to Lender for the Home Equity Extension of Credit or the date that Lender provided Borrower a copy of a notice concerning the Home Equity Extension of Credit making all disclosures required by section 50(g), article XVI, of the Texas Constitution.

Select one of the following.

B.8. The closing of the Home Equity Extension of Credit did not occur before one business day after the date that Borrower received a copy of the loan application if not previously provided and a final itemized disclosure of the actual fees, points, interest, costs, and charges that were charged at closing.

Or

B.8. Borrower understands that under the Texas Constitution this home equity loan may not be closed before one business day after the date that Borrower receives a copy of the loan application if not previously provided and a final itemized disclosure of actual fees, points, interest, costs, and charges to be charged at the closing of the loan unless Borrower

consents in writing for this information to be originally given or modified on the date of closing because of the existence of a bona fide emergency or other good cause. Borrower acknowledges the existence of a bona fide emergency or other good cause being [**specify nature of bona fide emergency or other good cause; see 7 Tex. Admin. Code § 153.13**] and consents to Lender providing a final itemized disclosure of actual fees, points, interest, costs, and charges to be charged on the loan on the loan closing date.

Select one of the following.

*B.9.* The closing of the Home Equity Extension of Credit did not occur before the first anniversary of the closing date of any other home equity extension of credit made under section 50(a)(6), article XVI, of the Texas Constitution and secured by part or all of the Property.

Or

*B.9.* Borrower requests a closing of the Home Equity Extension of Credit before the first anniversary of the closing date of any other extension of credit made under section 50(a)(6), article XVI, of the Texas Constitution and secured by part or all of the property due to an emergency that has been declared by the President of the United States or the governor as provided by law and that applies to the area where the property is located.

Continue with the following.

*B.10.* The closing of the Home Equity Extension of Credit has taken place at the office of Lender, an attorney at law, or a title company.

Select one of the following.

*B.11.* Borrower has not been required to apply the proceeds of the Home Equity Extension of Credit to repay another debt.

Or



*B.11.* Borrower has not been required to apply the proceeds of the Home Equity Extension of Credit to repay another debt except debt to another lender.

Or

*B.11.* Borrower has not been required to apply the proceeds of the Home Equity Extension of Credit to repay another debt except debt secured by the Property.

Or

*B.11.* Borrower has not been required to apply the proceeds of the Home Equity Extension of Credit to repay another debt except debt to another lender and debt secured by the Property.

Continue with the following.

*B.12.* Borrower has not assigned wages as security for the Home Equity Extension of Credit or signed a confession of judgment or power of attorney to Lender or anyone to confess judgment or appear for Borrower in a judicial proceeding.

*B.13.* Borrower has not signed any instrument relating to the Home Equity Extension of Credit in which blanks relating to substantive terms of the agreement were left to be filled in.

*B.14.* Borrower has received, as of the time the Home Equity Extension of Credit was made, a copy of the loan application and all executed documents signed by Borrower at closing related to the Home Equity Extension of Credit.

*B.15.* All of the Property is the homestead of Borrower. No portion of the Property is nonhomestead.

Select one of the following.

B.16. The Home Equity Extension of Credit is not a form of open-end account that may be debited from time to time or under which credit may be extended from time to time.

Or

B.16. The Home Equity Extension of Credit is a home equity line of credit constituting an open-end account that may be debited from time to time and under which credit may be extended from time to time subject to the restrictions found at Tex. Const. art. XVI, § 50(t).

Continue with the following.

B.17. Borrower has been advised that Borrower may, within three days after the Home Equity Extension of Credit is made, rescind the Home Equity Extension of Credit without penalty or charge. [Include if applicable: Borrower's Spouse has been advised that Borrower's Spouse may, within three days after the Home Equity Extension of Credit is made, rescind the Home Equity Extension of Credit without penalty or charge.]

B.18. Borrower understands and agrees that Lender is relying on the truth and accuracy of each of the representations and warranties in this Certificate and Agreement. Borrower acknowledges that Lender would not make the Home Equity Extension of Credit if any of the representations and warranties were not true and accurate.

\_\_\_\_\_  
[Name of borrower]

SUBSCRIBED AND SWORN TO before me on \_\_\_\_\_ by [name of affiant].

\_\_\_\_\_  
Notary Public, State of Texas

Include the following if applicable.

\_\_\_\_\_  
[Name of borrower's spouse]

SUBSCRIBED AND SWORN TO before me on \_\_\_\_\_ by [name of affiant].

\_\_\_\_\_  
Notary Public, State of Texas

Continue with the following.

\_\_\_\_\_  
[Name of lender]

SUBSCRIBED AND SWORN TO before me on \_\_\_\_\_ by [name of affiant].

\_\_\_\_\_  
Notary Public, State of Texas

*[Reserved]*

Form 11-8

**Notice Concerning Refinance of Existing Home Equity Loan to Non-Home Equity Loan under Section 50(f)(2), Article XVI, Texas Constitution**

YOUR EXISTING LOAN THAT YOU DESIRE TO REFINANCE IS A HOME EQUITY LOAN. YOU MAY HAVE THE OPTION TO REFINANCE YOUR HOME EQUITY LOAN AS EITHER A HOME EQUITY LOAN OR AS A NON-HOME EQUITY LOAN, IF OFFERED BY YOUR LENDER.

HOME EQUITY LOANS HAVE IMPORTANT CONSUMER PROTECTIONS. A LENDER MAY ONLY FORECLOSE A HOME EQUITY LOAN BASED ON A COURT ORDER. A HOME EQUITY LOAN MUST BE WITHOUT RECOURSE FOR PERSONAL LIABILITY AGAINST YOU AND YOUR SPOUSE.

IF YOU HAVE APPLIED TO REFINANCE YOUR EXISTING HOME EQUITY LOAN AS A NON-HOME EQUITY LOAN, YOU WILL LOSE CERTAIN CONSUMER PROTECTIONS. A NON-HOME EQUITY REFINANCED LOAN:

- (1) WILL PERMIT THE LENDER TO FORECLOSE WITHOUT A COURT ORDER;
- (2) WILL BE WITH RECOURSE FOR PERSONAL LIABILITY AGAINST YOU AND YOUR SPOUSE; AND
- (3) MAY ALSO CONTAIN OTHER TERMS OR CONDITIONS THAT MAY NOT BE PERMITTED IN A TRADITIONAL HOME EQUITY LOAN.

BEFORE YOU REFINANCE YOUR EXISTING HOME EQUITY LOAN TO MAKE IT A NON-HOME EQUITY LOAN, YOU SHOULD MAKE SURE YOU UNDERSTAND THAT YOU ARE WAIVING IMPORTANT PROTECTIONS THAT HOME EQUITY LOANS PROVIDE UNDER THE LAW AND SHOULD CONSIDER CONSULTING WITH AN ATTORNEY OF YOUR CHOOSING REGARDING THESE PROTECTIONS.

YOU MAY WISH TO ASK YOUR LENDER TO REFINANCE YOUR LOAN AS A HOME EQUITY LOAN. HOWEVER, A HOME EQUITY LOAN MAY HAVE A HIGHER INTEREST RATE AND CLOSING COSTS THAN A NON-HOME EQUITY LOAN.

Form 11-9

**Affidavit of Compliance (Pursuant to Section 50(f)(2),  
Article XVI, Texas Constitution)**

Date:

Affiant[s]: [name of owner] [include if applicable: [name of owner's spouse]]

Lender:

Home Equity Loan: [include recording information]

Property:

Affiant[s] on oath swear[s] that the following statements are true and within the personal knowledge of Affiant[s]:

1. I am a borrower named in the Note or the owner or spouse of any owner of the Property described in the Deed of Trust (which term includes any riders thereto), both dated [date], evidencing and securing a debt payable to the Lender and providing for a lien pursuant to section 50(a)(4), article XVI, of the Texas Constitution upon and against the Property (the "Loan").

2. The Loan is secured by homestead property as defined under applicable Texas law.

3. All of the following conditions are met in connection with the Loan:

a. The Property is not the subject of a Home Equity Loan that was closed within one year prior to the date of this Affidavit.

b. The Loan does not include the advance of any additional funds, other than:

- i. funds advanced to refinance a valid debt described by sections 50(a)(1) through (a)(7), article XVI, of the Texas Constitution; or
- ii. actual costs and reserves required Lender to refinance the debt.

4. The principal amount of the Loan when added to the aggregate total of the outstanding principal balances of all other indebtedness secured by valid encumbrances of record against the Property does not exceed 80 percent of the fair market value of the Property on the date the Loan is made.

5. Lender provided me with the written notice required by section 50(f)(2)(D), article XVI, of the Texas Constitution not later than the third business day after the date I submitted my loan application to Lender and at least twelve days before the date the Loan is closed.

\_\_\_\_\_  
[Name of owner]

SUBSCRIBED AND SWORN TO before me on \_\_\_\_\_ by [name of affiant].

\_\_\_\_\_  
Notary Public, State of Texas

Include the following if applicable.

\_\_\_\_\_  
[Name of owner's spouse]

SUBSCRIBED AND SWORN TO before me on \_\_\_\_\_ by [name of affiant].

\_\_\_\_\_  
Notary Public, State of Texas

Include the following if applicable.



\_\_\_\_\_  
[Name of nonborrowing owner]

SUBSCRIBED AND SWORN TO before me on \_\_\_\_\_ by [name of affiant].

\_\_\_\_\_  
Notary Public, State of Texas

Include the following if applicable.

\_\_\_\_\_  
[Name of nonborrowing owner's spouse]

SUBSCRIBED AND SWORN TO before me on \_\_\_\_\_ by [name of affiant].

\_\_\_\_\_  
Notary Public, State of Texas

*[Reserved]*



CHAPTER CONTENTS

§ 14.5	Notices .....	14-14
	§ 14.5:1 Letter to Reinstate Default Provisions .....	14-14
	§ 14.5:2 Notice of Maturity and Demand for Payment .....	14-15
	§ 14.5:3 Notice of Default and Intent to Accelerate .....	14-15
	§ 14.5:4 Notice of Acceleration .....	14-15
	§ 14.5:5 Reinstatement Agreement .....	14-15
	§ 14.5:6 Affidavit of Posting and Filing .....	14-15
	§ 14.5:7 Affidavit of Mailing .....	14-15
§ 14.6	Foreclosure Documents Unique to Real Property .....	14-15
	§ 14.6:1 Appointment of Substitute Trustee .....	14-15
	§ 14.6:2 Notice of Trustee's Sale .....	14-16
	§ 14.6:3 Agenda of Public Sale .....	14-16
	§ 14.6:4 Trustee's Deed .....	14-16
	§ 14.6:5 Foreclosure Affidavit .....	14-16
	§ 14.6:6 Notice and Affidavit of Advancement .....	14-16
	§ 14.6:7 IRS Notice Letter .....	14-16
	§ 14.6:8 Rescission of Nonjudicial Foreclosure Sale .....	14-17
§ 14.7	Foreclosure Documents for Public Disposition of Personal Property .....	14-17
	§ 14.7:1 Waiver of Right to Notice after Default .....	14-17
	§ 14.7:2 Notice of Public Disposition .....	14-18
	§ 14.7:3 Agenda of Public Sale .....	14-18
	§ 14.7:4 Bill of Sale .....	14-18
§ 14.8	Strict Foreclosure of Personal Property .....	14-18
	§ 14.8:1 Notice of Strict Foreclosure .....	14-18
	§ 14.8:2 Consent to Strict Foreclosure .....	14-18
	§ 14.8:3 Objection to Strict Foreclosure .....	14-18
§ 14.9	Private Disposition of Personal Property .....	14-19
	§ 14.9:1 Waiver of Notice after Default .....	14-19
	§ 14.9:2 Notice of Private Disposition .....	14-19
	§ 14.9:3 Memorandum of Private Sale .....	14-19
	§ 14.9:4 Bill of Sale .....	14-19
§ 14.10	Security Interest Included in Deed of Trust .....	14-19
§ 14.11	Collateral Transfer of Note and Lien Foreclosure .....	14-19

Additional Resources .....	14-20
<i>Forms</i>	
Form 14-1 Letter to Reinstate Default Provisions .....	14-1-1 to 14-1-2
Form 14-2 Notice of Change of Debtor's Address .....	14-2-1 to 14-2-2
Form 14-3 Notice of Maturity and Demand for Payment .....	14-3-1 to 14-3-2
Form 14-4 Notice of Default and Intent to Accelerate .....	14-4-1 to 14-4-2
Form 14-5 Notice of Acceleration .....	14-5-1 to 14-5-2
Form 14-6 Reinstatement Agreement .....	14-6-1 to 14-6-4
Form 14-7 Additional Clauses for Foreclosure Documents .....	14-7-1 to 14-7-2
Clause 14-7-1 Fair Debt Collection Act Notice .....	14-7-1
Clause 14-7-2 Fair Credit Reporting Act Notice .....	14-7-1
Clause 14-7-3 Fair Credit Reporting Act Notice .....	14-7-2
Form 14-8 Affidavit of Posting and Filing .....	14-8-1 to 14-8-2
Form 14-9 Affidavit of Mailing .....	14-9-1 to 14-9-2
Form 14-10 Appointment of Substitute Trustee[s] [Mortgagee] .....	14-10-1 to 14-10-2
Form 14-11 Appointment of Substitute Trustee[s] [Mortgage Servicer] .....	14-11-1 to 14-11-2
Form 14-12 Notice of Trustee's Sale [Mortgagee] .....	14-12-1 to 14-12-4
Form 14-13 Notice of Trustee's Sale [Mortgage Servicer] .....	14-13-1 to 14-13-4
Form 14-14 Agenda of Public Foreclosure Sale .....	14-14-1 to 14-14-4
Form 14-15 Agenda of Public Foreclosure Sale of Residential Real Property .....	14-15-1 to 14-15-4
Form 14-16 Trustee's Deed [with Bill of Sale] .....	14-16-1 to 14-16-4
Form 14-17 Foreclosure Affidavit .....	14-17-1 to 14-17-4
Form 14-18 Notice of Advancement and Demand for Payment .....	14-18-1 to 14-18-2
Form 14-19 Affidavit of Advancement .....	14-19-1 to 14-19-2
Form 14-20 IRS Notice Letter .....	14-20-1 to 14-20-4
Form 14-21 Waiver of Rights after Default .....	14-21-1 to 14-21-2
Form 14-22 Debtor's Consent to Acceptance of Collateral .....	14-22-1 to 14-22-2
Form 14-23 [Posted] Notice of Public Sale .....	14-23-1 to 14-23-2
Form 14-24 Agenda of Public Foreclosure Sale [Personal Property] .....	14-24-1 to 14-24-2
Form 14-25 Bill of Sale .....	14-25-1 to 14-25-2
Form 14-26 Notice of Strict Foreclosure .....	14-26-1 to 14-26-2

CHAPTER CONTENTS

Form 14-27	Objection to Proposal to Accept Collateral in [Full/Partial] Satisfaction of Obligation .....	14-27-1 to 14-27-2
Form 14-28	Notice of Our Plan to Sell Property .....	14-28-1 to 14-28-2
Form 14-29	Notification of Disposition of Collateral .....	14-29-1 to 14-29-2
Form 14-30	Memorandum of Private Foreclosure Sale .....	14-30-1 to 14-30-2
Form 14-31	Notice of Default [Home Equity Loan] .....	14-31-1 to 14-31-2
Form 14-32	Notice of Acceleration [Home Equity Loan] .....	14-32-1 to 14-32-2
Form 14-33	Application for an Expedited Order Under Rule 736 on a Home Equity, Reverse Mortgage, or Home Equity Line of Credit Loan .....	14-33-1 to 14-33-4
Form 14-34	Affidavit in Support of Petitioner's Application for an Expedited Order Under Rule 736 .....	14-34-1 to 14-34-4
Form 14-35	Declaration in Support of Petitioner's Application for an Expedited Order Under Rule 736 .....	14-35-1 to 14-35-4
Form 14-36	Military Status Affidavit .....	14-36-1 to 14-36-2
Form 14-37	Military Status Declaration .....	14-37-1 to 14-37-2
Form 14-38	Default Order .....	14-38-1 to 14-38-2
Form 14-39	Demand to Pay Proceeds of Rent .....	14-39-1 to 14-39-2
Form 14-40	Notice of Rescission of Trustee's Sale .....	14-40-1 to 14-40-4
Form 14-41	Affidavit of Return of Bid Amount .....	14-41-1 to 14-41-2

## Chapter 14

### Foreclosure Documents

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The Real Estate Forms Committee would like to acknowledge the contribution of G. Tommy Bastian and his work on the new rules for home equity foreclosures. Please see G. Tommy Bastian, *Expedited Foreclosure Home Equity, Home Equity Line of Credit, Reverse Mortgage, and Tax Lien Transfer and Property Tax Loan Forms for the New Supreme Court Rules*, in State Bar of Tex. Prof. Dev. Program, Advanced Real Estate Drafting Course ch. 15, 16–20, 27–30 (2012).

#### § 14.1 General Considerations

This chapter summarizes the nonjudicial foreclosure process for real and personal property. The forms in this chapter are drafted specifically for the loan documents in this manual. Foreclosure by a mortgage servicer on behalf of a mortgagee requires a special notice of sale. See form 14-13 in this chapter. The attorney is cautioned that these letters and documents are provided as examples only and should not be used as standard forms. As each foreclosure is unique and requires careful consideration, the attorney must tailor the forms to fit the facts of the case. A complete analysis of Texas foreclosure law is beyond the scope of this manual.

For a thorough discussion of Texas foreclosure law, with additional forms and examples, see William H. Locke, Jr., Ralph Martin Novak, Jr. & G. Tommy Bastian, eds., *Texas Foreclosure Manual*, State Bar of Texas (3rd ed. 2014 & Supp. 2018). See also “Additional Resources” at the end of these practice notes for related bibliographical material.

#### § 14.2 Real Estate Foreclosures

##### § 14.2:1 General

A real property foreclosure must be conducted by a trustee or substitute trustee in strict compliance with Tex. Prop. Code §§ 51.0001, 51.002, 51.0021, 51.0025, 51.0074, 51.0075, 51.009,

51.015 and with any requirements set out in the deed of trust. A trustee or substitute trustee foreclosing on residential real estate should also satisfy any applicable requirements of chapter 22 of the Texas Business and Commerce Code.

The attorney must carefully review all loan documents to determine if additional notices, postings, or procedures apply to the foreclosure. For example, the prior version of the foreclosure statute required posting the foreclosure notice in three public places. That language was incorporated into many old deed-of-trust forms. Even though the law no longer requires these postings, if the deed of trust includes the language, the postings must be made. *Harwath v. Hudson*, 654 S.W.2d 851, 854 (Tex. App.—Dallas 1983, writ ref’d n.r.c.).

Many deed-of-trust forms have a foreclosure section that essentially tracks the language of section 51.002 of the Property Code. Sections 51.0001, 51.0021, 51.0025, 51.0075, and 51.009 regulate foreclosures by mortgage servicers. Section 51.0075(f) allows the foreclosure purchaser and the trustee or substitute trustee to agree on a reasonable time after acceptance of the bid within which to deliver the purchase price; otherwise, the purchase price is payable without delay after acceptance of the bid. The deed of trust and security agreement forms in this manual do not repeat the statutory language but instead require the mortgagee or mortgage servicer to foreclose in accordance with the law then in effect.

### § 14.2:2 Statutory Requirements

In Texas, a nonjudicial foreclosure sale must be conducted by a trustee or substitute trustee on the first Tuesday of a month or, if the first Tuesday of the month occurs on January 1 or July 4, on the first Wednesday of the month, in the county in which part or all of the real estate is located. Tex. Prop. Code § 51.002. The sale must take place at the county courthouse in the county in which the property is located unless the commissioner's court designates another public place within a reasonable proximity to the county courthouse. Tex. Prop. Code § 51.002(h). The commissioner's court designation of sales location must be recorded in the real property records of that county, but will not be effective before the ninetieth day after the designation is recorded. Tex. Prop. Code § 51.002(h). A designation by a commissioner's court is not a ground for challenging or invalidating any sale. Tex. Prop. Code § 51.002(h). If the first Tuesday falls on a courthouse holiday in any month other than January or July, the sale may still be conducted. *Koehler v. Pioneer American Insurance Co.*, 425 S.W.2d 889, 891 (Tex. Civ. App.—Fort Worth 1968, no writ). The holding in *Koehler* is not applicable to the months of January and July. Tex. Prop. Code § 51.002(a-1). Because deed of trust terms are strictly construed, the holding in *Harwath v. Hudson*, 654 S.W.2d 851 (Tex. App.—Dallas 1983, writ ref'd n.r.e.), should be considered when a deed of trust includes language restricting a foreclosure sale to the first Tuesday of the month if a trustee or substitute trustee intends to conduct a first Wednesday foreclosure sale. If the deed of trust covers property that lies in two or more counties, the notice should provide where the sale is to take place. The notice must be posted in all counties in which the real property is located. Tex. Prop. Code § 51.002(b). If the deed of trust covers multiple properties located in different counties, all properties can be foreclosed in one sale, even if the tracts are not contiguous. *Bateman v. Carter-Jones Drill-*

*ing Co.*, 290 S.W.2d 366, 370 (Tex. Civ. App.—Texarkana 1956, writ ref'd n.r.e.); *Dall v. Lindsey*, 237 S.W.2d 1006, 1009-10 (Tex. Civ. App.—Amarillo 1951, writ ref'd n.r.e.); *see also Lewis v. Dainwood*, 130 S.W.2d 456, 457 (Tex. Civ. App.—San Antonio 1939, writ ref'd).

Section 51.0001 of the Texas Property Code recognizes the effects of the national Mortgage Electronic Registration System and the securitization of mortgages. This section added definitions of "book entry system," "debtor's last known address," "mortgage servicer," "mortgagee," "mortgagor," "security instrument," "substitute trustee," and "trustee."

Section 51.002(b) of the Property Code has three requirements for a foreclosure sale: (1) the mortgage servicer must give written notice of the sale to all debtors obligated to pay the debt, (2) the notice of the sale must be posted at the county courthouse of each county in which the property is located designating the county in which the property will be sold, and (3) a notice of the sale must be filed with the county clerk of each county in which the property is located. These steps must be completed at least twenty-one days before the sale date. Tex. Prop. Code § 51.002(b). However, if the courthouse or county clerk's office is closed because of inclement weather, natural disaster, or other act of God, the notices required by section 51.002(b) may be posted or filed up to forty-eight hours after the courthouse or county clerk's office reopens for business. Tex. Prop. Code § 51.002(b-1).

Additionally, the Property Code requires the mortgage servicer to give at least twenty days' notice of default before posting the property for foreclosure if the property is the debtor's residence. Tex. Prop. Code § 51.002(d).

Property Code section 51.002 requires the mortgage servicer to serve written notice of the sale on "each debtor who, according to the records of the mortgage servicer of the debt, is obligated to



pay the debt.” See Tex. Prop. Code § 51.002(b)(3). Although a guarantor has been held not to be such a debtor, many attorneys elect to send a notice of the foreclosure sale to a guarantor in the same manner as sent to the debtor. See *Long v. NCNB—Texas National Bank*, 882 S.W.2d 861, 866 (Tex. App.—Corpus Christi 1994, no writ); *Bishop v. National Loan Investors, L.P.*, 915 S.W.2d 241, 245 (Tex. App.—Fort Worth 1995, writ denied).

The notice must designate the county in which the property will be sold. Tex. Prop. Code § 51.002(b)(1). If no area has been designated for foreclosure sales by the county commissioner’s court, the notice of sale must designate the area where the sale is to take place. Tex. Prop. Code § 51.002(a). The notice of sale also must state the earliest time at which the sale will begin and the names and street addresses for the trustees or substitute trustees. Tex. Prop. Code §§ 51.002(b), 51.0075(e). The notice must also include conspicuous language regarding the rights of members of the armed forces. Tex. Prop. Code § 51.002(i). Beyond these requirements (and the disclosure required if a mortgage servicer is administering the foreclosure sale on behalf of the mortgagee that is discussed below in this section) there is little statutory or judicial guidance concerning the content of the notice.

The sale must take place between the hours of 10:00 A.M. and 4:00 P.M. on the first Tuesday of a month or, if the first Tuesday of the month occurs on January 1 or July 4, on the first Wednesday of the month. The sale must begin at the time stated in the notice of sale or not later than three hours after the time listed in the notice of sale. Tex. Prop. Code § 51.002(a), (c); Tex. Civ. Prac. & Rem. Code § 34.041.

The sale must be a public auction with the trustee announcing the property to those gathered at the courthouse and offering the property for sale to the highest bidder for cash. Often the mortgagee is the only bidder. Section 51.0075(f)

of the Property Code allows the foreclosure purchaser and the trustee or substitute trustee to agree on a reasonable time after acceptance of the bid within which to deliver the purchase price; otherwise, the purchase price is payable without delay after acceptance of the bid. Most trustees will accept, and some may prefer, the cash bid in the form of a cashier’s check or a certified check.

A mortgage servicer may administer a foreclosure for a mortgagee if two requirements are met. First, there must be an agreement between the mortgagee and mortgage servicer granting the mortgage servicer the right to service the mortgage. Second, the notice of sale must disclose that the mortgage servicer is representing the mortgagee servicing agreement, the name of the mortgagee, and the address of the mortgagee or the mortgage servicer authorized to service the mortgage. Tex. Prop. Code § 51.0025. Trustees or substitute trustees can set reasonable conditions for conducting the public sale if the conditions are announced before the bidding is opened for the first sale of the day. Tex. Prop. Code § 51.0075(a). A purchaser at the foreclosure sale acquires the property “AS IS” without any express or implied warranties except warranties of title from the mortgagor, but the foreclosing lender does not. *Sandel v. Burney*, 714 S.W.2d 40 (Tex. App.—San Antonio 1986, no writ). The purchase is made at the purchaser’s own risk. Tex. Prop. Code § 51.009(1). A purchaser at foreclosure is not a consumer. Tex. Prop. Code § 51.009(2).

### § 14.2:3 Suit for Deficiency—Real Property

A person liable on the debt, including a guarantor, may introduce evidence of the fair market value of the property as of the date of the foreclosure sale. Tex. Prop. Code §§ 51.003, 51.005. The attorney should discuss these rights with the mortgagee-client before foreclosure to decide if a deficiency is likely and if so whether it would

be prudent to obtain an appraisal to document fair market value and if a judicial foreclosure is a better alternative.

The rights granted to an obligor, including a guarantor, in sections 51.003 and 51.005 may be waived. *See LaSalle Bank N.A. v. Sleutel*, 289 F.3d 837, 841–42 (5th Cir. 2002); *Segal v. Emmes Capital, L.L.C.*, 155 S.W.3d 267, 279–80 (Tex. App.—Houston [1st Dist.] 2004, pet. dismissed).

#### § 14.2:4 Residential Property

If the property is used as the borrower's residence, the mortgagee or mortgage servicer must allow the borrower at least twenty days to cure the default before accelerating the maturity of the debt and giving the twenty-one-day foreclosure notice. Tex. Prop. Code § 51.002(d). The delinquent payment of ad valorem taxes may not be considered a default under a deed of trust or other contract lien if the owner of the residence has entered into an installment agreement for the payment of such taxes under section 33.02 of the Texas Tax Code. Tex. Prop. Code § 51.0011.

A trustee or substitute trustee conducting a residential real property foreclosure may contract with an attorney to advise the trustee or substitute trustee and to administer or perform any of the trustee's or substitute trustee's functions or responsibilities under the deed of trust and chapter 51 of the Texas Property Code. Tex. Bus. & Com. Code § 22.003. The trustee or substitute trustee may also contract with an auction company to arrange, manage, sponsor, or advertise a residential real property foreclosure sale. Tex. Bus. & Com. Code § 22.003.

For residential real property foreclosures, a trustee or substitute trustee must also satisfy any applicable requirements of sections 22.004, 22.005, and 22.006 of the Texas Business and Commerce Code. If the successful bidder is not the mortgagee or the mortgage servicer, the

trustee or substitute trustee must obtain the name, address, and other required information on certain parties submitting the highest and best bid. Tex. Bus. & Com. Code § 22.004. The trustee or substitute trustee must also provide the winning bidder a receipt for the sale proceeds tendered, deliver or record the deed, and account for and distribute the sale proceeds, including maintaining the sale proceeds in a separate account, and maintaining a written record of all deposits and disbursements from the account. Tex. Bus. & Com. Code §§ 22.005, 22.006.

A trustee or substitute trustee conducting a residential real property foreclosure may recover (1) the trustee's or substitute trustee's reasonable actual costs, (2) reasonable attorney's fees incurred by the trustee or substitute trustee, (3) reasonable trustee's or substitute trustee's fees, and (4) the trustee's or substitute trustee's reasonable attorney's fees in a suit based on a claim related to the sale if the suit is found to be groundless, in each instance payable from the sale proceeds in excess of the amount owed on the indebtedness secured by the residential real property. Tex. Bus. & Com. Code § 22.006. Certain trustee's or substitute trustee's fees and expenses in a residential real property foreclosure are presumed to be reasonable if they do not exceed the amounts provided by law. Tex. Bus. & Com. Code § 22.006.

#### § 14.2:5 Federal Interests

If the federal government has a property interest that would be extinguished through foreclosure, including a security interest, lien, or mortgage, the government's consent may be required to eliminate that interest; the government has a one-year right of redemption for certain liens eliminated by foreclosure of a superior lien without its consent. 12 U.S.C. § 1825(b)(2); 28 U.S.C. § 2410(c).

Before foreclosure, the federal tax lien records of the county in which the real property is located should be examined. If personal property secures the loan, the federal tax lien records of the secretary of state's office or other appropriate office should also be examined. See 26 U.S.C. § 6323(f)(1)(A). If the property is encumbered by an inferior federal tax lien filed more than thirty days before the scheduled foreclosure sale, the mortgagee or mortgage servicer must give a special notice to the Internal Revenue Service at least twenty-five days in advance of the sale. See 26 U.S.C. § 7425(b), (c). The Internal Revenue Code provides that unless a proper notice is given, a foreclosure sale will not affect the subordinate tax lien. In the case of real property, the IRS has a 120-day right of redemption following the sale, provided a proper notice was given. 26 U.S.C. § 7425(d).

#### § 14.2:6 Beachfront Property

If the property is located seaward of the Gulf Intracoastal Waterway, as defined in Tex. Nat. Res. Code § 61.025, the purchaser should receive the statutory notice specified by that section. See Tex. Att'y Gen. Op. No. JM-834 (1987). See also the section titled "Coastal Properties" in chapter 2 of this manual.

#### § 14.2:7 Personal Property Included in Deed of Trust

If the deed of trust includes a security agreement for personal property, the real property foreclosure sale can include the personal property in which a security interest is granted in the deed of trust as part of the foreclosure. See Tex. Bus. & Com. Code § 9.604(a). If personal property is sold in connection with the foreclosure sale of real property, the commercially reasonable standard of the Texas Business and Commerce Code does not govern the sale. *Huddleston v. TCB-Dallas*, 756 S.W.2d 343 (Tex. App.—Dallas 1988, writ denied).

#### § 14.2:8 Deed in Lieu of Foreclosure

The Supreme Court of Texas has ruled that there is no such thing as a "deed in lieu of foreclosure." *Flag-Redfern Oil Co. v. Humble Exploration Co.*, 744 S.W.2d 6, 8 (Tex. 1987). The supreme court held that a deed in lieu of foreclosure is merely a conveyance by the borrower as a payment for the debt and that, because the deed does not have the effect of a lien foreclosure, the deed does not extinguish any subordinate liens. Deeds in lieu of foreclosure are, however, recognized by statute in Texas. Tex. Prop. Code § 51.006. A creditor who accepts a deed in lieu of foreclosure may void that deed within four years of accepting it if the debtor fails to disclose a lien before executing the deed and the creditor has no personal knowledge of the undisclosed lien. Tex. Prop. Code § 51.006(b). Some borrowers prefer to execute a deed in lieu of foreclosure to avoid the publicity associated with a public foreclosure. Before advising a client about a deed-in-lieu transaction, the attorney should review the law on this subject. See the articles listed as "Additional Resources" at the end of these practice notes. For an example of a deed in lieu of foreclosure, see form 5-13 in this manual.

#### § 14.2:9 Home Equity Loan Lien Foreclosure

Tex. Const. art. XVI, § 50(a)(6), authorizes a voluntary lien on a Texas homestead for a home equity loan. (See chapter 11 in this manual for a discussion of home equity loans.) A lien on a Texas homestead securing the payment of a home equity loan may be foreclosed only by court order. Tex. Const. art. XVI, § 50(a)(6)(D). Article XVI, section 50(r), directs the Texas Supreme Court to promulgate rules of civil procedure for an expedited court order, and, acting pursuant to that authority, the Texas Supreme Court adopted rules 735 and 736 of the Texas Rules of Civil Procedure. The court approved forms for expedited foreclosure proceedings on

February 10, 2014 (Misc. Docket No. 14-9047, Feb. 10, 2014). The forms may be found at [www.txcourts.gov/media/847145/expedited-foreclosure-forms-for-website.pdf](http://www.txcourts.gov/media/847145/expedited-foreclosure-forms-for-website.pdf). Although rules 735 and 736 do require a judicial order before proceeding with the foreclosure of a home equity loan lien, those rules do not otherwise change existing Texas real property foreclosure law. *See* Tex. R. Civ. P. 735.2. The right of a lender to foreclose a home equity loan lien therefore remains conditioned on an underlying default on the home equity loan. (See forms 14-30 and 14-31 in this chapter for a notice of default and notice of acceleration letters on a home equity loan.)

Rules 735 and 736 were substantially amended effective January 1, 2012.

Rule 736 provides the procedure for obtaining a court order to allow foreclosure of a lien containing a power of sale in a security instrument securing a home equity loan. Tex. R. Civ. P. 735.1. Forms 14-32 through 14-37 are some of the forms promulgated by the supreme court. In addition, the practitioner should review section 14.4:5 below for additional information on consumer debt collection activities.

Rule 736 establishes an expedited judicial procedure for obtaining a court order that allows a lender to proceed with the foreclosure of a home equity loan lien. Under the rule, a lender files an application (see form 14-32) in any court with appropriate jurisdiction in any county where all or any part of the real property is located, including probate courts. Tex. R. Civ. P.

736.1(a). The required contents of the application were changed when the rule was amended and are set out in detail in Tex. R. Civ. P. 736.1(d).

The process for service of a rule 736 application changed effective January 1, 2012. Under the previous rule, the applicant or applicant's attorney mailed the application to the obligor and obligor's attorney. The new rule requires the

clerk of the court to prepare and serve a citation by both certified and regular mail for each respondent named in the application. A citation addressed to "the occupant of the property" must also be issued. Tex. R. Civ. P. 736.3(a), (b). Other requirements for service by the clerk of the court may be found in Tex. R. Civ. P. 736.3.

A response to an application for a court order permitting the lender to proceed with the foreclosure of a home equity loan lien is due on the first Monday following the expiration of thirty-eight days from the date the citation was placed in the custody of the United States Postal Service. Tex. R. Civ. P. 736.5(b).

The response must be signed in accordance with rule 57 and may be in the form of a general denial under rule 92, except that the respondent must affirmatively plead the defenses relied on as set out in rule 736.5(c)(1)–(5). Tex. R. Civ. P. 736.5(c). The response may not state an independent claim for relief, and the court is required to strike any such claim without a hearing. Tex. R. Civ. P. 736.5(d).

The court must not conduct a hearing unless a response is filed. Tex. R. Civ. P. 736.6.

No discovery is permitted in a proceeding governed by rule 736, and the only issue to be determined is whether a party may obtain an order to proceed with foreclosure under applicable law and the terms of the loan agreement, contract, or lien sought to be foreclosed. Tex. R. Civ. P. 735.2, 736.4.

An order under rule 736 is without prejudice and has no res judicata, collateral estoppel, estoppel by judgment, or other effect in any other judicial proceeding. Tex. R. Civ. P. 736.9.

If no response to the application is filed by the due date, the petitioner may file a motion and proposed order to obtain a default order. A default order must be granted by the court no later than thirty days after a motion is filed and

served in accordance with the rules. The return of service must be on file with the clerk of the court for at least ten days before the court may grant the application. Tex. R. Civ. P. 736.7. The granting or denial of the application is not an appealable order. Tex. R. Civ. P. 736.8(c).

An order (see form 14-37) granting an application that allows a lender to proceed with foreclosure of a home equity loan lien must describe—

1. the material facts establishing the basis for foreclosure,
2. the property to be foreclosed by commonly known mailing address and legal description,
3. the name and last known address of each respondent subject to the order, and
4. the recording or indexing information of each lien to be foreclosed.

Tex. R. Civ. P. 736.8(b).

A proceeding under rule 736 is automatically stayed if a respondent files a separate, original proceeding in a court of competent jurisdiction that puts in issue any matter relating to the foreclosure before 5:00 P.M. on the Monday before the scheduled foreclosure sale. Tex. R. Civ. P. 736.11(a). A stayed proceeding is to be dismissed if no order has been granted. If an order has been signed, the court must vacate the rule 736 order. Tex. R. Civ. P. 736.11(c).

#### **§ 14.2:10 Property Owned by Military Servicemember**

Property Code section 51.015 (1) prohibits any nonjudicial foreclosure of a dwelling owned by military personnel on active duty or within nine months after their active duty concludes; (2) provides that a court may, during the same active duty period and the nine months subsequent, either (a) stay a proceeding to judicially foreclose or enforce a mortgage lien or (b) modify the terms of any such mortgage, as necessary to preserve the interests of the parties; (3) authorizes the court to also issue similar orders of stay or take other actions to protect dependents of active duty personnel and third-party guarantors of the loan obligation; and (4) imposes a criminal penalty (class A misdemeanor) on any person who knowingly causes a foreclosure or seizure of property protected as set forth above. A borrower or guarantor may voluntarily waive these protections by written agreement contained in an instrument separate from the loan obligation. Tex. Prop. Code § 51.015. Property Code section 51.015 includes many of the same protections for military servicemembers as does the federal Servicemember's Civil Relief Act.

ify the terms of any such mortgage, as necessary to preserve the interests of the parties; (3) authorizes the court to also issue similar orders of stay or take other actions to protect dependents of active duty personnel and third-party guarantors of the loan obligation; and (4) imposes a criminal penalty (class A misdemeanor) on any person who knowingly causes a foreclosure or seizure of property protected as set forth above. A borrower or guarantor may voluntarily waive these protections by written agreement contained in an instrument separate from the loan obligation. Tex. Prop. Code § 51.015. Property Code section 51.015 includes many of the same protections for military servicemembers as does the federal Servicemember's Civil Relief Act.

#### **§ 14.3 Personal Property Foreclosures**

The foreclosure rules for personal property secured transactions are found at Tex. Bus. & Com. Code §§ 9.601–.628. There are four ways to foreclose a security interest in personal property collateral: as part of a real property foreclosure; by public disposition; by private disposition; and through strict foreclosure, accepting the property with or without a claim for a deficiency. Without foreclosing, a secured party may also collect amounts owed on collateral and enforce obligations of persons obligated on collateral.

A detailed discussion of the rules of personal property foreclosure is beyond the scope of this manual. Attorneys are encouraged to review the relevant provisions of chapter 9 of the Texas Business and Commerce Code and applicable case law before foreclosing a security interest in personal property.

A disposition of personal property collateral must be commercially reasonable, whether the disposition is public or private. Tex. Bus. & Com. Code § 9.610(b). This requirement cannot be waived or varied. Tex. Bus. & Com. Code

§ 9.602(7). The term *commercially reasonable* is a term of art, the meaning of which has been heavily litigated. The attorney should review the relevant case law on the particular type of personal property being disposed of to properly advise the client. Section 9.627 of the Code also gives guidelines for determining if conduct was commercially reasonable. Tex. Bus. & Com. Code § 9.627.

### § 14.3:1 Real Estate Foreclosure

If the security agreement covers both real and personal property, the secured party may elect to foreclose both under the real property laws. In that event, chapter 9 rules do not apply. Tex. Bus. & Com. Code § 9.604(a). For a discussion of the real property foreclosure rules, see section 14.2 above.

### § 14.3:2 Public Disposition vs. Private Disposition

The law of public and private foreclosure disposition of personal property collateral is found at Tex. Bus. & Com. Code §§ 9.610–.619, 9.623–.628. A disposition includes a sale, lease, or license of personal property collateral. A public disposition is not defined in the Texas Uniform Commercial Code. The official comment to section 9.610 states that although “public disposition” is not defined, it is one at which the price is determined after the public has had a meaningful opportunity for competitive bidding. In other words, a “public disposition” is a disposition at an auction open to the public. “Meaningful opportunity” is meant to imply that some form of advertisement or public notice must precede the sale (or other disposition) and that the public must have access to the sale or disposition. Tex. Bus. & Com. Code § 9.610 cmt. 7.

Conversely, although a private disposition also is not defined in the Texas UCC, some commentators believe that a “private disposition” is any disposition that is not a “public disposition.”

A public-sale foreclosure or other public disposition of personal property collateral is more difficult for the secured party because every aspect of the disposition must be commercially reasonable. Tex. Bus. & Com. Code § 9.610(b). Unlike a real estate foreclosure, for which a courthouse public auction is authorized, a public auction disposition of personal property collateral is appropriate only if that method of disposition is commercially reasonable for the collateral involved. With the existence of Internet auction sites, many types of personal property are sold at an Internet public auction. However, there may be some types of personal property for which a public auction disposition is not commercially reasonable. The manner of disposition must be commercially reasonable. A public auction disposition must be conducted fairly. Adequate advertising should precede the disposition to solicit potential bidders. Merely advertising in a local newspaper may not be “commercially reasonable,” particularly if a potential buyer for the property would ordinarily look elsewhere for advertisements offering that type of property for sale. The time and place of the public auction must be commercially reasonable. If there is a usual place or market for a public auction disposition of property of the type involved that is reasonably available, the collateral should be disposed of there. Tex. Bus. & Com. Code § 2.706(d)(2). “[I]f such ‘usual’ place or market is not reasonably available, a duly advertised public [disposition] may be held at another place if it is one which prospective bidders may reasonably be expected to attend, as distinguished from a place where there is no demand whatsoever for [property] of the kind.” Tex. Bus. & Com. Code § 2.706 cmt. 9. The collateral should be available for reasonable inspection by prospective bidders, either at the public auction disposition or at another place made known to the bidders. Tex. Bus. & Com. Code § 2.706(d)(3). In a transaction, other than a consumer transaction, if a secured party’s compliance with the provisions of chapter 9 is placed in issue, the secured party has the burden of establishing that

its collection, enforcement, or disposition of the collateral complied with the statutory requirements. Tex. Bus. & Com. Code § 9.626(a)(2). A secured party should consider how it will establish that all aspects of its public auction disposition of collateral meet the commercially reasonable requirement before deciding to proceed in that manner. A secured party may elect to conduct a private disposition. A private disposition may offer lower transaction costs to the secured party. A private disposition must be an arm's-length transaction.

There are two primary distinctions between a public disposition and a private disposition of personal property collateral. First, the secured party may purchase the collateral at a public disposition but generally may not do so at a private disposition. Tex. Bus. & Com. Code § 9.610(c). Second, the debtor is entitled to notification of "the time and place" of a public disposition but is merely entitled to notification of "the time after which" a private disposition is to be made. Tex. Bus. & Com. Code § 9.613(1)(E).

### § 14.3:3 Rules for Foreclosure

The property may be sold or otherwise disposed of as a unit or in parcels and at any time and place and on any terms. Tex. Bus. & Com. Code § 9.610(b). However, every aspect of the disposition must be commercially reasonable. Tex. Bus. & Com. Code § 9.610(b). The obligation of the secured party to proceed in a commercially reasonable manner may not be waived by the debtor. Tex. Bus. & Com. Code § 9.602(7).

Except as described below, the secured party must send a proper notification of disposition of collateral to the debtor and to any secondary obligor. Additionally, if the collateral is other than consumer goods, notice must be sent to any other person from whom the secured party has received, before the notification date, notification of a claim of an interest in the collateral and

to any other secured party that has filed a financing statement that meets the requirements set out in section 9.611(c)(3)(B) or that has complied with certificate of title or other title registration laws. Tex. Bus. & Com. Code § 9.611(c). Thus, for a disposition of collateral other than consumer goods, the foreclosing secured party has the duty of conducting a Uniform Commercial Code financing statement search to discover other potential secured parties and to notify any that are discovered. The attorney advising the secured party should carefully review section 9.611 and its comments to determine the filing offices to search and the period within which the search should be conducted. In a transaction other than a consumer transaction, a proper notification sent after default and ten or more days before the earliest time of disposition is deemed to be reasonable. Tex. Bus. & Com. Code § 9.612(b). The secured party need not give notice of disposition of the collateral if the property is perishable, threatens to decline speedily in value, or sells on a recognized market (such as a publicly listed stock). Tex. Bus. & Com. Code § 9.611(d). The debtor or a secondary obligor may waive its rights, but not the rights of other parties, to receive a notice of disposition of collateral by written waiver signed after default. Tex. Bus. & Com. Code § 9.624.

The contents of a proper notice of disposition of collateral are set forth in section 9.613 for collateral other than consumer goods and in section 9.614 for consumer goods collateral. Those sections also include model forms, which when completed are deemed to provide sufficient information concerning the disposition. The debtor may not waive, or agree that the secured party may vary from, the notification requirements of those sections. *See* Tex. Bus. & Com. Code § 9.602(7). Notices to consumers must also comply with the federal Fair Debt Collection Practices Act (15 U.S.C. §§ 1692-1692p) and the Texas Debt Collection Act (Tex. Fin. Code §§ 392.001-.404).

The secured party may buy personal property collateral at a public disposition. Tex. Bus. & Com. Code § 9.610(c)(1). The secured party may buy personal property collateral at a private disposition only if the property is of a kind that is customarily sold on a recognized market or is the subject of widely distributed standard price quotations. Tex. Bus. & Com. Code § 9.610(c)(2).

If a foreclosing secured party does not comply with section 9.601 *et seq.*, a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions. Tex. Bus. & Com. Code § 9.625(a). This section also sets out the damages for which a secured party may be liable, including minimum penalties in consumer transactions and nonconsumer transactions. *See* Tex. Bus. & Com. Code § 9.625(b)–(g).

A contract for sale, lease, license, or other disposition of personal property as a result of a foreclosure includes the warranties relating to title, possession, quiet enjoyment, and the like that by operation of law accompany a voluntary disposition of like-kind property. Tex. Bus. & Com. Code § 9.610(d). These warranties may be disclaimed or modified. The manner and the approved language for disclaiming or modifying warranties are set out in Tex. Bus. & Com. Code § 9.610(e), (f).

#### § 14.3:4 Strict Foreclosure

The law of strict foreclosure is found at Tex. Bus. & Com. Code §§ 9.620–.622. The secured party may accept personal property collateral in full or partial satisfaction of the secured obligation only under the circumstances set forth in section 9.620. A secured party may not accept collateral in partial satisfaction of a secured obligation in a consumer transaction. Tex. Bus. & Com. Code § 9.620(g).

A secured party that wants to accept personal property collateral in full or partial satisfaction of a secured obligation in a nonconsumer transaction must obtain the debtor's consent. The secured party must send its proposal to do so to any person from whom the secured party has received, before the debtor consented to the acceptance, a notice of a claim of interest in the collateral and to any other secured party or lienholder that has a perfected security interest in the collateral either because of a filed financing statement that meets the requirements of section 9.621(a)(2) or because of compliance with certificate of title or other title registration laws. Tex. Bus. & Com. Code § 9.621(a). If the secured party proposes to accept the collateral in partial satisfaction of the secured obligation, the secured party must also notify any secondary obligor. Tex. Bus. & Com. Code § 9.621(b). A secured party that proposes to accept personal property collateral in full or partial satisfaction of a secured obligation thus has a duty to conduct a UCC financing statement search to discover other potential secured parties and to notify those that have filed a proper financing statement of the secured party's proposal. Moreover, a secured party that accepts personal property collateral is liable to another secured party that should have been notified, but was not, for any loss resulting from the failure of the enforcing secured party to notify the other secured party. Tex. Bus. & Com. Code § 9.625(b). The debtor may consent to the acceptance of collateral in partial satisfaction of the secured obligation only by a record authenticated after default. The debtor may consent to acceptance of collateral in full satisfaction of the secured obligation by authenticating a record (for example, signing a writing) after default or by failing to object to a properly sent proposal within twenty days after the proposal is sent. Tex. Bus. & Com. Code § 9.620(c)(2).

The secured party may not use strict foreclosure if—



1. the debtor does not consent (Tex. Bus. & Com. Code § 9.620(a)(1));
2. the secured party timely receives objection in writing from a party entitled to notice of the proposed strict foreclosure (Tex. Bus. & Com. Code § 9.620(a)(2));
3. the secured party is foreclosing a security interest in consumer goods and the debtor is in possession of the goods (Tex. Bus. & Com. Code § 9.620(a)(3));
4. the secured party is foreclosing a security interest in consumer goods and the debtor has paid more than 60 percent of the principal amount of the obligation (Tex. Bus. & Com. Code § 9.620(e)); or
5. in a consumer transaction, the secured party does not propose to satisfy the secured obligation in full (Tex. Bus. & Com. Code § 9.620(g)).

After default, the debtor may waive or modify limitations 1., 3., and 4. by an authenticated agreement. Tex. Bus. & Com. Code §§ 9.620(a)(4), 9.624(b).

### § 14.3:5 Suit for Deficiency—Personal Property

The procedure for determining a deficiency or surplus is found in Tex. Bus. & Com. Code §§ 9.615, 9.626.

In a consumer goods transaction in which either the debtor is entitled to a surplus or a consumer obligor is liable for a deficiency, the secured party must send a written explanation of the surplus or deficiency. If a surplus exists, the secured party must send an explanation of the surplus before or when the secured party accounts to the debtor and pays any surplus or within fourteen days of the debtor's request for an explanation, whichever comes first. If a defi-

ciency exists, the secured party must send an explanation of the deficiency when the secured party first makes written demand for the deficiency or within fourteen days of the debtor's request for an explanation, whichever comes first. Tex. Bus. & Com. Code § 9.616(b). A debtor or consumer obligor is entitled without charge to one response to a request for an explanation of the surplus or deficiency during any six-month period in which the secured party does not send one. The secured party may require payment of a charge not exceeding \$25 for each additional response. Tex. Bus. & Com. Code § 9.616(e).

The rules for an action to collect a deficiency other than in a consumer transaction are set forth in section 9.626. This section provides for the determination of the deficiency when the secured party fails to comply with the procedures set forth in section 9.601 *et seq.* Under this section, the liability of a debtor or a secondary obligor for a deficiency is limited to an amount by which the sum of the secured obligation, expenses, and attorney's fees exceeds the greater of the proceeds the secured party realized or the amount the proceeds would have been if the secured party had proceeded in compliance with those provisions. Tex. Bus. & Com. Code § 9.626(a). A court may not infer from section 9.626 the nature of the proper rule in consumer transactions and may continue to apply existing principles. Tex. Bus. & Com. Code § 9.626(b). *See Greathouse v. Charter National Bank—Southwest*, 851 S.W.2d 173 (Tex. 1992); *Tanenbaum v. Economics Laboratory, Inc.*, 628 S.W.2d 769 (Tex. 1982).

### § 14.3:6 Cautions

The lender's rights are governed by subchapter F of article 9 of the Uniform Commercial Code (Tex. Bus. & Com. Code §§ 9.601–.628) and the security agreement. Certain provisions, noted in Tex. Bus. & Com. Code § 9.602, cannot be altered by the parties. Before exercising any

contractual right under the security agreement, the attorney should review these subchapters.

### § 14.3:7 Secured Party's Collection Rights—Accounts, Intangibles, and Instruments

After default, or earlier if agreed, the secured party may notify an account debtor or other person obligated on collateral, such as the maker of a Business and Commerce Code chapter 3 negotiable instrument, to make payment or otherwise render performance directly to the secured party. Tex. Bus. & Com. Code § 9.607(a). This remedy may enhance the secured party's recovery because payments on the collateral would otherwise be paid to the debtor. This procedure requires no prior notice to the debtor. *Cullen Frost Bank v. Dallas Sportswear Co.*, 730 S.W.2d 668, 669–70 (Tex. 1987). If a debtor or secondary obligor will be liable for a deficiency, a secured party must proceed in a commercially reasonable manner in collecting or enforcing the obligation of an account debtor or other person obligated on collateral. Tex. Bus. & Com. Code § 9.607(c).

### § 14.3:8 Right of Possession

After default, unless otherwise agreed, the secured party may take possession of tangible personal property collateral. Tex. Bus. & Com. Code § 9.609. The repossession must not breach the peace. This nonjudicial self-help remedy is useful in allowing the secured party to obtain possession without delay.

### § 14.3:9 Right of Redemption

A debtor, any secondary obligor, or any junior secured party or lienholder may redeem the collateral from the secured party at any time before (1) the secured party has collected the collateral under section 9.607, (2) the secured party has disposed of the collateral or entered into a contract to dispose of the collateral under section

9.610; or (3) the secured party has accepted the collateral in full or partial satisfaction of the obligation under section 9.622. *See* Tex. Bus. & Com. Code §§ 9.607, 9.610, 9.622. To redeem the collateral, a person must fulfill all obligations secured by the collateral and pay certain expenses and attorney's fees. Tex. Bus. & Com. Code § 9.623(b).

### § 14.3:10 Secured Party's Liability

If a secured party has not complied with section 9.601 *et seq.*, a court may order or restrain collection, enforcement, or disposition of collateral. Tex. Bus. & Com. Code § 9.625(a). Further, a secured party is liable for damages in the amount of any loss caused by a failure to comply with Texas Business and Commerce Code chapter 9. Tex. Bus. & Com. Code § 9.625(b). In addition, certain violations of chapter 9 render a noncomplying secured party liable for statutory minimum penalties. Tex. Bus. & Com. Code § 9.625(c), (f).

Chapter 9 requires the secured party's collection and enforcement rights to be exercised in a commercially reasonable manner. Evidence that a better price could have been obtained under a different foreclosure proceeding does not of itself establish that the sale was commercially unreasonable. A sale under judicial approval is deemed to be commercially reasonable, but the UCC does not require a secured party to seek such approval. *See* Tex. Bus. & Com. Code § 9.627.

## § 14.4 Foreclosure Documents

### § 14.4:1 Foreclosure Documents Applicable to Real Property and Personal Property

The appropriate forms to use in any foreclosure depend on the facts of the specific situation. The forms in this chapter are examples of foreclosure documents to be used with the forms in this

manual, without modification of their principal terms. Use of modified State Bar forms or other forms could significantly change the foreclosure document requirements.

Sections 14.4:2 through 14.10 below provide a chronological analysis of the foreclosure process and references to forms for compliance.

### § 14.4:2 Document Review

The attorney should review with the client all the loan documents for the transaction. In transactions that cover long time periods, there may be modification agreements that would affect the foreclosure process. For example, a subordinate creditor may have obtained an agreement from the first secured creditor to receive a special notice of default or foreclosure. The attorney should verify with the client that no such agreements exist.

### § 14.4:3 Statute of Limitations

The attorney should confirm that the statute of limitations has not barred any right to relief. A sale of real property under a power of sale contained in a deed of trust must be made not later than four years after the day the cause of action accrues. Tex. Civ. Prac. & Rem. Code § 16.035(b). However, a mortgage servicer may foreclose a security interest in personal property collateral notwithstanding that there is a limitations defense to the debt. *Miller, Hiersche, Martens & Hayward, P.C. v. Bent Tree National Bank*, 894 S.W.2d 828, 830 (Tex. App.—Dallas 1995, no writ).

### § 14.4:4 Current Title, Abstract, and Tax Searches

The attorney should verify current information about the collateral and its ownership. Because tax liens are accorded priority over most other claims, the client must know the amounts of any delinquent taxes to be able to decide if the fore-

closure is economically feasible. See Tex. Tax Code § 32.05.

The attorney should advise the client that title insurance coverage may be available. The limited preforeclosure policy (form T-98) is issued in connection with a mortgage in default to the named mortgagee or its assignee, a loan servicer, a trustee, or an attorney and insures as to matters recorded since the mortgage, including involuntary liens such as federal tax liens. See Procedural Rule P-43, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*, available at [www.tdi.texas.gov/title/titlem4g.html#P-43](http://www.tdi.texas.gov/title/titlem4g.html#P-43).

### § 14.4:5 Consumer Transactions

#### Fair Debt Collection Practices Act Notice:

The forms in this chapter are drafted for use in nonconsumer transactions, to which federal and state fair-debt collection acts do not apply. The Texas Property Code provides that a trustee or a substitute trustee is not a debt collector under Texas law. Tex. Prop. Code § 51.0075(b). If, however, the attorney wishes to try to adapt these forms for a consumer transaction, the notice contained in clause 14-7-1 in this chapter should be incorporated in the first correspondence the attorney has with the consumer. Additional modifications to the forms also may be required. Case law is unclear, and there is no Fifth Circuit authority on what additional collection efforts, if any, may be made during the thirty-day period during which the consumer may request debt verification. Nothing may be included with the notice that negates the notice or would lead an unsophisticated person to misunderstand the right to contest the debt.

*Chauncey v. JDR Recovery Corp.*, 118 F.3d 516, 519 (7th Cir. 1997) (demand that payment be received within thirty days or “a decision to pursue other avenues to collect the amount due will be made” found to contradict notice); *Terran v. Kaplan*, 109 F.3d 1428, 1434 (9th Cir. 1997) (statement that “[u]nless an immediate tele-

phone call is made . . . we may find it necessary to recommend to our client that they proceed with legal action” held not a demand for payment and thus not contradictory or overshadowing). The safest course of action would be to send only the notice found in clause 14-7-1 and wait thirty days before making any other collection efforts. The attorney, as a debt collector under the federal and state acts, can be personally liable to the consumer for failure to comply with the acts and should review this area of the law with care. See the section titled “Fair Debt Collection Practices” in chapter 2 of this manual and the materials in “Additional Resources” at the end of these practice notes.

**Fair Credit Reporting Act:** Any financial institution that extends credit to an individual and regularly and in the ordinary course of business reports negative information to a credit bureau must give its individual customers a clear and conspicuous written notice about reporting negative information. A financial institution complies with the notice requirement if the institution uses a model notice promulgated by the Board of Governors of the Federal Reserve System. There are two model notices, one that may be used before reporting negative information to a credit bureau and one that may be used after reporting negative information to a credit bureau. If the financial institution did not include the notice in its initial loan documentation or related communication, the notice should be given with the first correspondence concerning the foreclosure. 15 U.S.C. § 1681s-2(a)(7); 12 C.F.R. pt. 222. The model forms of notice are found in clauses 14-7-2 and 14-7-3. See the section titled “Fair Credit Reporting Act” in chapter 2.

## § 14.5 Notices

All foreclosure notices must be sent by certified mail and should be sent return receipt requested. For real estate foreclosures, the notice must be addressed to the debtor at the debtor’s last

known address. Tex. Prop. Code § 51.002(e). For personal property foreclosures, the notice should be sent to the address specified in the security agreement or other agreement or, if none, to any address reasonable under the circumstances. Tex. Bus. & Com. Code § 1.201(b)(36). For foreclosure of a debt secured by a debtor’s residence there is a presumption that the residential address is to be used for notice unless the debtor notifies the mortgage servicer otherwise. Tex. Prop. Code § 51.0001(2)(A). For all other debts the notices are sent to the last known address of the debtor as shown by the records of the mortgage servicer. Tex. Prop. Code § 51.0001(2)(B). If there is doubt about the proper address, it is good practice to send the notice to each address in the file. If two borrowers reside at the same address, the attorney may wish to send the letter separately to each person at the address. Some attorneys also send a copy of the letter to each party by first-class mail to attempt actual delivery if the certified mail is not accepted by the borrower. That attempt should be noted on the letter.

The mortgage servicer must give at least twenty days’ notice of default before posting the property for foreclosure if the property is the debtor’s residence. Tex. Prop. Code § 51.002(d). See the notice of default and intent to accelerate, form 14-4 in this chapter.

A debtor is required to inform the mortgage servicer of any change of address of the debtor. Tex. Prop. Code § 51.0021. Form 14-2 is a “Notice of Change of Debtor’s Address” to comply with this requirement.

### § 14.5:1 Letter to Reinstate Default Provisions

If the mortgagee has not insisted on strict performance of the loan documents in the past, the mortgagee should advise the borrower of its decision to strictly enforce the agreements in the

future. *Dhanani Investments, Inc. v. Second Master Bilt Homes, Inc.*, 650 S.W.2d 220, 222 (Tex. App.—Fort Worth 1983, no writ). See form 14-1 in this chapter.

### § 14.5:2 Notice of Maturity and Demand for Payment

If the note has matured by its own terms, the mortgagee or mortgage servicer should demand payment. See form 14-3 in this chapter.

### § 14.5:3 Notice of Default and Intent to Accelerate

The notices of default and of intent to accelerate are waived in the promissory note form (see form 6-1 in this manual). However, Texas courts deem acceleration a harsh remedy. *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 892–93 (Tex. 1991). Even if notices of default and of intent to accelerate have been expressly waived, many attorneys elect to send this notice, viewing the waiver more as a safeguard to protect the mortgagee from the complications of minor technicalities than as a license to foreclose on borrowers without notice or demand. See form 14-4 in this chapter.

### § 14.5:4 Notice of Acceleration

The notice of acceleration is used if the mortgagee or mortgage servicer gives notice of intent to accelerate and the borrower fails to cure the default. See form 14-5 in this chapter.

### § 14.5:5 Reinstatement Agreement

Sometimes the mortgagee and the borrower will agree to continue the payment terms of the note after acceleration. However, once the maturity of a note is accelerated, limitations on the entire debt will begin to run. A reinstatement agreement should rescind the acceleration and rein-

state the payment provisions in the note. See form 14-6 in this chapter.

### § 14.5:6 Affidavit of Posting and Filing

The affidavit of posting and filing is not required by law, but it serves to document where and when the notice was distributed and will normally be required by title companies. See form 14-8 in this chapter. If a newspaper or other public advertisement is used, the company publishing the notice should provide an affidavit of the publication, and the attorney should provide a copy of the page for the client's file. Some attorneys prefer to use a certificate form instead of an affidavit.

### § 14.5:7 Affidavit of Mailing

The affidavit of mailing is not required by law, but it serves to document legal notice mailing compliance and will normally be required by title companies. See form 14-9 in this chapter. Such an affidavit, completed and signed by a person knowledgeable of the facts, is prima facie evidence of service. Tex. Prop. Code § 51.002(e). Some attorneys prefer to use a certificate form instead of an affidavit.

## § 14.6 Foreclosure Documents Unique to Real Property

### § 14.6:1 Appointment of Substitute Trustee

Forms 14-10 and 14-11 in this chapter may be used if the mortgagee or mortgage servicer wishes for someone other than the trustee named in the deed of trust to act. The appointment may also be made in the notice of trustee's sale. See section 14.6:2 below. If required by the deed of trust, the appointment of substitute trustee must be recorded in the real property records before posting the notice of foreclosure.

### § 14.6:2 Notice of Trustee's Sale

Form 14-12 in this chapter has been adapted to include personal property that may be covered by the deed of trust and that the mortgagee may wish to foreclose on with the foreclosure of the real property. See section 14.2:7 above. Note that, once appointed, the substitute trustee is the trustee under the deed of trust and is referred to as such rather than as the substitute trustee.

The appointment or authorization of a trustee or substitute trustee made in a notice of sale is effective as of the date of the notice if the notice—

1. complies with sections 51.002 and 51.0075(e) of the Texas Property Code;
2. is signed by an attorney or agent of the mortgagee or mortgage servicer; and
3. contains a statement in all capital letters, bold-faced type, to read as follows:

**THIS INSTRUMENT APPOINTS THE SUBSTITUTE TRUSTEE(S) IDENTIFIED TO SELL THE PROPERTY DESCRIBED IN THE SECURITY INSTRUMENT IDENTIFIED IN THIS NOTICE OF SALE. THE PERSON SIGNING THIS NOTICE IS THE ATTORNEY OR AUTHORIZED AGENT OF THE MORTGAGEE OR MORTGAGE SERVICER.**

See Tex. Prop. Code § 51.0076. Form 14-13 allows a mortgage servicer to administer a foreclosure under Tex. Prop. Code § 51.0025.

### § 14.6:3 Agenda of Public Sale

Forms 14-14 and 14-15 in this chapter, although not required by law, serve to document the sale.

### § 14.6:4 Trustee's Deed

Form 14-16 in this chapter has been adapted to include personal property that may be covered by the deed of trust and that the mortgagee may wish to foreclose on with the foreclosure of the real property. See section 14.2:7 above. Note that, once appointed, the substitute trustee is the trustee under the deed of trust and is referred to as such rather than as the substitute trustee.

Deeds transferring an interest to or from an individual, including a trustee, must contain the confidentiality notice required by Tex. Prop. Code § 11.008. See section 3.16 in this manual.

### § 14.6:5 Foreclosure Affidavit

Form 14-17 in this chapter, although not required by law, serves to document the legal requirements of the sale. Title companies will normally require an affidavit from the trustee attesting to these matters. This form may be used as a stand-alone document or may be attached to the trustee's deed. It may also be used in conjunction with the affidavit of posting and filing (form 14-8) and the affidavit of mailing (form 14-9) with the appropriate modifications.

### § 14.6:6 Notice and Affidavit of Advancement

If the mortgagee advances funds to cure a default under the deed of trust to secure assumption or a similar form used to secure performance, the mortgagee should use the notice of advancement (form 14-18 in this chapter) and the affidavit of advancement (form 14-19) to protect its rights and put parties on notice of the payment.

### § 14.6:7 IRS Notice Letter

If the property is subject to an Internal Revenue Service lien, the notification letter at form 14-20

in this chapter may be used. See section 14.2:5 above for information about the IRS lien.

### § 14.6:8 Rescission of Nonjudicial Foreclosure Sale

Texas Property Code section 51.016 provides a nonexclusive method for rescission of a nonjudicial foreclosure sale of residential real property, as defined in section 51.016(a). See Tex. Prop. Code § 51.016. Not later than the fifteenth day after the date of a foreclosure sale, a mortgagee, trustee, or substitute trustee may rescind the sale if one or more of these statutory reasons listed in section 51.016(b) exists:

1. the statutory requirements for the sale were not satisfied;
2. the default leading to the sale was cured before the sale;
3. a receivership or dependent probate administration involving the property was pending at the time of sale;
4. a condition specified in the conditions of sale prescribed by the trustee or substitute trustee before the sale and made available in writing to prospective bidders at the sale was not met;
5. the mortgagee or mortgage servicer and the debtor agreed before the sale to cancel the sale based on an enforceable written agreement by the debtor to cure the default; or
6. at the time of the sale, a court-ordered or automatic stay of the sale imposed in a bankruptcy case filed by a person with an interest in the property was in effect.

Tex. Prop. Code § 51.016(b).

The party rescinding the sale must serve written notice of rescission on the purchaser and each debtor obligated to pay the debt that describes the reason for the rescission and includes

recording information for any affected trustee's deed. Tex. Prop. Code § 51.016(c)(1). See form 14-40 in this chapter. This notice must be served by certified mail in the county where all or a part of the property is located. Tex. Prop. Code § 51.016(c)(2), (d). The rescinding mortgagee, trustee, or substitute trustee shall record in the real property records of the county in which the written notice of rescission is filed an affidavit stating the date the bid amount was returned together with the certified mail, electronic or wire transfer, or courier service delivery tracking information. Tex. Prop. Code § 51.016(f). See form 14-41. This affidavit is prima facie evidence of the return of the bid amount. Tex. Prop. Code § 51.016(g). A completed rescission restores the mortgagee and debtor to their respective title, rights, and obligations under the instrument relating to the foreclosed property that existed immediately prior to the sale. Tex. Prop. Code § 51.016(h). No action challenging the effectiveness of a rescission under this section may be commenced, unless filed on or before the thirtieth calendar day after the notices of rescission are filed for recording. Tex. Prop. Code § 51.016(j). A rescission under this section is not effective as to a creditor or subsequent good-faith purchaser for value. Tex. Prop. Code § 51.016(i). Damages in a suit challenging the effectiveness of the rescission or resulting from the rescission are substantially limited to the amount of the bid price. See Tex. Prop. Code § 51.016(k), (l). Specific performance is not available. Tex. Prop. Code § 51.016(k).

### § 14.7 Foreclosure Documents for Public Disposition of Personal Property

#### § 14.7:1 Waiver of Right to Notice after Default

A debtor or secondary obligor may waive its rights (but not the rights of other parties) to notice of a public disposition of personal property collateral, but the waiver must be signed

after the default has occurred. Tex. Bus. & Com. Code § 9.624(a). See form 14-21 in this chapter for a waiver.

### § 14.7:2 Notice of Public Disposition

The posted notice of public sale can be used for public posting and advertisement of the sale. The attorney should consider advising the client about the requirements of a commercially reasonable sale and the risks associated with it. See form 14-23 in this chapter for a notice of public sale.

Texas Business and Commerce Code section 9.613 sets forth an approved form for notice of public or private disposition of personal property collateral other than consumer goods. See Tex. Bus. & Com. Code § 9.613. The approved form for notification of public or private disposition of personal property collateral that consists of consumer goods is set out in section 9.614. See Tex. Bus. & Com. Code § 9.614. Notice must be sent to the debtor, any secondary obligor, and, if the collateral is other than consumer goods, any other person from whom the secured party has received, before the notification date, an authenticated claim of interest in the collateral, and any other secured party or lienholder described in section 9.611(c)(3)(B), (C). See Tex. Bus. & Com. Code § 9.611(c). See form 14-28 for a notice if the collateral is consumer goods and form 14-29 for a notice if the collateral is not consumer goods.

### § 14.7:3 Agenda of Public Sale

The agenda of public sale is not required by the Uniform Commercial Code, but it serves to document that the sale was completed. See form 14-24 in this chapter.

### § 14.7:4 Bill of Sale

The bill of sale evidences the transfer of ownership of the personal property to the successful

bidder. See form 14-25 in this chapter. If applicable, a disclaimer of warranties should be included. To disclaim warranties, the attorney must use language similar to that provided in Tex. Bus. & Com. Code § 9.610(f).

## § 14.8 Strict Foreclosure of Personal Property

### § 14.8:1 Notice of Strict Foreclosure

The notice of strict foreclosure notifies the debtor and others required to be notified of the secured party's proposal to accept personal property collateral in satisfaction of the debt. See Tex. Bus. & Com. Code §§ 9.620–.622. See form 14-26 in this chapter for a notice of strict foreclosure.

### § 14.8:2 Consent to Strict Foreclosure

The debtor must consent to the secured party's proposal to accept the collateral in satisfaction of the debt. Tex. Bus. & Com. Code § 9.620(a)(1), (c). The consent may be an express consent made by the debtor agreeing to the secured party's proposal in a writing signed after default. Tex. Bus. & Com. Code § 9.620(c)(1), (2). See form 14-22 in this chapter for a consent form.

### § 14.8:3 Objection to Strict Foreclosure

A letter of objection notifies the secured party of a person's objection to the secured party's proposal to accept the collateral in satisfaction of the debt. See form 14-27 in this chapter. The letter may be sent by any person to whom the secured party sent its proposal to accept the collateral. To be effective, the objection letter must be received by the secured party within twenty days after the date the secured party sends its proposal. Tex. Bus. & Com. Code § 9.620(c)(2)(C), (d)(1), (d)(2)(A).



## § 14.9 Private Disposition of Personal Property

### § 14.9:1 Waiver of Notice after Default

A debtor or secondary obligor may waive its rights (but not the rights of other parties) to notice of a private disposition of personal property collateral, but the waiver must be signed after the default has occurred. Tex. Bus. & Com. Code § 9.624(a). See form 14-21 in this chapter for a waiver.

### § 14.9:2 Notice of Private Disposition

Texas Business and Commerce Code section 9.613 sets forth an approved form for notice of public or private disposition of personal property collateral other than consumer goods. See Tex. Bus. & Com. Code § 9.613. The approved form for notification of public or private disposition of personal property collateral that consists of consumer goods is set out in Tex. Bus. & Com. Code § 9.614. Notice must be sent to the debtor, any secondary obligor, and, if the collateral is other than consumer goods, any other person from whom the secured party has received, before the notification date, an authenticated claim of interest in the collateral, and any other secured party or lienholder described in section 9.611(c)(3)(B), (C). Tex. Bus. & Com. Code § 9.611(c). See form 14-28 in this chapter for a notice if the collateral is consumer goods and form 14-29 for a notice if the collateral is not consumer goods.

### § 14.9:3 Memorandum of Private Sale

The agenda of private sale is not required by the Uniform Commercial Code, but it serves to doc-

ument that the sale was completed. See form 14-30 in this chapter.

### § 14.9:4 Bill of Sale

The bill of sale evidences the transfer of ownership of the personal property to the buyer at the private foreclosure sale. See form 14-25 in this chapter. If applicable, a disclaimer of warranties should be included. To disclaim warranties, the attorney must use language similar to that provided in Tex. Bus. & Com. Code § 9.610(f).

## § 14.10 Security Interest Included in Deed of Trust

If the deed of trust contains the security interest covering personal property, the lienholder may foreclose the personal property lien with the real property foreclosure. Tex. Bus. & Com. Code § 9.604(a).

## § 14.11 Collateral Transfer of Note and Lien Foreclosure

The collateral transfer of note and lien form creates a security interest in an instrument, the collateral promissory note. The foreclosure of the collateral note under a collateral transfer is governed by the Texas Business and Commerce Code rather than by the Texas Property Code. See Tex. Bus. & Com. Code §§ 9.601–.628. The secured party may select any procedure applicable to the situation: strict foreclosure, public disposition, or private disposition. Without foreclosing on the collateral note, the secured party may collect and enforce the collateral note, including, if the collateral note is in default, accelerating the collateral note and exercising any foreclosure remedy contained in the underlying deed of trust. See the collateral transfer of note and lien, form 9-8 in this manual.

## Additional Resources

- Austin, Judd A., Jr. "HOA Collections and Foreclosures: New Statutes & New Rules." In *Advanced Real Estate Drafting Course, 2012*. Austin: State Bar of Texas, 2012.
- Ayers, R. Glen. "Mortgage Foreclosure in an Age of Securitization: Missing Original Notes and Other Problems for Creditors." In *Advanced Real Estate Law Course, 2009*. Austin: State Bar of Texas, 2009.
- Bastian, G. Tommy. "Expedited Foreclosure Home Equity, Home Equity Line of Credit, Reverse Mortgage, and Tax Lien Transfer and Property Tax Loan Forms for the New Supreme Court Rules." In *Advanced Real Estate Drafting Course, 2012*. Austin: State Bar of Texas, 2012.
- . "Foreclosure of Farm and Ranch Real Property." In *Advanced Real Estate Strategies Course, 2008*. Austin: State Bar of Texas, 2008.
- . "How Securitization Changed Residential Foreclosures." In *Advanced Real Estate Law Course, 2010*. Austin: State Bar of Texas, 2010.
- . "Rule 735 and 736 Foreclosures: Tax Lien Transfers." In *Advanced Real Estate Law Course, 2009*. Austin: State Bar of Texas, 2009.
- . "Rule 736 Promulgated Forms." In *Advanced Real Estate Drafting Course, 2014*. Austin: State Bar of Texas, 2014.
- . "Texas Foreclosures: Myths and Reality." In *Advanced Real Estate Law Course, 2011*. Austin: State Bar of Texas, 2011.
- Baucum, Michael. "Alternatives to Foreclosure—Ideas and Forms." In *Advanced Real Estate Drafting Course, 2015*. Austin: State Bar of Texas, 2015.
- Biel, Frederick J. "Commercial Foreclosures: Selected Documentation and Procedural Issues." In *Advanced Real Estate Strategies Course, 2010*. Austin: State Bar of Texas, 2010.
- . "Servicing, Foreclosing, and Re-Selling Non-Securitized Single Family Residential Real Estate Secured Notes." In *Advanced Real Estate Law Course, 2011*. Austin: State Bar of Texas, 2011.
- . "UCC Related Foreclosure Matters—Commercial Reasonableness and Its Impact on Deficiency and Surplus Claims under Chapter 9." In *Advanced Real Estate Law Course, 2013*. Austin: State Bar of Texas, 2013.
- Burns, Randolph L. "Looking at a Receivership Issue? Here's What You Need to Know." In *Advanced Real Estate Law Course, 2012*. Austin: State Bar of Texas, 2012.
- Derber, David P. "Personal Property Foreclosures." In *Advanced Real Estate Strategies Course, 2010*. Austin: State Bar of Texas, 2010.
- Doggett, Mary Belan, and Yanira M. Reyes. "Foreclosure of Transferred Ad Valorem Tax Liens." In *Advanced Real Estate Law Course, 2012*. Austin: State Bar of Texas, 2012.
- Dysart, Sara E. "Attorney Acting as Substitute Trustee in a Non-Judicial Foreclosure Sale." In *Advanced Real Estate Strategies Course, 2008*. Austin: State Bar of Texas, 2008.
- . "Planning for Defaults, Workouts, and Foreclosures." In *Advanced Real Estate Strategies Course, 2010*. Austin: State Bar of Texas, 2010.

## Form 14-15

Note: On the first sale of the day by a trustee or a substitute trustee an announcement of the reasonable conditions for conducting the public sale may be made pursuant to Tex. Prop. Code § 51.0075(a). Tex. Prop. Code § 51.0075(f) was amended in 2009 to allow the foreclosure purchaser and the trustee or substitute trustee to agree on a reasonable time after acceptance of the bid within which to deliver the purchase price; otherwise, the purchase price is payable without delay after acceptance of the bid.

---

**Agenda of Public Foreclosure Sale of Residential Real Property**

[county] County, Texas, [date]

I am [name of trustee], Trustee under the Deed of Trust recorded in [recording data] of the real property records of [county] County, Texas. [Name of mortgagee or mortgage servicer] has instructed me to sell, at public auction, the property described in the Deed of Trust,

Include one or both of the following.

together with the personal property that is subject to the security interest granted in the Deed of Trust[.]

And/Or

but not including any property previously released from the Deed of Trust, including but not limited to the property described in Exhibit [exhibit letter/number] attached hereto.

Continue with the following.

This is to be an "AS IS" sale. This sale will be conducted subject to the right of rescission contained in section 51.016 of the Texas Property Code.

The property is [read legal description or offer a copy for review. If appropriate, provide beachfront notice. See TREC form no. 33-2 at <https://www.trec.texas.gov/forms/addendum-coastal-area-property>].

[**Include if applicable:** THERE WILL BE NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE FOR THE PERSONAL PROPERTY IN THIS DISPOSITION.]

I now call for cash bids on the property. Each bidder will please state his or her name, for whom the bid is being made, and the amount of each bid made. [**Include if applicable:** All bidders must execute an acknowledgment of receipt of the beachfront notice in order to bid.]

Bids in the order made:

1. Name:

Representing:

Amount bid:

Repeat above information as needed.

Are there any further bids?

Include the following information, as required by Tex. Bus. & Com. Code § 22.004, for the winning bidder other than the mortgagee or mortgage servicer.

Bidder submitting the highest and best bid:

Name:

Address:

Telephone number:

E-mail address:

Taxpayer identification number:

Bidder's principal (if bidder is acting as an agent):

Name of individual or organization:

Name of organization's contact person:

Address:

Telephone number:

E-mail address:

Grantee in deed:

Name:

Address:

Party tendering payment of highest and best bid:

Name:

Address:

Telephone number:

E-mail address:

Government-issued photo identification: [attach copy]

Select one of the following.

If the bidder has requested, and the trustee agrees to grant the bidder, a reasonable time to obtain the amount of the bid, select the following.

Hearing no further bids, this sale is adjourned until \_\_\_\_\_, at which time this sale will reconvene at this location if the bidder has not delivered cash to me, as Trustee, in the

amount of the bidder's bid; provided, however, that if the bidder delivers the cash bid, the property will be sold to the bidder without further notice, and this sale will be concluded.

The time for reconvening the sale must allow time to complete the sale by 4:00 P.M. and bidding on behalf of the beneficiary should commence at its minimum bid. If the sale is reconvened, this agenda should be reread in full.

If the bidder has not requested time to obtain the amount of the bid, select the following.

Hearing no further bids, the property is sold to \_\_\_\_\_, who made the highest and best bid.

This concludes the sale.

Continue with the following.

\_\_\_\_\_  
[Name of trustee]

Form 14-16

**Trustee's Deed [with Bill of Sale]**

**Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.**

Date:

Trustee:

Deed of Trust

Date:

Grantor:

Mortgagee:

Recording information:

Property: [Insert property description and include the following if applicable: , including all personal property secured by the security agreement included in the Deed of Trust.]

Note

Date:

Principal amount:

Borrower:

Mortgagee:

Date of Sale (first Tuesday of month):

Time of Sale:

Place of Sale:

Buyer:

Buyer's Mailing Address:

[Amount of Sale:]

A default existed under the Deed of Trust and Mortgage or its agent directed Trustee to enforce the trust.

Notices stating the time, place, and terms of sale of the Property were posted and filed and [include if applicable: as shown by the affidavit attached to this deed and incorporated in it by this reference] Mortgagee either personally or by agent served notice of the sale to each debtor, as required by section 51.002 of the Texas Property Code. In accordance with that statute and the Deed of Trust, Trustee sold the Property to Buyer, who was the highest bidder at the public auction [include if the amount of sale is completed: , for the Amount of Sale]. The sale was made on the Date of Sale, began at the Time of Sale or not later than three hours thereafter, and was concluded by 4:00 P.M.

Trustee, subject to any prior liens, the right of rescission contained in section 51.016 of the Texas Property Code, and other exceptions to conveyance and warranty in the Deed of Trust and for the [bid price/Amount of Sale] paid by Buyer as consideration, grants, sells, and conveys the Property to Buyer, "AS IS," together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Buyer and Buyer's heirs, successors, and assigns forever. Trustee binds Grantor and Grantor's heirs and successors to warrant and forever defend all and singular the Property to Buyer and Buyer's heirs, succes-



sors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the prior liens and other exceptions to conveyance and warranty in the Dced of Trust.

Include the following if applicable.

TRUSTEE HAS NOT MADE, AND DOES NOT MAKE, ANY REPRESENTATION, EXPRESS OR IMPLIED, WITH RESPECT TO THE PERSONAL PROPERTY, AND THE PERSONAL PROPERTY IS SOLD TO BUYER "AS IS, WHERE IS, AND WITH ALL FAULTS." THERE IS NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE IN THIS DISPOSITION OF PERSONAL PROPERTY.

Continue with the following.

---

[Name of trustee]

Include acknowledgment.

*[Reserved]*

Form 14-17

Foreclosure Affidavit

Date:

Affiant:

If the affidavit is to be attached to the trustee's deed and has been incorporated by reference, the following may be omitted.

Deed of Trust

Date:

Grantor:

Mortgagee:

Recording information:

Property: [Insert property description and include the following if applicable: , including all personal property secured by the security agreement included in the Deed of Trust.]

Continue with the following.

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. This affidavit is made with respect to the foreclosure of the Deed of Trust that occurred on [date].

2. Attached to this affidavit is a copy of the Notice of Trustee's Sale, file-stamped by the county clerk's office.

3. The trustee's sale took place on **[date]** at approximately **[time]** at the place at the courthouse designated in the notice **[include if applicable: , being the area designated by the county commissioner's court for foreclosure sales]**.

Select one of the following.

4. Attached to this affidavit is a copy of the letter sent to each debtor obligated to pay the debt at the address required under the Texas Property Code.

Or

4. At least twenty-one days before the trustee's sale, Affiant, either personally or by agent, served notice of the sale on each debtor, at the address for that debtor as shown by Mortgagee's records, who **[is/are]: [list name[s] and address[es]]**.

Continue with the following.

The **[notice[s]/letter[s]] [was/were]** served on **[date]** by certified mail, postage prepaid, properly addressed to each debtor listed above at the address**[es]** stated.

5. To the best of Affiant's knowledge, the debtor**[s]** **[was/were]** alive on the date of the trustee's sale.

Select one of the following.

6. **[Name of grantor]** is a servicemember in military service, as those terms are defined in 50 U.S.C. § 3911; however, the obligation described in the mortgage originated after **[name]** began military service on **[date]**.

Or

6. **[Name of grantor]** is a servicemember in military service, as those terms are defined in 50 U.S.C. § 3911, and the obligation described in the mortgage originated before **[name]** began military service on **[date]**. However, **[name]**, during **[his/her]** military service,

executed and delivered a written waiver of rights and protections provided by 50 U.S.C. §§ 3901-4043, and a copy of the waiver is attached to this affidavit.

Or

6. [Name of grantor] was not a servicemember in military service, as those terms are defined in 50 U.S.C. § 3911, or at any time within ninety days preceding the date of the trustee's sale.

Include the following if applicable.

7. Attached to this affidavit is a copy of the notice sent to the Internal Revenue Service regarding the tax liens described therein.

Continue with the following.

\_\_\_\_\_  
[Name of affiant]

SUBSCRIBED AND SWORN TO before me on \_\_\_\_\_ by [name of affiant].

\_\_\_\_\_  
Notary Public, State of Texas

*[Reserved]*

Form 14-18

**Notice of Advancement and Demand for Payment**

[Date]

[Name and address of borrower]

See section 14.5 in this chapter.

Re: [describe note and loan documents]

[Salutation]

This letter is to give you notice of default under the referenced loan documents. This default consists of your failure to pay the loan that you assumed and agreed to pay. The mortgagee has paid \$[amount] to [name of mortgage company].

Demand is made for the immediate payment of \$[amount], with interest as allowed by the deed of trust. Unless the default is cured by [date], the mortgagee intends to foreclose its lien under the loan documents.

Include clause 14-7-1 if this is the first correspondence from the attorney to a debtor who is a consumer. See section 14.4:5.

If you have any questions, please consult your legal counsel.

Sincerely yours,

\_\_\_\_\_  
[Name of attorney]

Certified Mail No. [number]  
Return Receipt Requested  
c: [name of borrower], by first-class mail

*[Reserved]*



Form 14-19

**Affidavit of Advancement**

Date:

Affiant:

Deed of Trust to Secure Assumption

Date:

Grantor:

Grantor's address:

Mortgagee:

Mortgagee's address:

Trustee:

Trustee's address:

Recording information:

Property:

Amount Advanced:

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

Affiant is Mortgagee in the Deed of Trust to Secure Assumption. Grantor has defaulted in the performance of the loan assumed, and Affiant has advanced the Amount Advanced to

cure the default. Affiant has given notice of the advancement to Grantor and has demanded to be reimbursed.

\_\_\_\_\_  
[Name of affiant]

SUBSCRIBED AND SWORN TO before me on \_\_\_\_\_ by [name of affiant].

\_\_\_\_\_  
Notary Public, State of Texas

## Form 14-20

## IRS Notice Letter

[Date]

District Director  
Internal Revenue Service  
[Address]  
Attention: Technical Support Group Manager

Re: Notice of nonjudicial foreclosure sale on property  
Taxpayer:

[Salutation]

This letter is notice as required under section 7425 of the Internal Revenue Code and Treasury Regulations section 301.7425-3(a) that property encumbered by a deed-of-trust lien granted by [name of borrower] is being nonjudicially foreclosed pursuant to the authority granted in the deed of trust. [Name of mortgagee], holder of the deed-of-trust lien, gives notice of the proposed nonjudicial sale of the property.

1. *Name and Address of Creditor.* The name and address of the person for whom this notice is submitted is [name of mortgagee]. This creditor is the current owner and holder of the deed of trust and the promissory note[s] secured by it, which are described as follows: [describe deed of trust and promissory note[s]].

2. *Tax Lien Descriptions.* A copy of each of the following notices of federal tax lien potentially affecting the property to be sold is enclosed:

Place filed: [county] County, Texas

Date filed:

Recording data:

Tax amount:

Taxpayer:

Repeat above information as needed.

3. *Description and Location of Property.* A detailed description, including location of the property affected by this notice, is [include property description and any other relevant data].

The street address of the property is [address].

4. *Date, Time, and Place of Foreclosure Sale.* The date, time, place, and terms of the proposed sale are as follows:

Date:

Time: Between the hours of 10:00 A.M. and 4:00 P.M. and to begin no earlier than [time] and no later than three hours thereafter.

Place:

Terms: To the highest bidder for cash.

5. *Debt.* The approximate amount of the principal obligation, including interest, secured by the lien sought to be enforced and a description of the other expenses (such as legal expenses and selling costs) that may be charged against the sale proceeds are as follows:

Principal balance:

Interest through [date]:

Daily accrual:

Legal and sale expenses: Estimated range of expenses is from \$[amount] to \$[amount].

Include the following if applicable.

6. *Property within District.* The property within your district is referred to in the mortgagee title policy held by [name of mortgagee], which covers the tract and related improvements and which has been included if available.

Continue with the following.

7. *Acknowledgment of Notice Requested.* Please acknowledge receipt of this notice by returning a file-stamped copy of this letter in the enclosed envelope. If you have any questions, please do not hesitate to call.

Sincerely yours,

---

[Name of attorney]

c: [name of client]

*[Reserved]*

Form 14-21

**Waiver of Rights after Default**

Date:

Security Agreement

Date:

Lender (Secured Party):

Debtor:

Collateral:

Note

Date:

Amount:

Borrower (Obligor):

[Secondary Obligor:]

[Debtor/Secondary Obligor] acknowledges that a default exists under the Note and the Security Agreement. [Debtor/Secondary Obligor] waives all further notices of disposition of the collateral, pursuant to section 9.624(a) of the Texas Business and Commerce Code.

Include the following if a waiver of disposition of consumer goods collateral is desired. See section 14.3:4 in this chapter for requirements for using a waiver.

Further, [Debtor/Secondary Obligor] waives the right to require Secured Party to dispose of the collateral within ninety days pursuant to section 9.620(e) of the Texas Business and Commerce Code.

Include the following if a waiver of the right to redeem the collateral is desired. Note: This waiver may not be used in a consumer goods transaction.

[Debtor/Secondary Obligor] acknowledges that the collateral is not consumer goods and waives its right to redeem the collateral.

Continue with the following.

\_\_\_\_\_  
[Name of debtor or secondary obligor]



Form 14-22

**Debtor's Consent to Acceptance of Collateral**

Date:

Security Agreement

Date:

Lender (Secured Party):

Debtor:

Collateral:

Note

Date:

Amount:

Borrower (Obligor):

[Secondary Obligor:]

[Debtor/Secondary Obligor] acknowledges receipt of a proposal from Lender to accept the collateral in [full/partial] satisfaction of the obligation. [Debtor/Secondary Obligor] consents to the acceptance of the collateral as proposed by Lender.

[Debtor/Secondary Obligor] acknowledges that a default has occurred under the Note and the Security Agreement [./and/,] [**include if the collateral is consumer goods:** that Debtor is not in possession of the collateral at this time[./, and]] [**include if applicable:** that 60 percent of the cash price has not been paid in a consumer purchase-money transaction or 60 percent of

the principal amount of the obligation has not been paid in a consumer non-purchase-money transaction]. [If 60 percent of the cash price has been paid in a consumer purchase-money transaction or 60 percent of the principal amount of the obligation has been paid in a consumer non-purchase-money transaction, include: Further, [Debtor/Secondary Obligor] waives its right to require disposition of the collateral within ninety days pursuant to section 9.620(e) of the Texas Business and Commerce Code.]

---

[Name of debtor or secondary obligor]

Form 14-23

**[Posted] Notice of Public Sale**

Date:

Security Agreement

Date:

Debtor:

Lender (Secured Party):

Collateral:

Note

Date:

Amount:

Borrower (Obligor):

Lender (Secured Party):

[Secondary Obligor:]

Date of Sale:

Place of Sale:

Time of Sale:

A default exists under the Security Agreement. Secured Party will sell the Collateral at public auction to the highest bidder for cash at the Place of Sale on the Date of Sale to satisfy the debt secured by the Security Agreement. The sale will begin at the Time of Sale.

[Include if applicable: THERE WILL BE NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE FOR THE PERSONAL PROPERTY IN THIS DISPOSITION.]

---

[Name of lender]

Form 14-24

**Agenda of Public Foreclosure Sale  
Held on [date]  
[Personal Property]**

I am [name], [title]. [Name of debtor] signed a security agreement in favor of [name of lender], the lender, granting a security interest in [describe collateral], the property in this sale. The lender has authorized me to sell the property at public auction. The property is [read itemized list of property or offer a copy for review]. [Include if applicable: THERE WILL BE NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE FOR THE PERSONAL PROPERTY IN THIS DISPOSITION.]

I now call for cash bids on the property. Each bidder will please state his or her name, for whom the bid is being made, and the amount of each bid made.

Bids in the order made:

1. Name:

Representing:

Amount bid:

Repeat above information as needed.

Are there any further bids?

If the successful bidder is not the lender, continue with the following.

Does the bidder require time to obtain cash in the amount of its bid?

If the answer is "yes," continue with the following.

Hearing no further bids, this sale is adjourned until \_\_\_\_\_, at which time this sale will reconvene at this location if the bidder has not delivered cash to me in the amount of the bidder's bid; provided, however, that if the bidder delivers the cash bid, the property will be sold to the bidder without further notice, and this sale will be concluded.

If the sale is reconvened, this agenda should be reread in full.

If the answer is "no" or if the successful bidder is the lender, continue with the following.

Hearing no further bids, the property is sold to \_\_\_\_\_, who made the highest and best bid.

This concludes the sale.

Continue with the following.

\_\_\_\_\_  
[Name of trustee]

Form 14-25

Bill of Sale

Date:

Security Agreement

Date:

Debtor:

Lender (Secured Party):

Property:

Note

Date:

Amount:

Borrower (Obligor):

Lender (Secured Party):

Date of Sale:

Place of Sale:

Time of Sale:

Buyer:

A default occurred under the Security Agreement. Notices stating the time, place, and terms of sale of the property were sent to Debtor, any secondary obligor, and other persons to whom Lender is required to send such notice by the laws of the state of Texas. At the foreclosure sale for the Property, Lender accepted Buyer's bid, which was the highest bid.

Lender, subject to the prior liens and other exceptions to conveyance and warranty in the Security Agreement and for the amount of sale paid by Buyer as consideration, sells and conveys the Property to Buyer.

Include the following if applicable.

LENDER HAS NOT MADE, AND DOES NOT MAKE, ANY REPRESENTATION, EXPRESS OR IMPLIED, WITH RESPECT TO THE PROPERTY, AND THE PROPERTY IS SOLD TO BUYER "AS IS, WHERE IS, AND WITH ALL FAULTS." [Include if applicable: THERE IS NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE IN THIS DISPOSITION OF PERSONAL PROPERTY.]

Continue with the following.

---

[Name of lender]



## Form 14-26

## Notice of Strict Foreclosure

[Date]

[Name and address of borrower]

Re: [describe property, note, and loan documents]

[Salutation]

This letter is to give you notice that [name of lender], the lender, proposes to accept the Property described above in [full/partial] satisfaction of the obligations under the note and security agreement, as provided in sections 9.620 through 9.622 of the Texas Business and Commerce Code. This proposal is [unconditional/subject only to the condition that any property not in the possession of the lender be preserved and maintained].

If the lender receives within twenty-one days from the date of this letter your written objection to this proposal, the lender will dispose of the Property at either a public or a private disposition or will undertake to collect from or enforce an obligation of any person obligated on the Property, as allowed by law.

Include the following if applicable.

A copy of this letter has been sent to the secured party[ics], lienholder[s], or other persons below, as required by law.

Continue with the following.

If you have any questions, please consult your legal counsel.

Sincerely yours,

---

[Name of attorney]

Certified Mail No. [number]

Return Receipt Requested

c: [name of borrower], by first-class mail

[c: [name[s] of secured party[ies] and other persons required by  
Tex. Bus. & Com. Code §§ 9.620--.621]]

Form 14-27

**Objection to Proposal to Accept Collateral in [Full/Partial]  
Satisfaction of Obligation**

[Date]

[Name and address of lender]

Security Agreement

Date:

Debtor:

Lender (Secured Party):

Collateral:

Note

Date:

Amount:

Borrower (Obligor):

[Secondary Obligor:]

Lender (Secured Party):

[Salutation]

This letter is to notify you of an objection to your proposal to accept the collateral dated  
[date of lender's proposal].

---

[Name of debtor or person objecting]

Form 14-28

This form is for use in consumer goods transactions.

---

**Notice of Our Plan to Sell Property**

[Date]

[Name and address of borrower]

[Name and address of any obligor who is also a debtor]

Re: [describe property, note, and loan documents]

[Salutation]

We have your [describe collateral] because you broke promises in our agreement.

Select one of the following. Include the first paragraph for a public disposition. Include the second paragraph for a private disposition.

We will sell [describe collateral] at public sale. A sale could include a lease or license. The sale will be held on [date] at [time] at [place]. You may attend the sale and bring bidders if you want.

Or

We will sell [describe collateral] at private sale sometime after [date]. A sale could include a lease or license.

Continue with the following.

The money that we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you [will/will not] still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.

You can get the property back at any time before we sell it by paying us the full amount you owe (not just the past-due payments), including our expenses. To learn the exact amount you must pay, call us at [telephone number]. If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at [telephone number] [include if applicable: or write us at [address of secured party]] and request a written explanation. [Include if applicable: We will charge you \$[amount] for the explanation if we sent you another written explanation of the amount you owe us within the last six months.]

If you need more information about the sale, call us at [telephone number] or write us at [address of secured party].

[Include if applicable: We are sending this notice to the following people who have an interest in [describe collateral] or who owe money under your agreement: [list names of all other debtors and obligors, if any].]

---

[Name of lender]

Form 14-29

This form is for use in transactions other than those for consumer goods.

Notification of Disposition of Collateral

[Date]

[Name and address of debtor, obligor, or other person to whom the notice is sent]

[Name, address, and telephone number of secured party]

[Include only if debtor is not an addressee: Name[s] of Debtor[s]: [name[s]]]

Select one of the following. Include the first paragraph for a public disposition. Include the second paragraph for a private disposition.

We will [sell/lease/license] the [describe collateral] [include if applicable: to the highest qualified bidder] in public on [date] at [time] at [place].

Or

We will [sell/lease/license] the [describe collateral] privately sometime after [date].

Continue with the following.

You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to [sell/lease/license] [include if applicable: for a charge of \${amount}]. You may request an account by calling us at [telephone number].

[Name of lender]

Certified Mail No. [number]
Return Receipt Requested
c: [name of debtor], by first-class mail

*[Reserved]*



Form 14-30

**Memorandum of Private Foreclosure Sale  
Held on [date]**

I am [name], [title]. [Name of debtor] signed a security agreement in favor of [name of lender], the lender, granting a security interest in [describe collateral], the property in this sale. The lender has given notice to Debtor and any secondary obligor that after [date] the property would be sold at a private sale. The property is [read itemized list of property or offer a copy for review]. [Include if applicable: THERE WILL BE NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE FOR THE PERSONAL PROPERTY IN THIS DISPOSITION.]

I now call for cash bids on the property. Each bidder will please state his or her name, for whom the bid is being made, and the amount of each bid made.

- 1. Name:
- Representing:
- Amount bid:

Repeat above information as needed.

Are there any further bids?

If the successful bidder is not the lender, continue with the following.

Does the bidder require time to obtain cash in the amount of its bid?

If the answer is "yes," continue with the following.

Hearing no further bids, this sale is adjourned until \_\_\_\_\_, at which time this sale will reconvene at this location if the bidder has not delivered cash to me in the amount of

the bidder's bid; provided, however, that if the bidder delivers the cash bid, the property will be sold to the bidder without further notice, and this sale will be concluded.

If the sale is reconvened, this agenda should be reread in full.

If the answer is "no" or if the successful bidder is the lender, continue with the following.

Hearing no further bids, the property is sold to \_\_\_\_\_, who made the highest and best bid.

This concludes the sale.

Continue with the following.

\_\_\_\_\_  
[Name of person conducting sale]

## Form 14-31

**Notice of Default**  
[Home Equity Loan]

[Date]

[Name and address of borrower]

Re: [describe note and loan documents]

[Salutation]

This letter is to give you notice of default under the referenced loan documents on your Texas Constitution article XVI, section 50(a)(6), home equity loan. This default consists of [describe default; if the default is monetary, include the amount in default and the name of the mortgagee.]. I am attempting to collect this indebtedness, and any information obtained will be used for that purpose. This letter is being sent to your attention in accordance with state and federal law.

You are notified that if the default is not cured within twenty days from the date of posting of this letter, the mortgagee will enforce its rights under the loan documents. Specifically, the mortgagee will accelerate the maturity of your home equity note and declare due and payable the unpaid principal balance, together with accrued but unpaid interest and fees and expenses allowed by law. If the amount due is not timely paid, the mortgagee will seek a court order allowing the mortgagee to foreclose the lien you granted on your homestead under the loan documents in accordance with Texas Constitution article XVI, section 50(a)(6), and rules 735 and 736 of the Texas Rules of Civil Procedure.

In accordance with federal laws regarding fair debt collections, unless you, within thirty days after receipt of this notice, dispute the validity of the debt set forth above, or any portion thereof, the indebtedness will be assumed to be valid. If you notify the undersigned in writing

within the thirty-day period that the indebtedness, or any portion thereof, is disputed, I will obtain a verification of the indebtedness, and I will mail you that verification. If within the same thirty-day period you request in writing the name and address of the original mortgagee, and if the original mortgagee is different from the current lender, I will furnish you with that information. Federal laws do not require that I wait until the end of the thirty-day period before taking action to collect the debt. If, however, you have requested verification of the debt or the name and address of the original mortgagee within the thirty-day period, I will cease collection activities until the requested information has been mailed to you.

If you have any questions, please consult your legal counsel.

Sincerely yours,

---

[Name of attorney]

Certified Mail No. [number]  
Return Receipt Requested  
c: [name of borrower], by first-class mail

## Form 14-32

**Notice of Acceleration**  
[Home Equity Loan]

[Date]

[Name and address of borrower]

Re: [describe note and loan documents]

[Salutation]

By letter dated [date of letter], I notified you of a default under the referenced loan documents on your Texas Constitution article XVI, section 50(a)(6), home equity loan. I am attempting to collect this indebtedness, and any information obtained will be used for that purpose.

Because the default on your home equity note has not been cured, the mortgagee has accelerated the maturity of your note, declaring all unpaid principal, together with accrued but unpaid interest and fees and expenses allowed by law, immediately due and payable. The mortgagee will now seek a court order allowing the mortgagee to foreclose the lien you granted on your homestead under the loan documents in accordance with Texas Constitution article XVI, section 50(a)(6), and rules 735 and 736 of the Texas Rules of Civil Procedure.

If you have any questions, please consult your legal counsel.

Sincerely yours,

---

[Name of attorney]

Certified Mail No. [number]  
Return Receipt Requested  
c: [name of borrower], by first-class mail

*[Reserved]*



- A. The type of lien sought to be foreclosed is a \_\_\_\_\_ [*see liens described in Texas Rule of Civil Procedure 735.1(a)*] under \_\_\_\_\_ [*state the statutory or constitutional authority for the lien*]. The lien is indexed at \_\_\_\_\_ [*volume/page, instrument number, or clerk's file number*] and recorded in the real property records of \_\_\_\_\_ County, Texas.
- B. Petitioner has authority to seek foreclosure of the lien because \_\_\_\_\_.
- C. The name of each Respondent obligated to pay the underlying debt or obligation evidenced by the \_\_\_\_\_ [*loan agreement, contract, or lien*] encumbering the property sought to be foreclosed is \_\_\_\_\_.
- D. The name of each Respondent who is a mortgagor of the lien instrument sought to be foreclosed, but who is not a maker or assumer of the underlying debt, is \_\_\_\_\_.
- E. As of \_\_\_\_\_ [*a date that is no more than sixty days prior to the date that the application is filed*]:
- (i) [*If the default is monetary.*] \_\_\_\_\_ [*number and frequency of payments (e.g., monthly)*] have not been paid. The amount required to cure the default is \_\_\_\_\_. According to Petitioner's records, all lawful offsets, payments, and credits have been applied to the account in default.



(ii) [If the lien secures a reverse mortgage or the default is nonmonetary.] The facts creating the default and Petitioner's authority to enforce the lien are \_\_\_\_\_.

(iii) The total amount to pay off the \_\_\_\_\_ [loan agreement, contract, or lien] is \_\_\_\_\_.

F. Notice to cure the default has been sent by certified mail to each Respondent who is obligated to pay the underlying debt or obligation. The opportunity to cure has expired.

G. Before this application was filed, any other action required to initiate a foreclosure proceeding by Texas law or the \_\_\_\_\_ [loan agreement, contract, or lien] sought to be foreclosed was performed.

5. **Legal action is not being sought against the occupant of the property unless the occupant is named as a Respondent in this application.**

6. **If Petitioner obtains a court order, Petitioner will proceed with foreclosure of the property in accordance with applicable law and the terms of the \_\_\_\_\_ [loan agreement, contract, or lien] sought to be foreclosed.**

7. The following documents are attached to this application:

A. An affidavit or declaration of material facts describing the basis for foreclosure.

B. The \_\_\_\_\_ [note, original recorded lien, or other documentation] establishing the lien.

- C. *[If the lien has been assigned.]* The current assignment of the lien recorded in the real property records of the county where the property is located.
- D. A copy of each default notice required to be mailed to any Respondent under Texas law and the \_\_\_\_\_ *[loan agreement, contract, or lien]* sought to be foreclosed, and the \_\_\_\_\_ *[USPS Tracking report, return receipt, or other proof]* demonstrating that a notice was sent by certified mail before this application was filed.

**8. Assert and protect your rights as a member of the armed forces of the United States.**

**If you or your spouse is serving on active military duty, including active military duty as a member of the Texas National Guard or the National Guard of another state or as a member of a reserve component of the armed forces of the United States, please send written notice of the active duty military service to Petitioner or Petitioner's attorney immediately.**

9. *Prayer for Relief:* Petitioner seeks an expedited order under Rule 736 so that it may proceed with foreclosure in accordance with applicable law and terms of the \_\_\_\_\_ *[loan agreement, contract, or lien]* sought to be foreclosed.

\_\_\_\_\_  
*[Petitioner's signature block]*



*administration for Petitioner) and the connection or role of the affiant or the affiant's employer with respect to the servicing or foreclosure of Obligor's account (e.g., mortgagee or mortgage servicer).]*

3. I have read and understand the purpose of the application to which my affidavit is attached and adopt by reference the statements made in it. I am the authorized agent or representative of Petitioner with respect to Obligor's account, and in that capacity, I am authorized to make this affidavit on Petitioner's behalf. My testimony is based on my experience, my knowledge of the usual business practices of \_\_\_\_\_ [affiant's employer] and the servicing industry in general, my job responsibilities, and the servicing records for Obligor's account.
4. Through my job responsibilities, I have access to and have reviewed the servicing records and data for Obligor's account, including electronic and computer generated records and data compilations. The records attached to the application are the original records or exact duplicates of the original records kept in the servicing file for Obligor's account.
5. Based on the regular practices of \_\_\_\_\_ [affiant's employer] and the servicing industry in general, these records:
  - a. were made at or near the time of each act, event, or condition set forth in the records;
  - b. were made by, or from information transmitted by, a person engaged in the servicing of Obligor's account who had actual knowledge of the acts, events, or conditions recorded; and
  - c. are the kind of records that are kept in the regular course of servicing loan agreements.
6. It is the regular practice of businesses engaged in the servicing of loan agreements or other contracts requiring the collection of money to keep accurate records on debits and credits to an account, an account's balance, the collateral securing the right to the

lienholder's right to repayment, and efforts to enforce the underlying debt if the Obligor has defaulted. These records are relied upon for accuracy by all persons engaged in the servicing and enforcement of a loan agreement. There is no indication that the servicing records for Obligor's account are untrustworthy.

- 7. Based on the servicing records for Obligor's account, \_\_\_\_\_. *[State all facts demonstrating the basis for foreclosure, including, if applicable, the number of unpaid scheduled payments, the amounts required to cure the default and payoff the loan, and the credits and offsets that have been applied to Obligor's account. Describe proof (e.g., USPS Tracking report, return receipt, or other proof) that Obligor was given notice of the default by certified mail.]*
- 8. I sign this affidavit based on the personal knowledge that I have obtained by reviewing the servicing records for Obligor's account. The statements made in the application and my affidavit are true and correct as of the date stated.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_

\_\_\_\_\_  
*[printed name and title of affiant]*

\_\_\_\_\_  
*[signature of affiant]*

Signed under oath before me on \_\_\_\_\_, 20\_\_.

*[notary's seal]*

\_\_\_\_\_  
Notary Public in and for the State of Texas

My commission expires: \_\_\_\_\_.

*[Reserved]*

Form 14-35

The Texas Supreme Court approved forms for expedited foreclosure proceedings on February 10, 2014. The forms may be found on the court's website, www.txcourts.gov/media/847145/expedited-foreclosure-forms-for-website.pdf. The form below is a reproduction of the form in the order.

Cause No. \_\_\_\_\_

In Re: Order for Foreclosure  
Concerning \_\_\_\_\_  
[property address] Under Tex. R. Civ. P.  
736

In the \_\_\_\_\_ [type of court, e.g.,  
district, county, or probate] Court

Petitioner:

\_\_\_\_\_

\_\_\_\_\_ County, Texas

Respondent(s):

\_\_\_\_\_

\_\_\_\_\_ [court designation]

Declaration in Support of Petitioner's Application for an Expedited Order Under Rule 736

I, \_\_\_\_\_ [name], declare:

1. My name is \_\_\_\_\_ [first, middle, and last name]. I am an adult and of sound mind.
2. I am \_\_\_\_\_ [job title or position] of \_\_\_\_\_ [name of declarant's employer], whose address is \_\_\_\_\_ [street address, city, state, and zip code]. My declaration concerns the account of \_\_\_\_\_ [name of each person who is obligated for the underlying debt or lien sought to be foreclosed] ("Obligor"). \_\_\_\_\_ [Explain the relationship between the declarant or the declarant's employer and Petitioner (e.g., declarant's employer is the agent for loan service administration for Petitioner) and the connection or role of the declarant or the declarant's employer with respect to the servicing or foreclosure of Obligor's account (e.g., mortgagee or mortgage servicer).]

3. I have read and understand the purpose of the application to which my declaration is attached and adopt by reference the statements made in it. I am the authorized agent or representative of Petitioner with respect to Obligor's account, and in that capacity, I am authorized to make this declaration on Petitioner's behalf. My testimony is based on my experience, my knowledge of the usual business practices of \_\_\_\_\_ [*declarant's employer*] and the servicing industry in general, my job responsibilities, and the servicing records for Obligor's account.
4. Through my job responsibilities, I have access to and have reviewed the servicing records and data for Obligor's account, including electronic and computer generated records and data compilations. The records attached to the application are the original records or exact duplicates of the original records kept in the servicing file for Obligor's account.
5. Based on the regular practices of \_\_\_\_\_ [*declarant's employer*] and the servicing industry in general, these records:
  - a. were made at or near the time of each act, event, or condition set forth in the records;
  - b. were made by, or from information transmitted by, a person engaged in the servicing of Obligor's account who had actual knowledge of the acts, events, or conditions recorded; and
  - c. are the kind of records that are kept in the regular course of servicing loan agreements.
6. It is the regular practice of businesses engaged in the servicing of loan agreements or other contracts requiring the collection of money to keep accurate records on debits and credits to an account, an account's balance, the collateral securing the right to the lienholder's right to repayment, and efforts to enforce the underlying debt if the Obligor has defaulted. These records are relied upon for accuracy by all persons engaged in the servicing and enforcement of a loan agreement. There is no indication that the servicing records for Obligor's account are untrustworthy.



7. Based on the servicing records for Obligor's account, \_\_\_\_\_. [*State all facts demonstrating the basis for foreclosure, including, if applicable, the number of unpaid scheduled payments, the amounts required to cure the default and payoff the loan, and the credits and offsets that have been applied to Obligor's account. Describe proof (e.g., USPS Tracking report, return receipt, or other proof) that Obligor was given notice of the default by certified mail.*]
8. I sign this declaration based on the personal knowledge that I have obtained by reviewing the servicing records for Obligor's account. The statements made in the application and my declaration are true and correct as of the date stated.

**JURAT**

My name is \_\_\_\_\_ [*first, middle, and last*], my date of birth is \_\_\_\_\_, and my address is \_\_\_\_\_ [*street, city, state, zip code, and country*]. I declare under penalty of perjury that the foregoing is true and correct.

Executed on the \_\_\_\_ day of \_\_\_\_\_ [*month*], \_\_\_\_\_ [*year*].

\_\_\_\_\_  
[*signature of declarant*]

*[Reserved]*



4. *[Choose one]*

- a. I know that Respondent is **not** currently in the military because I asked the U.S. Department of Defense to check its Defense Manpower Data Center (DMDC) database. DMDC notified me that Respondent is not on active duty in any of the armed forces. I attach a true copy of the DMDC verification. *[You can print a copy of the DMDC verification from this web address: <https://www.dmdc.osd.mil/appj/scra/scraHome.do>.]*
- b. I know that Respondent is **not** currently in the military because \_\_\_\_\_. *[State facts that would render a person ineligible for military service, such as being in prison or having a serious disability.]*
- c. I am unable to determine if Respondent is in military service.
- d. Respondent is in the military now.
5. *[If Respondent was previously in the military.]* Respondent's period of military service ended more than \_\_\_\_ months before this proceeding was filed.

\_\_\_\_\_  
*[signature of affiant]*

Signed under oath before me on \_\_\_\_\_, 20\_\_.

*[notary's seal]*

\_\_\_\_\_  
 Notary Public in and for the State of Texas

My commission expires: \_\_\_\_\_.



armed forces. I attach a true copy of the DMDC verification. [You can print a copy of the DMDC verification from this web address: <https://www.dmdc.osd.mil/appj/scra/scraHome.do>.]

- f. I know that Respondent is **not** currently in the military because \_\_\_\_\_. [State facts that would render a person ineligible for military service, such as being in prison or having a serious disability.]
- g. I am unable to determine if Respondent is in military service.
- h. Respondent is in the military now.

5. [If Respondent was previously in the military.] Respondent's period of military service ended more than \_\_\_\_ months before this proceeding was filed.

**JURAT**

My name is \_\_\_\_\_ [first, middle, and last], my date of birth is \_\_\_\_\_, and my address is \_\_\_\_\_ [street, city, state, zip code, and country]. I declare under penalty of perjury that the foregoing is true and correct.

Executed on the \_\_\_\_ day of \_\_\_\_\_ [month], \_\_\_\_\_ [year].

\_\_\_\_\_  
[signature of declarant]



\_\_\_\_\_  
 [legal description of the property]

4. The lien to be foreclosed is indexed or recorded at \_\_\_\_\_ [volume/page, instrument number, or clerk's file number] and recorded in the real property records of \_\_\_\_\_ County, Texas.
5. The material facts establishing Respondent's default are alleged in Petitioner's application and the supporting \_\_\_\_\_ [affidavit or declaration]. Those facts are adopted by the court and incorporated by reference in this order.
6. Based on the \_\_\_\_\_ [affidavit or declaration] of Petitioner, no Respondent subject to this order is protected from foreclosure by the Servicemembers Civil Relief Act, 50 U.S.C. App. § 501 *et seq.*
7. Therefore, the Court grants Petitioner's motion for a default order under Texas Rules of Civil Procedure 736.7 and 736.8. Petitioner may proceed with foreclosure of the property described above in accordance with applicable law and the \_\_\_\_\_ [loan agreement, contract, or lien] sought to be foreclosed.
8. This order is not subject to a motion for rehearing, a new trial, a bill of review, or an appeal. Any challenge to this order must be made in a separate, original proceeding filed in accordance with Texas Rule of Civil Procedure 736.11.

SIGNED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
 JUDGE PRESIDING



Form 14-39

**Demand to Pay Proceeds of Rent**

[Date]

[Name and address of borrower]

Re: [describe note and loan documents]

[Salutation]

A default exists under the referenced loan documents.

Demand is made for the payment of the proceeds of all accrued but unpaid rent as of the date you receive this letter and all rent that accrues after you receive this letter in accordance with the Texas Property Code. Payment of the proceeds should be made to [name of mortgagee and address for payments]. The tenant[s] will be instructed to pay all rents to the mortgagee until further notice, in accordance with [the deed of trust/[specify instrument]] and the Texas Property Code.

Include clause 14-7-1 in this chapter if this is the first correspondence from the attorney to a debtor who is a consumer. See section 14.4:5.

If you have any questions, please consult your legal counsel.

Sincerely yours,

\_\_\_\_\_  
[Name of attorney]

Certified Mail No. [number]  
Return Receipt Requested  
c: [name of borrower], by first-class mail

*[Reserved]*

Form 14-40

**Notice of Rescission of Trustee's Sale**

**Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.**

Date:

[Trustee/Substitute Trustee]:

[Trustee/Substitute Trustee]'s Address:

Repeat as necessary for multiple trustees.

Debtor[s]:

[Debtor's/Debtors'] Address[es]:

Buyer[s]:

[Buyer's/Buyers'] Address[es]:

Note

Date:

Principal amount:

Borrower:

Mortgagee:

Trustee's Deed

Date:

Trustee:

Buyer:

Recording information:

Property: **[Insert property description and include the following if applicable: , including all personal property secured by the security agreement included in the Deed of Trust.]**

County:

Date of Sale (first Tuesday of month):

Time of Sale:

Place of Sale: **[Designate county location where sale will take place (may be other than courthouse)]**

Notice is given that on the Date of Sale, Trustee[s] offered the Property for sale at public auction at the Place of Sale, to the highest bidder for cash, "AS IS." The sale was struck off at the Time of Sale to Buyer[s].

The foreclosure sale is rescinded by the Trustee[s] because one or more of the statutory reasons listed below exist:

1. the statutory requirements for the sale were not satisfied;
2. the default leading to the sale was cured before the sale;

3. a receivership or dependent probate administration involving the Property was pending at the Time of Sale;

4. a condition specified in the conditions of sale prescribed by the Trustee[s] or Substitute Trustee[s] before the sale and made available in writing to prospective bidders at the sale was not met;

5. the Mortgagee or mortgage servicer and the Debtor[s] agreed before the sale to cancel the sale based on an enforceable written agreement by the Debtor[s] to cure the default;  
or

6. at the Time of Sale, a court-ordered or automatic stay of the sale imposed in a bankruptcy case filed by a person with an interest in the Property was in effect.

---

[Name of trustee]

Repeat signature line as necessary.

*[Reserved]*

Form 14-41

**Affidavit of Return of Bid Amount**

Date:

Affiant:

Trustee's Deed

Date:

Trustee:

Buyer:

Recording information:

Property: **[Insert property description and include the following if applicable: , including all personal property secured by the security agreement included in the Deed of Trust.]**

Tracking Information: **[certified mail, electronic or wire transfer, or delivery service tracking information]**

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. This affidavit is made with respect to the rescission of a foreclosure sale evidenced by the Trustee's Deed.
2. On the date shown above, the bid amount for the Trustee's Deed was returned to the Buyer by the method shown in the Tracking Information.

\_\_\_\_\_  
[Name of affiant]

SUBSCRIBED AND SWORN TO before me on \_\_\_\_\_ by [name of affiant].

\_\_\_\_\_  
Notary Public, State of Texas



*[Chapter 15 is reserved for expansion.]*



# TEXAS REAL ESTATE FORMS MANUAL

**Third Edition**

**Volume 3**

A project of the  
Real Estate Forms Committee  
of the  
State Bar of Texas



Austin · 2017

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.

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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.

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Austin, Texas 78711

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## Chapter 18

### Residential Construction Contract Documents

§ 18.1	General Considerations .....	18-1
§ 18.2	Cautions .....	18-1
	§ 18.2:1 Construction Trust Fund Statute .....	18-1
	§ 18.2:2 Texas Residential Construction Liability Act .....	18-2
	§ 18.2:3 Construction Anti-Indemnity Statute .....	18-2
§ 18.3	Precommencement .....	18-3
	§ 18.3:1 Homestead and Mechanic’s Liens .....	18-3
	§ 18.3:2 Contract Price .....	18-3
	§ 18.3:3 Cautions .....	18-3
	§ 18.3:4 Owner Liability to Mechanic’s Lien Claimants and Owner Retainage .....	18-4
	§ 18.3:5 Other Considerations .....	18-5
§ 18.4	Commencement .....	18-6
§ 18.5	Postcommencement .....	18-6
§ 18.6	Warranties .....	18-6
§ 18.7	Instructions for Completing Forms .....	18-7
	§ 18.7:1 Contractor’s Disclosure Statement for Residential Construction Contracts .....	18-7
	§ 18.7:2 Contractor’s List of Subcontractors and Suppliers .....	18-7
	§ 18.7:3 Contractor’s Disbursement Disclosure for Residential Construction .....	18-7
	§ 18.7:4 Residential Construction Contract .....	18-7
	§ 18.7:5 Affidavit of Commencement .....	18-8
	§ 18.7:6 Change Order .....	18-8
	§ 18.7:7 Affidavit of Completion .....	18-8
	§ 18.7:8 Lien Waiver .....	18-8
	§ 18.7:9 Bills-Paid Affidavit .....	18-9
	Additional Resources .....	18-10

#### *Forms*

Form 18-1	Contractor’s Disclosure Statement for Residential Construction .....	18-1-1 to 18-1-6
Form 18-2	Contractor’s List of Subcontractors and Suppliers .....	18-2-1 to 18-2-2

CHAPTER CONTENTS

Form 18-3	Contractor's Disbursement Disclosure for Residential Construction (Consumer-Owned) .....	18-3-1 to 18-3-2
Form 18-4	Residential Construction Contract .....	18-4-1 to 18-4-20
Form 18-5	Affidavit of Commencement .....	18-5-1 to 18-5-2
Form 18-6	Change Order .....	18-6-1 to 18-6-2
Form 18-7	Owner Affidavit of Completion .....	18-7-1 to 18-7-2
Form 18-8	Conditional Partial Release During Construction .....	18-8-1 to 18-8-2
Form 18-9	Unconditional Partial Release During Construction .....	18-9-1 to 18-9-2
Form 18-10	Conditional Final Release .....	18-10-1 to 18-10-2
Form 18-11	Unconditional Release on Final Payment .....	18-11-1 to 18-11-2
Form 18-12	[Final] Bills-Paid Affidavit .....	18-12-1 to 18-12-4

## Chapter 18

### Residential Construction Contract Documents

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#### § 18.1 General Considerations

The principal functions of a residential construction contract are to establish the terms of the construction agreement, such as price, description of the project, commencement and completion dates, warranties, and allocation of responsibilities, and to create a system for building, approving, and paying for the construction.

The Texas Constitution provides several consumer protection provisions relating to construction on homestead property. For a lien for the construction of improvements to be created against homestead property there must be a written contract. For remodeling or renovations the constitution requires a written application for extension of credit be submitted by the homeowners at least five days before executing the contract, unless the work is acknowledged to be necessary for the immediate repair of conditions that materially affect the health or safety of the residents of the homestead. In addition to this five-day application period, the owner has a three-day right of rescission following execution of the contract. For renovation or repair projects, the contract must also be executed at the office of the third-party lender extending credit for the work and material, the office of an attorney at law, or a title company office. Tex. Const. art. XVI, § 50(a)(5). See chapter 20 in this manual for a detailed discussion of these requirements. Forms 20-6 and 20-7 are closing certificates used to confirm compliance with these requirements.

This chapter contains a residential construction contract (form 18-4). Designed as a basic form, the contract specifies construction costs, a description of the property on which the new

improvements are to be situated, a description of the plans and specifications for the project, and a completion date for the work.

Each transaction should be examined to determine if additional provisions are necessary. If form 18-4 is used to document a transaction in which the construction costs are financed, a comprehensive review of chapter 20 in this manual is needed. The attorney may also wish to consider including additional provisions, which are beyond the scope of this chapter, relating to such matters as work delays, responsibility for soil condition and design, loan commitment requirements, late charges, and delay damages.

#### § 18.2 Cautions

##### § 18.2:1 Construction Trust Fund Statute

The Texas Construction Trust Fund Act (Texas Property Code sections 162.001–.033) states that contractors agreeing to do more than \$5,000 worth of work must put the owner's funds for each such job in a "construction account" at a financial institution. Tex. Prop. Code § 162.006. The general contractor becomes a trustee for the funds received from the owner for the benefit of the subcontractors and suppliers on the project. Tex. Prop. Code § 162.003. The builder's profit on a cost-plus contract is not considered a trust fund. Tex. Prop. Code § 162.001(c). Misuse of trust funds of \$500 or more with intent to defraud is a third-degree felony. Failure to establish or maintain a construction account in violation of sections 162.006 or 162.007 is a class A misdemeanor. Making a false affidavit that the contractor has paid the project bills is a class A

misdeemeanor with a possible penalty of up to one year in jail, a \$4,000 fine, or both, and personal liability for loss or damage resulting from a false statement. Tex. Prop. Code §§ 53.085(d), (e), 162.032.

The attorney should also be familiar with the law of involuntary mechanic's liens. See chapter 21 in this manual.

### § 18.2:2 Texas Residential Construction Liability Act

The Texas Residential Construction Liability Act (RCLA), Texas Property Code chapter 27, controls key aspects of residential construction regarding defect claims. Analysis of the provisions of the RCLA is beyond the scope of this manual, although an overview of the RCLA is included below because of its applicability to certain requirements in residential construction contract documents.

**RCLA Applicability and Notice:** The RCLA applies to construction defect disputes involving a residence, which the RCLA defines as “the real property and improvements for a single-family house, duplex, triplex, or quadruplex or a unit and the common elements in a multiunit residential structure in which title to the individual units is transferred to the owners under a condominium or cooperative system.” Tex. Prop. Code § 27.001(7).

**Notices Required in Contract:** Contracts for home or residential construction must contain the statutory notices prescribed by the RCLA. The notice is included in form 18-4 in this chapter.

#### **Dispute Resolution Requirements:**

Residential construction defect disputes are addressed by the RCLA. The RCLA requires owner claimants to complete several conditions precedent before filing suit or arbitration based

on most residential construction defect claims. Certain limited types of claims are exempt from the RCLA dispute resolution process, including claims solely for personal injury, wrongful death, or property damage; cases of builder wrongful abandonment of the project; real estate fraud claims under chapter 27 of the Texas Business and Commerce Code; and violations of the Trust Fund Act (Property Code chapter 162). Tex. Prop. Code § 27.002.

The dispute process includes several steps, including advance notice to builders, opportunity for builder inspection of the claimed defects, disclosure to the builder of expert reports, and builder offers to repair. Tex. Prop. Code § 27.004.

### § 18.2:3 Construction Anti-Indemnity Statute

Chapter 151 of the Texas Insurance Code prohibits an indemnity in a construction contract, or in an agreement collateral to or affecting a construction contract, to the extent that it requires an indemnitor to indemnify a party, including a third party, against a claim caused by the negligence or fault, violation of a law, or breach of contract of the indemnitee, its agent or employee, or any third party under the control or supervision of the indemnitee, other than the indemnitor or its agent, employee, or subcontractor of any tier. A provision in a construction contract that requires the purchase of additional insured coverage is void to the extent that it requires coverage that is prohibited under subchapter C of chapter 151. This subchapter does not apply to an indemnity provision in a construction contract, or an agreement collateral to or affecting a construction contract, pertaining to a single-family house, townhouse, duplex, or directly related land development, or to a public works project of a municipality. Tex. Ins. Code § 151.105(10).



## § 18.3 Precommencement

### § 18.3:1 Homestead and Mechanic's Liens

Texas homesteads are exempt from forced sale except for the enforcement of purchase-money liens, property tax liens, an owelty of partition, the refinancing of a federal tax lien, mechanic's and materialman's liens, "home equity" or second-lien financing, a reverse mortgage, and the conversion and refinance of a personal property lien secured by a manufactured home to a lien on real property. A contract for new improvements or improvements to an existing home that create a mechanic's and materialman's lien against the homestead must be in writing, made before material is furnished or labor performed, signed by both husband and wife if the homestead is a family one, and compliant with other conditions provided in the Texas Constitution. Tex. Const. art. XVI, § 50; Tex. Prop. Code § 53.254. The contract must also contain the notice required by Tex. Prop. Code § 41.007. The residential construction contract, used alone, does not create a mechanic's lien. For a more complete discussion of lien and financing issues, see chapter 20 in this manual.

### § 18.3:2 Contract Price

Three basic price structures are used in construction contracts.

*Lump sum* or *stipulated sum* is the simplest type of contract price. The contractor reviews the plans and specifications for the project and contractually agrees on a fixed price for the work. Unless the parties agree to change this stipulated amount, this will be the amount paid by the owner.

A *unit price* contract establishes a price for a given unit of work (for example, \$13 per square yard of asphalt paving).

A *cost-plus* arrangement establishes the price to the owner based on the actual cost of the work plus a certain percentage of profit for the contractor. In cost-plus, guaranteed-maximum construction contracts the contractor guarantees that the cost to the owner will not exceed a maximum price.

### § 18.3:3 Cautions

Commencement of construction before the contract is executed invalidates a mechanic's lien on a homestead. Tex. Prop. Code § 53.254(b).

Changes to the scope of a project should be documented through the use of a change order, form 18-6 in this chapter. Whether a contractual mechanic's lien extends to such changes depends on the agreement of the parties as expressed in the original construction contract.

Without an agreement to the contrary, there is no contractual lien for partial performance on a homestead. The contract must be substantially performed. *Fidelity Savings & Loan Ass'n v. Baldwin*, 416 S.W.2d 482, 483 (Tex. Civ. App.—Beaumont 1967, writ ref'd n.r.e.).

Sales taxes are the responsibility of the owner unless the contract provides for a lump-sum price, in which case the cost is the responsibility of the contractor as the consumer. Tex. Tax Code § 151.056. If the contractor manufactures or produces and also places ready-mix concrete into the property, the concrete must be separately billed, with tax on the materials paid by the owner. Tex. Tax Code § 151.056(g).

Workers' compensation laws apply to employer-employee relationships but not to independent contractors. Tex. Lab. Code §§ 406.121–123.

The Texas Home Solicitations Transaction Act may apply if the consumer's obligation is entered into at a location other than the contractor's place of business. If the Act applies, additional notices are required. Tex. Bus. & Com.

Code §§ 601.002, 601.051–.053. The statutory notice of cancellation is included in the residential construction contract (form 18-4 in this chapter).

In unincorporated areas of certain counties, a builder's failure to provide the notice indicating all inspections of a new residential construction of a single-family house or duplex showed compliance with applicable building code standards constitutes a criminal offense. The builder has an affirmative defense if the builder's failure to submit the notice is the result of the failure of the person who performed the inspection to provide appropriate documentation to the builder to submit to the county. Tex. Loc. Gov't Code §§ 233.154–.155.

#### § 18.3:4 Owner Liability to Mechanic's Lien Claimants and Owner Retainage

The perfection of involuntary mechanic's liens is covered in chapter 21 in this manual. Before contracting for residential construction, owners should become familiar with their potential liability for mechanic's liens. Owner liability for properly noticed and filed subcontractor and supplier mechanic's liens is the sum of two amounts described in Tex. Prop. Code § 53.084. First, an owner is liable for the 10 percent statutory retainage owners are required to withhold from payments to the original contractor on every construction project. Tex. Prop. Code §§ 53.101–.103; *Page v. Structural Wood Components*, 102 S.W.3d 720 (Tex. 2003). In addition, an owner is liable for "fund trapping," which means "trapping" or withholding remaining contract funds otherwise owed to the original contractor. This is required when the owner receives a mechanic's lien notice letter containing language telling the owner to withhold payment from the contractor for the claim amount. Tex. Prop. Code § 53.056(b), (d). If an owner receives a lien notice letter containing the required fund-trap warning and fails to withhold

payment from the contractor, the owner is personally liable and the owner's property is subject to a lien for amounts paid after receipt of the notice. This fund-trapping liability is in addition to the owner's liability for the 10 percent statutory retainage. Consequently, to protect the owner in case involuntary mechanic's liens are asserted, the owner must do two things: (1) retain 10 percent of the adjusted original contract price throughout the duration of the project and for the time after completion provided for lien claimants to file mechanic's liens and (2) withhold the proper amount of undisbursed funds ("trapped funds") from the contractor if lien notices are received from subcontractors or suppliers. Tex. Prop. Code §§ 53.081, 53.084, 53.101. If an owner fails to withhold the statutory retainage, the owner is nevertheless liable for the amount that should have been withheld. Tex. Prop. Code § 53.103(a).

#### Time for Withholding Statutory 10 Percent Retainage:

Owners, to protect themselves from mechanic's lien claimant liability, should withhold payment of statutory retainage for at least the time allowed for claimants to file lien affidavits. Tex. Prop. Code § 53.057. This period of time is discussed in chapter 21 in this manual. However, an outline of the applicable time limits is provided below.

The retainage provisions affecting first- and second-tier claimants were amended by the 2011 Texas legislature. Owners must withhold retainage until the earliest of the following:

1. The lien filing date provided by Tex. Prop. Code § 53.052, which is the fifteenth day of the third month following the last month of work or delivery by the claimant. (See the chart at section 21.9:2 in this manual.)
2. The fortieth day after the date stated in the affidavit of completion for the original contract, but only if the owner sent the claimant notice of the affida-

vit. This affidavit of completion is provided for in Tex. Prop. Code § 53.106, which allows, but does not require, the owner to file such an affidavit stating the date of final completion for the project. See form 18-7. Notice of filing and a copy of the affidavit must be sent to claimants making a written request for one or to claimants who have sent out owner lien notices. However, regardless of whether a claimant makes a request for such affidavit or sends a lien notice, if the affidavit is not sent to a claimant, then the forty-day deadline described in this section does not apply to that claimant. The affidavit is prima facie evidence of the actual final completion date for the project if it is sent to claimants as required.

3. The thirtieth day after the day the owner sends written notice to the claimant demanding that the claimant file its mechanic's lien affidavit. The notice must contain a legal description of the project property and the owner's name and address, and it must specify that the lien affidavit must be filed within thirty days of the date the notice was sent. The "demand to file a lien" section of the Texas Property Code, Tex. Prop. Code § 53.057(g), provides that this notice is effective only for the amount of contractual retainage earned by the claimant as of the day notice was sent.

**Owner Failure to Withhold 10 Percent Retainage:** If the owner fails to withhold statutory retainage, then the claimants are entitled to perfect their claims by notice and affidavit within the longer deadlines described above (i.e., the fifteenth day of the third month following the last month of work or delivery). No thirty-day or forty-day deadlines, under Tex.

Prop. Code § 53.057(f), are applicable if the owner fails to withhold the statutory retainage.

**Summary of Owner Retainage Withholding Period on Residential Projects:** In summary, for residential projects, owners are liable to hold retainage for the longer lien-filing period provided by Tex. Prop. Code § 53.052, meaning the fifteenth day of the third month following the last month of work or delivery completing the project. See the chart at section 21.9:2 in this manual. If an owner wants to shorten this time, he must send one of the applicable notices described above: either filing and sending an affidavit of completion (form 18-7) or sending notice to claimants demanding that they file their lien affidavits. Because the effect of the thirty-day notice to file lien is limited to the accrued amount of the claimant's retainage, this notice is of limited use. Therefore, residential owners should consider the affidavit of completion process if they want to shorten the retainage withholding period. Owners are cautioned that only those suppliers and subcontractors who are sent the affidavit of completion are subject to the forty-day deadline. A second-tier supplier-claimant, delivering material at the end of the project and not known to the owner, will not receive an affidavit of completion, and therefore that claimant's lien will not be cut off by the forty-day deadline.

### § 18.3:5 Other Considerations

Both property and liability insurance should be obtained by the contractor to insure the project, and the cost should be factored into the contract price.

Water and electricity should be provided to the lot line by the owner. If not, the contract should allocate the additional cost of obtaining service.

A survey should be performed before the commencement of construction, at the owner's cost.

The Federal Trade Commission requires insulation installers and new home sellers to supply information on the efficacy of the home insulation products they sell. See 16 C.F.R. pt. 460. The residential construction contract, form 18-4 in this chapter, includes a section for providing the required insulation disclosure data.

Independent contractor status of the contractor reduces the risk of owner liability. *Exxon Corp. v. Quinn*, 726 S.W.2d 17, 19-20 (Tex. 1987). To help preserve the contractor's independent contractor status, the owner's control over the performance of the work should be limited.

Responsibility for the foundation is one of the most important risk allocation issues in a construction contract. Usually, the party who has the most control over the design of the foundation bears the responsibility for its performance.

If a contract that provides for the construction of new improvements to real property located in Texas contains a provision making the contract or any conflict arising under the contract subject to the laws of another state, to litigation in the courts of another state, or to arbitration in another state, that provision is voidable by the party obligated to perform the construction. Tex. Bus. & Com. Code §§ 272.001-.002.

### § 18.4 Commencement

Commencement of construction is required under the residential construction contract, form 18-4 in this chapter, to begin within thirty days from the contract date. The inception date of a statutory mechanic's lien is the date that construction begins or materials are first delivered. Tex. Prop. Code § 53.124. This date may be established by filing an affidavit of commencement, form 18-5.

### § 18.5 Postcommencement

In the residential construction contract, form 18-4 in this chapter, delays caused by unforeseen circumstances extend the completion date. Delays caused by either party can be made the subject of monetary penalties. The price of the project may be adjusted for concealed conditions.

The contractor agrees to clean up the property following completion. The owner walk-through is intended to produce a "punch list" of items the owner wants completed or corrected by the contractor. Acceptance of work occurs only after inspection and approval by the owner. Evidence of completion must be provided by the contractor to the owner. Substantial completion occurs when a certificate of occupancy is issued.

Change orders occur only on agreement by the owner and the contractor. This agreement may be documented by form 18-6.

### § 18.6 Warranties

Alternative express warranty provisions are included in form 18-4 in this chapter, in paragraph E.1.e. Texas law implies a warranty of "good and workmanlike" construction, which can be disclaimed. Also, a warranty of "habitability" is implied, which cannot be disclaimed. See *Centex Homes v. Buecher*, 95 S.W.3d 266 (Tex. 2002); *Melody Home Manufacturing v. Barnes*, 741 S.W.2d 349 (Tex. 1987); *Gupta v. Ritter Homes, Inc.*, 646 S.W.2d 168 (Tex. 1983); *March v. Thiery*, 729 S.W.2d 889 (Tex. App.—Corpus Christi 1987, no writ). In *Centex Homes*, the Texas Supreme Court held that—

the implied warranty of good workmanship may be disclaimed by the parties when their agreement provides for the manner, performance, or quality of the desired construction. We further hold that the warranty of

habitability may not be disclaimed generally. This latter implied warranty, however, only extends to defects that render the property so defective that it is unsuitable for its intended use as a home.

*Centex Homes*, 95 S.W.3d at 274–75.

One of the alternative express warranties provided in form 18-4 refers to the Texas Residential Construction Commission (TRCC) warranties. These TRCC warranties provide detailed quality standards for residential construction. Although the TRCC was abolished effective September 1, 2009, the warranty standards previously developed by the TRCC may still be incorporated by reference. The TRCC warranties are available online at [www.texasinspector.com/files/TRCC-Standards-of-Performance.pdf](http://www.texasinspector.com/files/TRCC-Standards-of-Performance.pdf).

## § 18.7 Instructions for Completing Forms

### § 18.7:1 Contractor's Disclosure Statement for Residential Construction Contracts

Form 18-1 in this chapter is mandated by the Texas Property Code. This statement must be delivered to the owner before the execution of the construction contract. Tex. Prop. Code § 53.255.

### § 18.7:2 Contractor's List of Subcontractors and Suppliers

Before beginning work on a project the original contractor must furnish to the owner a written list with the name, address, and telephone number of each subcontractor and supplier that the general contractor intends to use. See form 18-2 in this chapter. This list must be updated within fifteen days of the addition or deletion of a sub-

contractor or supplier unless the owner signs a written waiver of the right to an updated list. Tex. Prop. Code § 53.256(a). Specific language for the written waiver is given in Tex. Prop. Code § 53.256(d). To use the first alternative for payment of project retainage, described in form 18-4, paragraph 3.f. of exhibit A, the contractor must list all subcontractors and suppliers of any tier involved with the project, timely update this list, and furnish a final updated list on or before the date of final completion. See also the optional paragraph C.1.c. in form 18-4. The owner should recognize that if this alternative is selected and an affidavit of completion is not sent to a claimant for any reason, including that the owner was not made aware of the claimant, then the owner will be liable to that claimant for the claimant's share of statutory retainage even though the owner may have already paid the retainage.

### § 18.7:3 Contractor's Disbursement Disclosure for Residential Construction

As a prerequisite to obtaining an advance of funds in a residential construction project, the general contractor is required to provide the owner with a signed statement listing the bills paid and to be paid. See form 18-3 in this chapter. If the lender is funding an advance directly to the contractor and not through the owner, that lender must provide the owner a lender's disbursement statement and the contractor's disbursement statement used to apply for the advance. Tex. Prop. Code § 53.258.

### § 18.7:4 Residential Construction Contract

Form 18-4 in this chapter is a contract for the construction of a residence without an architect. The contract assumes a project in which the ultimate homeowner holds title to the land before the commencement of construction. Under the contract, the construction process and the duties

and obligations of the parties are divided into distinct preconstruction, construction, and post-construction stages. The principal functions of the contract are to establish the terms of the construction agreement, such as price, description of the project, commencement and completion dates, allocation of responsibilities, and so forth, and to create a system for building, approving, and paying for the construction.

### § 18.7:5 Affidavit of Commencement

The owner and the original contractor may jointly execute and file an affidavit of commencement with the county clerk of the county in which the land is located. Tex. Prop. Code § 53.124(c). See form 18-5 in this chapter. An affidavit of commencement is prima facie evidence of the date of the commencement of construction and fixes the date of inception of the involuntary mechanic's liens filed relating to the construction. Tex. Prop. Code § 53.124(d).

The affidavit should be executed and recorded within thirty days after the date of actual commencement of construction or delivery of materials. Tex. Prop. Code § 53.124(c). The owner and the original contractor should not execute this affidavit at the closing of the construction loan lest a delay in recording cause the affidavit to reflect a commencement date before the recording date. The owner and the contractor should execute and record the affidavit promptly after the construction loan documents have been filed and construction has actually commenced.

### § 18.7:6 Change Order

Form 18-6 in this chapter documents amendments to the residential construction contract that may change the plans and specifications, adjust the contract amount, or alter the completion date.

### § 18.7:7 Affidavit of Completion

The owner may file an affidavit of completion with the county clerk of the county in which the property is located. See form 18-7 in this chapter. Completion is defined not as "substantial completion" as used in the contract but as "the actual completion of the work, including any extras or change orders reasonably required or contemplated under the original contract, other than warranty work or replacement or repair of the work performed under the contract." Tex. Prop. Code § 53.001(15). An affidavit of completion meeting the requirements of section 53.106 constitutes prima facie evidence of the date of completion. Tex. Prop. Code § 53.106(d).

The affidavit should be filed on or before the tenth day after the completion of the work. If the affidavit is filed following the tenth day after the date of completion, the date of completion is presumed to be the date of actual filing. Tex. Prop. Code § 53.106(d).

The owner must send a copy, by certified mail, return receipt requested, or registered mail, to the original contractor not later than the date the affidavit is filed and to each claimant who has sent the owner a notice of lien liability not later than the date the affidavit is filed or the tenth day after the date the owner receives notice. Tex. Prop. Code § 53.106(b). The owner must also furnish a copy of the affidavit to any person who furnished materials or labor for the construction and requests a copy. The affidavit must be furnished not later than the tenth day after the date the request is received or ten days after the date the affidavit is filed, whichever is later. Tex. Prop. Code § 53.106(c).

### § 18.7:8 Lien Waiver

Forms 18-8 through 18-11 in this chapter are statutory forms required for lien and bond claim waivers to document final or interim acknowl-

edgment of payments. The forms must be used verbatim, in lieu of any other form of lien release associated with construction payments. However, if a mechanic's lien affidavit has already been filed in the real estate records, the form of release does not have to conform to forms 18-8 through 18-11. Tex. Prop. Code §§ 53.281–287. Blanket advance releases of all mechanic's lien rights of the contractor should be enforceable, if expressly stated in the residential construction contract and if the contract is executed before commencement of any work. Tex. Prop. Code § 53.282(a)(3).

### § 18.7:9 Bills-Paid Affidavit

The contractor, on request by the owner and as a condition of payment to the contractor, must provide the owner an affidavit stating that all of

the contractor's subcontractors, laborers, and materialmen have been paid or identifying those not paid. See form 18-12 in this chapter. The affidavit may include representations regarding bills to be paid with the funds received and indemnity provisions. Tex. Prop. Code § 53.085.

A bills-paid affidavit must be signed by the general contractor as a condition for final payment. Tex. Prop. Code § 53.259.

There are significant penalties, both civil and criminal, for the making of false affidavits. The penalties may include a \$4,000 fine, confinement in jail for a period not to exceed one year, or both, and personal liability of the person signing the affidavit for any loss or damage resulting from the false statement. Tex. Prop. Code §§ 53.085(d), (e), 53.259(e), (d).

## Additional Resources

- Beyer, Gerry W. *Real Property*. 2nd ed. West's Texas Forms 13–15. St. Paul, MN: West, 2001. Supplement 2016.
- Bush, Robert L. Russell, James W. Rudnicki, and Kathryn L. Koons. "Drafting Issues in Residential Construction Contracts." In *Residential Real Estate Construction Law Course, 2008*. Austin: State Bar of Texas, 2008.
- McQuality, Mark S. "Texas Residential Construction Claims: It Was Time for Change." In *Advanced Consumer and Commercial Law Course, 2009*. Austin: State Bar of Texas, 2009.
- St. Claire, Frank A., and William V. Dorsaneo III. *Texas Real Estate Guide*. New York: Matthew Bender & Co., 2001.
- Texas Residential Construction Commission. "Limited Statutory Warranty and Building and Performance Standards," effective June 1, 2005.
- Walthall, Thomas J., Jr., and R. Wes Johnson. "Construction Contract Clauses & Retainage and Contingent Payment." In *Advanced Real Estate Drafting Course, 2009*. Austin: State Bar of Texas, 2009.



Plans for the purpose of completing the Improvements if Contractor fails to do so in accordance with the terms of the Contract Documents.

C.2. Owner agrees to—

- a. Furnish to Contractor reasonable proof acceptable to Contractor that Owner has the ability to pay to Contractor the full Contract Sum.
- b. Provide water and electricity to the property line.

C.3. The following are stipulated:

- a. *Change Orders.* Contractor is under no duty to make any changes in the Plans requested by Owner until a mutually agreeable change order is signed by Contractor and Owner.
- b. *Plans.* If Owner furnishes the Plans, Owner warrants the sufficiency of the Plans. If Contractor furnishes the Plans, Contractor warrants the Plans are in substantial compliance with all applicable laws, including applicable building codes and the International Residential Code, 2009 Edition, available at <http://codes.iccsafe.org/app/book/toc/2009/I-Codes/2009%20IRC%HTML/index.html>.
- c. *Consumer Products.* “Consumer Products,” as defined by the Federal Trade Commission, are excluded from Contractor’s warranty only to the extent individual manufacturers’ warranties are passed through Contractor and assigned to Owner, with a copy received by Owner. Contractor assigns and passes through to Owner the manufacturers’ warranties on all appliances and equipment. In the case of passed-through and received manufacturers’ warranties on Consumer Products, Owner’s recourse is directly to the manufacturer, and Contractor will have no responsibility for them,

except for problems relating to Contractor's installation and hookup of the items.

- d. *Consult Your Attorney.* This is intended to be a legally binding contract. READ IT CAREFULLY. If you do not understand the effect of any part of the Contract Documents, consult your attorney BEFORE signing.
- e. *F.T.C. Insulation Disclosure.* The F.T.C. Insulation Disclosure Data are provided in accordance with the Federal Trade Commission regulation at 16 C.F.R. pt. 460.

**D. After Completion of Precommencement Matters**

*D.1.* Contractor agrees to—

- a. Obtain a building permit and commence the Work within thirty days after Owner has completed all of Owner's obligations under the Precommencement Matters and file an affidavit of commencement in the real property records of the county in which the Property is located.
- b. Comply with all regulations and restrictions imposed by local, state, and federal agencies.
- c. Diligently prosecute the Work to completion and substantially complete the Work according to the Plans by the Completion Date.
- d. Pay all valid bills and charges to Contractor for material or labor relating to the Improvements.
- e. Keep the Property free from claims of liens for labor or material arising directly through Contractor, except that Contractor may reasonably dispute any claim.

- f. Include in the Improvements insulation with the characteristics set forth above in the F.T.C. Insulation Disclosure Data.

D.2. Contractor agrees not to delay the work.

D.3. Owner agrees to—

- a. Pay to Contractor the Contract Sum, disbursed according to the [Contract terms/payment schedule], no later than the Payment Deadline.
- b. Promptly pay to the seller of the Allowance Items all charges in excess of the allowances.
- c. Make selection of Allowance Items within ten days after receipt of notice from Contractor; otherwise, Contractor may make the selections or extend the time for Owner to make the selections, in which case Owner will pay any charges related to the delay and Contractor is entitled to extend the Completion Date.
- d. Deliver to Contractor, within three business days of Contractor's draw request, written notice of Work not accepted, with specific reasons and reasonable requirements stated for causing the Work to be accepted.

D.4. Owner agrees not to—

- a. Communicate directly with laborers about the Work.
- b. Delay or interfere with the progress of the Work.

D.5. Contractor and Owner agree that—

- a. If Owner, at any time before or during the progress of the Work, wants any modifications made to the Plans ("Changed Work"), Owner will request in

writing that Contractor undertake the Changed Work. If Contractor agrees to do the Changed Work, Contractor may submit to Owner an estimate of the cost of the Changed Work and an extension of the Completion Date to reflect the additional time required for completing it. If a preapproved written change order is not obtained, Contractor may submit to Owner the notice of change order and extension of time in writing, and the failure of Owner to make written objection within ten days of the notice is conclusively deemed approval by Owner. The Contract Sum and the Completion Date will automatically adjust to incorporate any change orders.

- b. Should Contractor encounter Concealed Conditions, the Contract Sum will be equitably adjusted by change order on claim by either party made within twenty days after notice by Contractor to Owner of the Concealed Conditions.
- c. Contractor occupies the status of an independent contractor, as that term is defined in the construction industry.
- d. Unless otherwise specifically provided, reference to any equipment, material, article, or patented process by trade name, make, or catalog number is regarded as establishing a standard of quality and is not construed as limiting competition. Contractor may, at Contractor's option, use any equipment, material, article, or patented process that is substantially equal to that named.
- e. Contractor has the right to subcontract any part or all of the Work.

#### **E. After Substantial Completion**

*E.1.* Contractor agrees to—

- a. Remove debris and surplus materials occasioned by the Work.
- b. Notify Owner on Substantial Completion of the Work and file an affidavit of completion in the real property records of the county in which the Property is located.
- c. Deliver possession of the Improvements to Owner on the day following the later of Substantial Completion or final payment to Contractor of the Contract Sum.
- d. Release the Work and Property from all claims, including claims of subcontractors and materialmen, on receipt of final payment.

Select one of the following. Use the second paragraph to reference the Texas Residential Construction Commission warranty standards.

- c. Contractor warrants its labor and materials against construction defects and warrants that its construction services have been performed in a good and workmanlike manner and that the materials are adequate for their intended purposes. These warranties extend for a period of one year after substantial completion. Owner must give notice of the defect within this one-year warranty period, and contractor has up to six months to correct the defect. The giving of this express warranty is not intended to, and does not, negate implied warranties.

Or

- e. Contractor warrants that its performance of work on the project meets the residential construction warranties adopted by the Texas Residential Construction Commission. The warranties will extend for the following periods after substantial completion:

- i. one year for workmanship and materials;
- ii. two years for plumbing, electrical, heating, and air-conditioning delivery systems; and
- iii. ten years for major structural components of the home.

THESE EXPRESS WARRANTIES ARE GIVEN IN LIEU OF THE IMPLIED WARRANTY OF GOOD AND WORKMANLIKE CONSTRUCTION, WHICH IS DISCLAIMED.

Continue with the following.

*E.2.* Owner agrees to—

- a. Pay to Contractor the final payment of the Contract Sum, including all amounts due under the Contract Documents, according to Exhibit A.
- b. Sign and file for record within five days after Substantial Completion a notice of substantial completion and acceptance.

*E.3.* Owner and Contractor agree that Owner's acceptance of possession will be conclusively presumed to constitute Owner's acceptance of the Improvements as Substantially Complete and inhabitable.

## **F. Default and Termination**

*F.1. Building Permit.* If a building permit has not been issued within ten business days of completion of all Precommencement Matters, Owner may terminate this Contract by written notice within ten business days and recover out-of-pocket costs from Contractor; otherwise, Owner must give Contractor ten days' written notice and opportunity to cure before terminating this Contract.

*F.2. Precommencement Matters.* If the Precommencement Matters have not been completed within thirty days from the Contract Date, Owner or Contractor may unilaterally terminate this Contract by written notice within forty days from the Contract Date, in which case this Contract will terminate, and the performing party is entitled to recover reasonable out-of-pocket costs from the nonperforming party.

*F.3. Owner's Default.* Each of the following constitutes a material breach of this Contract by Owner: (a) failing to fully and timely perform any covenant of Owner under this Contract; (b) making any representation to Contractor found to be materially false, misleading, or erroneous; and (c) substantially breaching any of Owner's obligations under this Contract.

*F.4. Contractor's Default.* Each of the following constitutes a material breach of this Contract by Contractor: (a) delaying the Work such that the progress of the Substantial Completion of the Improvements falls more than thirty days behind the time shown for completion of the Work; (b) failing to fully and timely perform any covenant of Contractor under this Contract; (c) making any representation to Owner found to be materially false, misleading, or erroneous; and (d) substantially breaching any of Contractor's obligations under this Contract or required by applicable law.

*F.5. Remedies.* If one party defaults, and the default is not cured within ten days of written notice specifically describing the default, this Contract may be terminated by written notice from the nondefaulting party to the defaulting party.

Include the following if desired, modifying if needed to reflect the appropriate price structure.

In the event of such termination, the following formula is agreed on as a reasonable and fair way to assess the actual damages, without the expense and delay associated with other forms of dispute resolution:

- a. *Damages to Contractor.* If termination resulted from an act of default of Owner, Owner will pay to Contractor, within thirty days of written notice from Contractor, an amount equal to all amounts due and owing at the time of the termination, including payment for Changed Work, plus [percent] percent of the remaining Contract Sum to compensate Contractor for the lost profit and for the difficulty and burden of locating other work for the Contractor's subcontractors to prevent hardship on them and the loss of loyalty resulting from such hardship.
- b. *Damages to Owner.* If termination resulted from an act of default of Contractor, damages recoverable by Owner from Contractor will be in accordance with Texas Property Code chapter 27 (the Residential Construction Liability Act), if applicable. If the Residential Construction Liability Act does not apply, Contractor will pay to Owner, in addition to actual damages, consequential damages, which are liquidated in an amount equal to two months' interest on Owner's interim construction loan (based on the assumption, whether true or not, that there exists such a loan and that it is fully disbursed and in an amount equal to the Contract Sum) to compensate Owner for the time and expense associated with obtaining another contractor to complete the Work. It is agreed by the parties that this liquidated amount is a reasonable estimate of the consequential damages actually incurred by Owner. Payment by Contractor will be delivered to Owner on the earlier of (i) payment of all amounts due to Contractor, with a right of offset to Owner for unpaid damages under this section; (ii) completion of construction of the Improvements; or (iii) the expiration of thirty days from written notice from Owner.

Continue with the following.



**G. Miscellaneous Provisions**

*G.1. Agreement of Parties.* The Contract Documents, including any of their exhibits and attachments, are the entire agreement of the parties. There are no representations, agreements, or promises between the parties, and neither party is relying on any statements or representations of any agent of the other party, that are not in those documents.

*G.2. Amendment of Contract.* This Contract may be amended only by an instrument in writing signed by the parties.

*G.3. Attorney's Fees.* If either party retains an attorney to enforce this Contract, the party prevailing in litigation is entitled to recover reasonable attorney's fees, court and other costs, and related expenses.

*G.4. Binding Effect.* This Contract binds, benefits, and may be enforced by the parties and their respective representatives, successors in interest, and, if permitted, their assigns.

*G.5. Counterparts.* If this Contract is executed in multiple counterparts, all counterparts taken together will constitute this Contract.

*G.6. Choice of Law.* This contract is to be construed under the laws of the state of Texas, without regard to choice-of-laws in any jurisdiction.

*G.7. Venue.* Venue is in the county or counties in which the Property is located.

*G.8. Notices.* Any notice required or permitted under this Contract must be in writing. Any notice required by this Contract will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this Contract. Notice may also be given by regular

mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

*G.9. Time.* Time is of the essence. Unless otherwise specified, all references to days mean calendar days. Business days exclude all Saturdays, Sundays, and national holidays. If the date for performance of any obligation falls on a Saturday, Sunday, or national holiday, that obligation is performable on the next business day.

*G.10.* When the context requires, singular nouns and pronouns include the plural.

Include the following if the contract calls for renovation or repair of existing homestead improvements and a lien for financing the improvements is contemplated. See section 20.1:1 in this manual.

*G.11. Repair or Renovation Construction.* If the Scope of Work includes repair or renovation of existing improvements, the following provisions apply. Contractor and Owner certify and represent that they are aware of and have complied with the following legal rights and obligations:

- a. *Rescission.* Owner may rescind this contract (and any other proposals, contracts, or agreements with Contractor regarding the repair or renovation of existing improvements) without penalty or charge within three days after the execution of the contract by all parties. See the "Notice of Cancellation" form below.
- b. *Place of Signing Contract.* Owner acknowledges that this contract was signed at one of the following offices and not elsewhere: (i) the office of a third-party lender making an extension of credit for the Work and material to be furnished; (ii) the office of an attorney at law; or (iii) the office of a title company.

- c. *Five-Day Waiting Period.* This contract and any other contract signed in connection with the repair and renovation Work mentioned in this contract have not been executed by Owner or Owner's spouse before the fifth day after Owner made written application for an extension of credit for the Work and material contemplated.

Include the following if applicable.

G.12. *Special Provisions.* [specify]

G.13. *Notices.*

The following notice is required by Tex. Prop. Code § 41.007. This notice must appear in a minimum of ten-point bold-faced type or equivalent "next to" the owner's signature line. Tex. Prop. Code § 41.007(a).

**IMPORTANT NOTICE: You and your contractor are responsible for meeting the terms and conditions of this contract. If you sign this contract and you fail to meet the terms and conditions of this contract, you may lose your legal ownership rights in your home. KNOW YOUR RIGHTS AND DUTIES UNDER THE LAW.**

The following notice is required by Tex. Prop. Code § 27.007.

#### **RESIDENTIAL CONSTRUCTION LIABILITY ACT (RCLA) NOTICE**

**This contract is subject to Chapter 27 of the Texas Property Code. The provisions of that chapter may affect your right to recover damages arising from a construction defect. If you have a complaint concerning a construction defect and that defect has not been corrected as may be required by law or by contract, you must provide the notice required by Chapter 27 of the Texas Property Code to the contractor by certified mail, return receipt requested, not later than the 60th day before the date you file suit to recover damages in a court of law or initiate arbitration. The notice must refer to Chapter 27 of the Texas Property Code and must describe the construction defect. If**

requested by the contractor, you must provide the contractor an opportunity to inspect and cure the defect as provided by Section 27.004 of the Texas Property Code.

Continue with the following.

\_\_\_\_\_  
[Name of owner]

If the owner is married, both spouses must sign the contract.

Include the following if applicable.

**YOU, THE OWNER, MAY CANCEL THIS TRANSACTION AT ANY TIME BEFORE MID-NIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.**

Continue with the following.

\_\_\_\_\_  
[Name of contractor]

If the notice of the owner's right to cancel is included, attach completed duplicate copies of the following notice of cancellation.

The notice of right to cancel, if required, must appear "in immediate proximity to" the owner's signature in a minimum of ten-point bold-faced type. Tex. Bus. & Com. Code § 601.052; 16 C.F.R. § 429.1(a).

A notice concerning the purchaser's three-day right of rescission under a contract to purchase real property must be given if (1) the seller or the seller's agent solicits the sale at a place other than the seller's place of business; (2) the purchaser submits the purchase contract to the seller or the seller's agent at a place other than the seller's place of business; and (3) the consideration payable under the purchase contract exceeds \$100; unless either (1) the purchaser is represented by a licensed attorney; (2) the transaction is negotiated by a licensed real estate broker; or (3) the transaction is negotiated at a place other than the purchaser's residence by the person who owns the property, as described in Tex. Bus. & Com. Code ch. 601.

The notice of cancellation form must be easily detachable from the contract to which it is attached, must be in the same language as the contract, and must contain the following information and statements. Tex. Bus. & Com. Code § 601.053.

### Notice of Cancellation

[Date]

**YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.**

**IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN TEN BUSINESS DAYS FOLLOWING RECEIPT BY THE MERCHANT OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELED.**

**IF YOU CANCEL YOU MUST MAKE AVAILABLE TO THE MERCHANT AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE MERCHANT REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE MERCHANT'S EXPENSE AND RISK.**

IF YOU DO NOT AGREE TO RETURN THE GOODS TO THE MERCHANT OR IF THE MERCHANT DOES NOT PICK THEM UP WITHIN TWENTY DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO [name of merchant], AT [address of merchant's place of business] NOT LATER THAN MID-NIGHT OF [date].

---

I HEREBY CANCEL THIS TRANSACTION.

Dated: \_\_\_\_\_

\_\_\_\_\_  
[Name of purchaser]

Include any attachments.

**Chapter 19**  
**Commercial Construction Contract Documents**

§ 19.1	Nature of Contract .....	19-1
§ 19.2	Architect and Engineering Services .....	19-1
§ 19.3	Role of Architect/Engineer .....	19-1
§ 19.4	Contract Price .....	19-2
§ 19.5	Retainage .....	19-2
§ 19.6	Payment and Performance Bonds .....	19-2
§ 19.7	Insurance .....	19-2
§ 19.8	Default and Remedies .....	19-2
§ 19.9	Warranties .....	19-3
§ 19.10	Choice of Law and Venue .....	19-3

*Forms*

Form 19-1	Commercial Construction Contract .....	19-1-1 to 19-1-74
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*[Reserved]*



## Chapter 19

### Commercial Construction Contract Documents

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Note: The State Bar of Texas Real Estate Forms Committee is grateful to Bill Locke, shareholder with Graves, Dougherty, Hearon & Moody, in Austin, Texas, and Charles Comiskey, senior vice president of Brady Chapman Holland & Associates, Inc., an insurance brokerage firm with offices in Houston, Texas, and president of RiskTech, Inc., a risk management consulting firm in Houston, Texas, for their assistance in preparing exhibit D of form 19-1 in this chapter.

#### § 19.1 Nature of Contract

Form 19-1 in this chapter is intended to be used for commercial construction projects that are designed by an architect with participation by the architect's engineering consultant(s). The term *Architect/Engineer* as used in the contract designates the design professional for the project.

#### § 19.2 Architect and Engineering Services

The statutes applicable to architects and engineers govern the types of design and professional services that may be provided by each. Some professional services may be performed by either an architect or an engineer, including the preparation of site plans and the depiction of building systems. *See, e.g.,* Tex. Occ. Code §§ 1001.0031(d), (e), 1051.0016(b), (c). Certain plans and specifications may be prepared only by a licensed architect or a licensed engineer. *See* Tex. Occ. Code §§ 1001.0031(c), 1051.703. Some projects may be designed by persons who are not licensed architects or engineers. *See, e.g.,* Tex. Occ. Code §§ 1051.606, 1001.056-.057.

#### § 19.3 Role of Architect/Engineer

The commercial construction contract (form 19-1 in this chapter) designates the Architect/Engineer (A/E) as the owner's representative and

anticipates that the A/E will provide design services prior to construction and contract administration services during the construction phase. As part of the contract administration services, the A/E will, among other duties, carry out the following: give the notice to proceed, approve payment applications from the contractor, respond to submittals and requests for clarification, review the contractor's construction schedule, determine whether delay is excused, approve or make reasonable objection to proposed subcontractors, review the contractor's draw requests for payment, determine whether the project is substantially complete, prepare the list of correction items required (punch list) for final completion, determine whether to recommend the owner's final payment, and receive information and documents on behalf of the owner, such as lien releases and affidavits of bills paid. The A/E is designated in the contract as the initial decision maker for claims made by the owner or the contractor.

The contract administration services specified in the contract are typical of those in industry-standard forms, such as American Institute of Architects construction contracts. However, the A/E is not a party to the construction contract. Therefore, the terms of the architect's contract should be made consistent with the A/E provisions in form 19-1. Alternatively, the architect's contract can be drafted to incorporate the provisions of form 19-1 by reference in describing the A/E's obligations.

### § 19.4 Contract Price

The cost of construction is calculated on the basis of the actual cost of the work, plus the contractor's fee, not to exceed a stated guaranteed maximum price.

Section F. of the contract specifies the types of construction costs that are reimbursable as the cost of the work.

Paragraph F.5. requires the contractor to provide a schedule of values for the owner's approval. The approved schedule of values will be used to determine progress payments, as provided in section J.

The contract price, allowances, contractor's contingency, owner's contingency, and the amount of liquidated damages, if required by the owner, are to be set out in exhibit C of the contract.

### § 19.5 Retainage

The contract provides for 10 percent retainage to be withheld in accordance with the provisions of chapter 53 of the Texas Property Code.

### § 19.6 Payment and Performance Bonds

The owner may require the contractor to provide payment and performance bonds by designating the requirement on exhibit D of the contract.

### § 19.7 Insurance

The insurance requirements for the contractor and, if applicable, the subcontractors are to be set out in exhibit D, which contains sample insurance requirements.

### § 19.8 Default and Remedies

Sections M. and N. contain the default and remedies provisions. Paragraph N.7. also includes a

waiver of consequential damages. Before selecting the liquidated damages option or determining the liquidated damages amount, the practitioner should consider the enforceability of such clauses. See *Phillips v. Phillips*, 820 S.W.2d 785, 789 (Tex. 1991); *Garden Ridge, L.P. v. Advance International, Inc.*, 403 S.W.3d 432, 440 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). In *Garden Ridge, L.P.*, the court described the test set out in *Phillips* as follows:

“The test for determining whether a provision is valid and enforceable as liquidated damages is (1) if the damages for the prospective breach of the contract are difficult to measure; and (2) the stipulated damages are a reasonable estimate of actual damages.” *Chan v. Montebello Dev. Co.*, No. 14-06-00936-CV, 2008 WL 2986379, at \*3 (Tex. App.—Houston [14th Dist.] July 31, 2008, pet. denied) (citing *Phillips*, 820 S.W.2d at 788). Further, we stated:

In order to meet this burden, the party asserting the defense is required to prove the amount of the other parties' actual damages, if any, to show that the liquidated damages are not an approximation of the stipulated sum. If the liquidated damages are shown to be disproportionate to the actual damages, then the liquidated damages must be declared a penalty. . . .

*Id.* at \*3–4 (citations omitted).

*Garden Ridge, L.P.*, 403 S.W.3d at 440.

Also, liquidated damages must be in lieu of and not coupled with or in addition to actual damages. A contract provision that “fixes liquidated damages without excluding additional liability for actual damages is not a reasonable forecast

of just compensation and therefore a penalty.”  
*Phillips*, 820 S.W.2d at 789.

Paragraph J.10. authorizes the owner to withhold payment based on conditions that could result in loss or damages to the owner as long as the conditions remain uncured. The practitioner should consult the provisions of chapter 28 of the Texas Property Code, requiring prompt payment to contractors and subcontractors.

### § 19.9 Warranties

The contractor’s warranties are set out in section P. In addition to the customary one-year war-

ranty against defects in labor and materials, section P expressly provides a ten-year warranty on structural components, including the foundation.

### § 19.10 Choice of Law and Venue

If a contract that provides for the construction of new improvements to real property located in Texas contains a provision making the contract or any conflict arising under the contract subject to the laws of another state, to litigation in the courts of another state, or to arbitration in another state, that provision is voidable by the party obligated to perform the construction. Tex. Bus. & Com. Code §§ 272.001–.002.

*[Reserved]*

Form 19-1

**Commercial Construction Contract**  
[Short Form—Guaranteed Maximum Price]

**Basic Information**

Effective Date:

Owner:

Address:

Phone:

E-mail:

Architect/Engineer ("Owner Rep"):

Address:

Phone:

E-mail:

Contractor:

Contractor's Representative for Project:

Address:

Phone:

E-mail:

Lender:

Address:

Phone:

E-mail:

Project: [include general description of improvements to be constructed]

Project Site: [state physical address of site and attach legal description as identified in exhibit A]

Contract Price: [the sum of the costs of construction, contractor's contingency, owner's contingency, and contractor's fee as identified in exhibit C]

Guaranteed Maximum Price:

Substantial Completion Date:

Insurance and Bond Requirements: [see exhibit D]

Plans: [specifications and drawings as identified in exhibit B]

Owner and Contractor agree to the following terms and conditions.

**A. Definitions**

*A.1.* "Allowance" means a dollar amount specified to be used for portions of the Work that have not been fully defined in the Plans or where a range of options is available for Owner's selection.

*A.2.* "Applicable Law" means all federal, state, and local laws, rules, and regulations applicable to the Project, the Work, or the Contractor, as indicated by the context.

A.3. "Bid" means a response to a request for bids. The term includes proposals submitted in response to a request for proposals.

A.4. "Business Day" means a day other than a Saturday, Sunday, or national holiday. As used in this Contract, the term "days" means calendar days. All periods are measured in calendar days unless business days are specified.

A.5. "Change Order" means a description of changes in the Work, and any increase or decrease in the Guaranteed Maximum Price and extension or reduction of Contract Time resulting from such changes, that has been signed by Owner and Contractor.

A.6. "Claim" means a demand or assertion by one of the parties seeking, as a matter of right, payment of money or other relief with respect to the terms of the Construction Documents, and also includes other disputes and matters in question between Owner and Contractor arising out of or relating to the Construction Documents.

A.7. "Commencement Date" means the date on which a written notice to proceed is delivered by Owner Rep to Contractor.

A.8. "Concealed Conditions" means physical conditions in existence on the Effective Date located beneath the surface of the ground, or concealed or unknown conditions in an existing structure, that are at variance with the conditions indicated in the Construction Documents or are substantially different from those conditions shown in the Construction Documents and that Contractor could not have discovered by the exercise of reasonable diligence.

A.9. "Conditions to Final Payment" means the conditions required by this Contract that must be satisfied by Contractor or waived by Owner in writing for Owner to be obligated to make the Final Payment to Contractor.

A.10. "Construction Documents" mean the documents identified in paragraph B.1.

*A.11.* “Contractor’s Contingency” means the amount identified in Exhibit C that is for Contractor’s exclusive use in connection with unanticipated increases to the Costs of Construction. The Contractor’s Contingency is not intended to be used to cover increases to the Costs of Construction due to changes in the Scope of Work resulting from errors in the Owner Information or changes to the Scope of Work requested by Owner.

*A.12.* “Contract Time” means the period provided in this Contract for reaching Substantial Completion, and, if specified, the period for achieving Final Completion.

*A.13.* “Cost Savings” means the amount equal to the Guaranteed Maximum Price less the total amount paid by Owner to Contractor under this Contract. It does not include savings that result from Owner’s failure to use all of the Owner’s Contingency or to fully use an Allowance or trade discounts, or from Owner’s decisions during construction to use less costly materials than called for in the Plans and Specifications, or to reduce the Scope of Work.

*A.14.* “Drawings” means the graphic and pictorial portions of the Construction Documents showing the design, location, and dimensions of the Work.

*A.15.* “Excused Delay” means a delay in Contractor’s performance under the terms of this Contract due to acts of God, strikes, lockouts, labor shortages, labor restrictions by any governmental authority, civil riot, floods, abnormal adverse weather conditions that exceed [number] days, unavoidable casualties, or any cause beyond the control of Contractor, a Subcontractor, or a Supplier of any tier, that could not have been avoided using reasonable diligence. “Excused Delay” does not include delay resulting from negligence, default, or any condition not constituting an Excused Delay.

*A.16.* “Final Completion” means all the Work required by the Plans has been completed, all punch list items from the Substantial Completion review have been completed, and all Conditions to Final Payment have been satisfied.



iv. assess liquidated damages if Substantial Completion has not been achieved as provided in Exhibit C.

c. *Recourse to Performance Bond.* Upon the occurrence of a Contractor default, Owner may make demand on the surety to perform its obligations under a Performance Bond provided for the Project.

*N.4. Damages for Contractor's Unexcused Delay.* If the Work is not Substantially Complete by the Substantial Completion Date due to Contractor's Unexcused Delay, Owner may assess liquidated damages as provided in Exhibit C.

*N.5. Excused Delay.* If it is determined that Contractor has been delayed by an Excused Delay, the time to complete the Work will be extended by one day for each day of an Excused Delay. This extension of the Contract Time will be Contractor's sole remedy for an Excused Delay and no monetary damage or other compensation is due Contractor for such delay.

*N.6. Damages for Owner's Delay.* If it is determined that Contractor has been delayed by an Excused Delay, the time to complete the Work will be extended by one day for each day of an Excused Delay. This extension of the Contract Time will be Contractor's sole remedy for an Excused Delay, unless the delay is due to acts of Owner constituting unreasonable interference with Contractor's ability to perform the Work that continues after notice of the interference is given by Contractor. The exercise by Owner of any right provided by this Contract, including suspension of Work, does not constitute unreasonable interference with Contractor's ability to perform the Work. Contractor will be entitled to the General Conditions and other direct Costs of Construction described in paragraph F.2. for each day of delay due to Owner's interference.

*N.7. Waiver of Consequential Damages.* Except as provided in this section N., Owner and Contractor each waive the right to recover consequential damages in a suit or

action brought against the other arising out of a default under the Construction Documents, regardless of whether the claim for recovery is based in contract or tort.

**O. Owner's Right to Terminate for Convenience.** Owner has the right to terminate this Contract for Owner's convenience by giving Contractor thirty days' prior written notice of termination. Upon such termination, Contractor will be entitled to payment as described in paragraph N.3.a.

**P. Warranties.** Contractor warrants to Owner that labor, materials, and equipment furnished under the Contract will be new and of high quality and will be free from defects and that all Work will be performed in a good and workmanlike manner and will conform to the Construction Documents. Work will be considered defective if it does not conform to the Construction Documents. Contractor additionally expressly warrants all structural components of the Project, including the foundation, for ten years following Substantial Completion. For a period of one year following Substantial Completion, Contractor will repair or replace any defective Work at no charge if Owner provides written notice to Contractor of a warranty claim during the one-year warranty period. Contractor hereby assigns all equipment, roofing, and other vendor warranties to Owner and will deliver all manuals, books, and instructions and warranty policy documentation to Owner as part of the Conditions to Final Payment. The warranties set forth in this paragraph are cumulative of, and in addition to, all other warranties or remedies available at law or by this Contract, and can be assigned by Owner.

**Q. Safety**

*Q.1.* Owner will not have control over or charge of and will not be responsible for construction means, methods, techniques, sequences, or procedures used or for safety precautions and programs in connection with the Work, since these are solely Contractor's responsibility.

*[Chapter 22 is reserved for expansion.]*



# TEXAS REAL ESTATE FORMS MANUAL

Third Edition

Volume 4

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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.

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### § 25.11:3 Expansion Option

If the landlord wants to grant the tenant the right to lease additional space, insert clause 25-10-4 in this chapter and attach the expansion space rider at form 25-11.

### § 25.11:4 Extension Option

If the landlord wants to grant the tenant the right to extend the lease term, insert clause 25-10-5 in this chapter and attach the extension option rider at form 25-12.

### § 25.11:5 Waiver of Tenant's Right to Protest Appraised Value

If a property owner does not file a valuation protest, a tenant who is contractually obligated to reimburse the owner for property taxes is entitled to pursue an administrative protest before the appraisal review board. Tex. Tax Code § 41.413. A tenant contractually obligated to reimburse a landlord for taxes imposed on the property may also appeal an appraisal review board order determining a protest brought by the party. Tex. Tax Code § 42.015. The statutory language is fairly vague, but it seems apparent that any tenant who, pursuant to its lease, is obligated to reimburse a landlord for a portion of real property taxes is entitled to exercise these rights and in so doing may request the appraisal review board to issue subpoenas to the landlord to provide relevant information and documentation regarding value. This, in turn, may require the landlord to disclose information, such as the rent roll for the property, that the landlord may wish to keep confidential. In addition, multi-tenant situations could result in unwieldy protests. The landlord who wishes to avoid these possibilities should consider including in the lease a provision like clause 25-10-6 in this chapter.

### § 25.11:6 Margin Tax

Chapter 171 of the Tax Code applies the Texas "margin tax" to most businesses, including limited partnerships previously exempt from the franchise tax. General partnerships, sole proprietorships, and businesses that do not meet the annual revenue minimum continue to be exempt. Landlords and tenants might negotiate any of the following treatments of the margin tax: (1) an express carve-out of the margin tax from real property taxes (tenant position), (2) reliance on the landlord's general right to pass through the margin tax as a tax imposed in lieu of real property taxes (landlord position), or (3) the landlord's right to pass through the margin tax as a tax in lieu of real estate taxes, but limiting the pass-through amount based on a formula or a cap (compromise position).

## § 25.12 Additional Forms

Additional forms that may be useful in lease transactions, such as an assignment, guaranty, and tenant estoppel certificate, are found at forms 25-13 through 25-18 in this chapter.

### § 25.12:1 Subordination, Attornment, and Nondisturbance Agreement

If the landlord's lender requires a first or prior lien on the landlord's estate and a lease has been executed, use the subordination, attornment, and nondisturbance agreement at form 25-13 in this chapter to subordinate the lease but still protect the tenant's rights following a foreclosure.

### § 25.12:2 Tenant's Subordination to Deed-of-Trust Lien

A lender may require that an existing lease be subordinated to its new lien. Foreclosure of the lien will then extinguish the lease. Form 25-14 in this chapter may be used to subordinate the lease.

### § 25.12:3 Tenant's Acceptance Letter

If the landlord requires the tenant to acknowledge that the premises are satisfactory, especially if the lease requires any improvements as a condition to the beginning of the lease, use the tenant's acceptance letter at form 25-16 in this chapter.

### § 25.12:4 Landlord's Lien Waiver

By using form 25-20 in this chapter, the owner of real property waives statutory and contractual landlord's liens on any of the lessee's personal property subject to the security interests of a third-party lender. Clause 25-10-1 also may be used for this purpose.

### § 25.12:5 Lockout Notice

The lockout notice, form 25-23 in this chapter, is to be posted at the premises. *See* Tex. Prop. Code § 93.002. It is for use with commercial leases only. Do not use it with residential leases, which are governed by Tex. Prop. Code § 92.0081.

### § 25.12:6 Notice of Change of Locks

Form 25-24 in this chapter is used if the lease does not contain language superseding Tex. Prop. Code § 93.002. The letter is to be given by the owner or property manager and is for use with commercial leases only. Do not use it for residential leases. *See* Tex. Prop. Code § 92.0081.

### § 25.12:7 Tenant Improvements Rider to Lease or Work Letter

Form 25-25 in this chapter may be used with the basic lease, the retail lease, the office lease, or the industrial lease if the parties wish to provide for construction of tenant improvements to the leased premises. The work letter provides a gen-

eral outline for a description of the work and the allocation of responsibility for preparation of plans, performance of work, and payment of any allowances or other amounts by the landlord. The form also requires the contractor to maintain insurance and sets out the effect of construction delays on the commencement date of the lease.

### § 25.12:8 Lead-Based Paint Hazards Disclosure

Form 25-26 in this chapter is based on the sample disclosure format for target housing rentals and leases issued by the Environmental Protection Agency and the Department of Housing and Urban Development. *See* 61 Fed. Reg. 9074 (1996); *see also* 40 C.F.R. § 745.113. The rule does not require the use of any specific format as long as all the required elements are included in the disclosure. *See* the section titled "Lead-Based Paint Disclosures" in chapter 2 of this manual for additional information.

### § 25.12:9 Asbestos Disclosure

Form 25-27 in this chapter is for disclosure of asbestos-containing material or presumed asbestos-containing material by commercial building or facility owners. The Occupational Safety and Health Administration rules require commercial building or facility owners to notify tenants of the presence of asbestos-containing materials or, if the building was constructed before 1981, of presumed asbestos-containing materials. *See* 29 C.F.R. §§ 1910.1001, 1926.1011. The rules do not require the use of any specific format.

### § 25.12:10 Modification of Lease

The modification of lease, form 25-31 in this chapter, is used to document changes to the lease during the lease term.



## Chapter 26

### Miscellaneous Documents

Form 26-1	Affidavit of Facts Concerning Identity of Heirs .....	26-1-1 to 26-1-4
Form 26-2	Affidavit of Identity .....	26-2-1 to 26-2-2
Form 26-3	Affidavit of Marital Status .....	26-3-1 to 26-3-4
Form 26-4	Affidavit of Nonproduction .....	26-4-1 to 26-4-4
Form 26-5	Assumed [Business/Professional] Name Certificate for Incorporated Business or Profession .....	26-5-1 to 26-5-2
Form 26-6	Assumed [Business/Professional] Name Certificate for Unincorporated Business or Profession .....	26-6-1 to 26-6-4
Form 26-7	Boundary Line Agreement and Special Warranty Deed .....	26-7-1 to 26-7-2
Form 26-8	Certificate of Management, Control, and Disposition .....	26-8-1 to 26-8-2
Form 26-9	Certificate of Resolutions [Corporation] .....	26-9-1 to 26-9-4
Form 26-10	Certificate of Resolutions [General Partnership] .....	26-10-1 to 26-10-2
Form 26-11	Certificate of Resolutions [Limited Liability Company] .....	26-11-1 to 26-11-2
Form 26-12	Certificate of Resolutions [Limited Partnership] .....	26-12-1 to 26-12-4
Form 26-13	Certificate of Resolutions [Nonprofit Corporation] .....	26-13-1 to 26-13-4
Form 26-14	Certificate of Resolutions [Unincorporated Association] .....	26-14-1 to 26-14-4
Form 26-15	Closing Instructions [from Borrower] .....	26-15-1 to 26-15-4
Form 26-16	Closing Instructions [from Lender] .....	26-16-1 to 26-16-6
Form 26-17	Closing Instructions [from Purchaser] .....	26-17-1 to 26-17-6
Form 26-18	Closing Instructions [from Seller] .....	26-18-1 to 26-18-2
Form 26-19	Declaration of Nonforeign Status—Entity .....	26-19-1 to 26-19-2
Form 26-20	Declaration of Nonforeign Status—Individual .....	26-20-1 to 26-20-2
Form 26-21	Designation of Homestead .....	26-21-1 to 26-21-2
Form 26-22	Easement Agreement for Access .....	26-22-1 to 26-22-8
Form 26-23	Easement Agreement for Reciprocal Access .....	26-23-1 to 26-23-8
Form 26-24	Easement Agreement for Utilities .....	26-24-1 to 26-24-6
Form 26-25	Easement in Gross Agreement .....	26-25-1 to 26-25-8
Form 26-26	Escrow Agreement .....	26-26-1 to 26-26-4
Form 26-27	Homestead Affidavit as Release of Judgment Lien .....	26-27-1 to 26-27-4
Form 26-28	Lis Pendens .....	26-28-1 to 26-28-2

CHAPTER CONTENTS

Form 26-29	Listing Agreement [Exclusive Agency].....	26-29-1 to 26-29-12
Form 26-30	Listing Agreement [Exclusive Right to Sell].....	26-30-1 to 26-30-12
Form 26-31	Listing Agreement [Open Listing].....	26-31-1 to 26-31-12
Form 26-32	Partial Release of Judgment Lien.....	26-32-1 to 26-32-2
Form 26-33	Property Condition Disclaimer .....	26-33-1 to 26-33-4
Form 26-34	Release of Judgment Lien .....	26-34-1 to 26-34-2
Form 26-35	Revocation of Power of Attorney .....	26-35-1 to 26-35-2
Form 26-36	Special Durable Power of Attorney for Real Estate Transactions.....	26-36-1 to 26-36-6
Form 26-37	Statutory Durable Power of Attorney .....	26-37-1 to 26-37-10
Form 26-38	Certification of Durable Power of Attorney by Agent.....	26-38-1 to 26-38-4

by common law and the warranties in Section 5.023 of the Texas Property Code (or its successor) are excluded].

Terms and Conditions: The following terms and conditions apply to the Easement granted by this agreement:

1. *Character of Easement.* The Easement and related rights granted by Grantor in this agreement to Grantee are an [exclusive/nonexclusive] and irrevocable easement in gross for the benefit of Grantee and its successors and assigns, as owner of the rights created by the Easement in gross, and is exclusive and irrevocable (as applicable, the "Holder"). The Easement and related rights granted by Grantor in this agreement are binding on Grantor; on the Grantor's heirs, legal representatives, successors, and assigns; and on all future owners of the Easement Property. This Easement and other rights granted by Grantor in this agreement are independent of any lands or estates of interest in lands; there is no other real property benefiting from the Easement granted in this agreement.

2. *Assignment.* Grantee may assign, sublease, license, transfer, or convey its interest in this agreement or any part of its interest in the Easement without Grantor's consent, provided that the assignee or transferee shall be subject to all of the obligations, covenants, and conditions applicable to Grantee.

3. *Duration of Easement.* [The duration of the Easement is perpetual./The duration of the Easement is for [number] years beginning [date].]

4. *Improvement and Maintenance of Easement Property.* Improvement and maintenance of the Easement Property and the Facilities will be at the sole expense of Holder. Holder has the right to eliminate any encroachments into the Easement Property that interfere with the Easement Purpose. Holder must maintain the Easement Property in a neat and clean condition. Holder has the right to construct, install, maintain, replace, and remove the Facilities on, under, or across any portion of the Easement Property. All matters concerning the

Facilities and their configuration, construction, installation, maintenance, replacement, and removal are at Holder's sole discretion, subject to performance of Holder's obligations under this agreement. Holder has the right to remove or relocate any fences within the Easement Property or along or near its boundary lines if reasonably necessary to construct, install, maintain, replace, or remove the Facilities, subject to replacement of the fences to their original condition on the completion of the work.

5. *Equitable Rights of Enforcement.* This Easement may be enforced by restraining orders and injunctions (temporary or permanent) prohibiting interference and commanding compliance. Restraining orders and injunctions will be obtainable on proof of the existence of interference or threatened interference, without the necessity of proof of inadequacy of legal remedies or irreparable harm, and will be obtainable only by the parties to or those benefited by this agreement; provided, however, that the act of obtaining an injunction or restraining order will not be deemed to be an election of remedies or a waiver of any other rights or remedies available at law or in equity.

6. *Attorney's Fees.* If [either/any] party retains an attorney to enforce this agreement, the party prevailing in litigation is entitled to recover reasonable attorney's fees and court and other costs.

7. *Binding Effect.* This agreement binds, benefits, and may be enforced by the parties and their respective heirs, successors, and permitted assigns.

8. *Choice of Law.* This agreement will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. Venue is in the county or counties in which the Easement Property is located.

9. *Counterparts.* This agreement may be executed in multiple counterparts. All counterparts taken together constitute this agreement.

**Form 26-37**

This form is provided by section 752.051 of the Texas Estates Code. It has broad, sweeping, and detailed powers and can be used for real estate transactions as well as a wide variety of other transactions.

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**Statutory Durable Power of Attorney**

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE DURABLE POWER OF ATTORNEY ACT, SUBTITLE P, TITLE 2, ESTATES CODE. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO. IF YOU WANT YOUR AGENT TO HAVE THE AUTHORITY TO SIGN HOME EQUITY LOAN DOCUMENTS ON YOUR BEHALF, THIS POWER OF ATTORNEY MUST BE SIGNED BY YOU AT THE OFFICE OF THE LENDER, AN ATTORNEY AT LAW, OR A TITLE COMPANY.

You should select someone you trust to serve as your agent. Unless you specify otherwise, generally the agent's authority will continue until:

- (1) you die or revoke the power of attorney;
- (2) your agent resigns, is removed by court order, or is unable to act for you; or
- (3) a guardian is appointed for your estate.

I, \_\_\_\_\_ (insert your name and address),  
appoint \_\_\_\_\_ (insert the name and address of the  
person appointed) as my agent to act for me in any lawful way with respect to all of the fol-

lowing powers that I have initialed below. (YOU MAY APPOINT CO-AGENTS. UNLESS YOU PROVIDE OTHERWISE, CO-AGENTS MAY ACT INDEPENDENTLY.)

TO GRANT ALL OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF (O) AND IGNORE THE LINES IN FRONT OF THE OTHER POWERS LISTED IN (A) THROUGH (N).

TO GRANT A POWER, YOU MUST INITIAL THE LINE IN FRONT OF THE POWER YOU ARE GRANTING.

TO WITHHOLD A POWER, DO NOT INITIAL THE LINE IN FRONT OF THE POWER. YOU MAY, BUT DO NOT NEED TO, CROSS OUT EACH POWER WITHHELD.

- (A) Real property transactions;
- (B) Tangible personal property transactions;
- (C) Stock and bond transactions;
- (D) Commodity and option transactions;
- (E) Banking and other financial institution transactions;
- (F) Business operating transactions;
- (G) Insurance and annuity transactions;
- (H) Estate, trust, and other beneficiary transactions;
- (I) Claims and litigation;
- (J) Personal and family maintenance;

(K) Benefits from social security, Medicare, Medicaid, or other governmental programs or civil or military service;

(L) Retirement plan transactions;

(M) Tax matters;

(N) Digital assets and the content of an electronic communication;

(O) ALL OF THE POWERS LISTED IN (A) THROUGH (N). YOU DO NOT HAVE TO INITIAL THE LINE IN FRONT OF ANY OTHER POWER IF YOU INITIAL LINE (O).

#### SPECIAL INSTRUCTIONS:

Special instructions applicable to agent compensation (initial in front of one of the following sentences to have it apply; if no selection is made, each agent will be entitled to compensation that is reasonable under the circumstances):

My agent is entitled to reimbursement of reasonable expenses incurred on my behalf and to compensation that is reasonable under the circumstances.

My agent is entitled to reimbursement of reasonable expenses incurred on my behalf but shall receive no compensation for serving as my agent.

Special instructions applicable to co-agents (if you have appointed co-agents to act, initial in front of one of the following sentences to have it apply; if no selection is made, each agent will be entitled to act independently):

Each of my co-agents may act independently for me.

My co-agents may act for me only if the co-agents act jointly.

My co-agents may act for me only if a majority of the co-agents act jointly.

Special instructions applicable to gifts (initial in front of the following sentence to have it apply):

I grant my agent the power to apply my property to make gifts outright to or for the benefit of a person, including by the exercise of a presently exercisable general power of appointment held by me, except that the amount of a gift to an individual may not exceed the amount of annual exclusions allowed from the federal gift tax for the calendar year of the gift.

Include the following, if applicable, pursuant to Tex. Est. Code § 752.052.

#### GRANT OF SPECIFIC AUTHORITY (OPTIONAL)

My agent MAY NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:

(CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. INITIAL ONLY the specific authority you WANT to give your agent. If you DO NOT want to grant your agent one or more of the following powers, you may also CROSS OUT a power you DO NOT want to grant.)

Create, amend, revoke, or terminate an inter vivos trust

Make a gift, subject to the limitations of Section 751.032 of the Durable Power of Attorney Act (Section 751.032, Estates Code) and any special instructions in this power of attorney

Create or change rights of survivorship

Create or change a beneficiary designation



\_\_\_\_ Authorize another person to exercise the authority granted under this power of attorney.

Continue with the following.

ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.

Multiple horizontal lines for providing special instructions.

UNLESS YOU DIRECT OTHERWISE BELOW, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT TERMINATES.

CHOOSE ONE OF THE FOLLOWING ALTERNATIVES BY CROSSING OUT THE ALTERNATIVE NOT CHOSEN:

(A) This power of attorney is not affected by my subsequent disability or incapacity.

(B) This power of attorney becomes effective upon my disability or incapacity.

YOU SHOULD CHOOSE ALTERNATIVE (A) IF THIS POWER OF ATTORNEY IS TO BECOME EFFECTIVE ON THE DATE IT IS EXECUTED.

IF NEITHER (A) NOR (B) IS CROSSED OUT, IT WILL BE ASSUMED THAT YOU CHOSE ALTERNATIVE (A).

If Alternative (B) is chosen and a definition of my disability or incapacity is not contained in this power of attorney, I shall be considered disabled or incapacitated for purposes of this power of attorney if a physician certifies in writing at a date later than the date this power of attorney is executed that, based on the physician's medical examination of me, I am mentally incapable of managing my financial affairs. I authorize the physician who examines me for this purpose to disclose my physical or mental condition to another person for purposes of this power of attorney. A third party who accepts this power of attorney is fully protected from any action taken under this power of attorney that is based on the determination made by a physician of my disability or incapacity.

I agree that any third party who receives a copy of this document may act under it. Termination of this durable power of attorney is not effective as to a third party until the third party has actual knowledge of the termination. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney. The meaning and effect of this durable power of attorney is determined by Texas law.

If any agent named by me dies, becomes incapacitated, resigns, or refuses to act, or is removed by court order, or if my marriage to an agent named by me is dissolved by a court decree of divorce or annulment or is declared void by a court (unless I provided in this document that the dissolution or declaration does not terminate the agent's authority to act under this power of attorney), I name the following (each to act alone and successively, in the order named) as successor(s) to that agent:

\_\_\_\_\_  
\_\_\_\_\_

Signed this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
(your signature)

State of \_\_\_\_\_

County of \_\_\_\_\_

This document was acknowledged before me on \_\_\_\_\_ (date) by

\_\_\_\_\_ (name of principal).

\_\_\_\_\_  
(signature of notarial office)  
(Seal, if any, of notary)

\_\_\_\_\_  
(printed name of notary)

My commission expires: \_\_\_\_\_

## IMPORTANT INFORMATION FOR AGENT

## Agent's Duties

When you accept the authority granted under this power of attorney, you establish a "fiduciary" relationship with the principal. This is a special legal relationship that imposes on you legal duties that continue until you resign or the power of attorney is terminated, suspended, or revoked by the principal or by operation of law. A fiduciary duty generally includes the duty to:

- (1) act in good faith;
- (2) do nothing beyond the authority granted in this power of attorney;
- (3) act loyally for the principal's benefit;
- (4) avoid conflicts that would impair your ability to act in the principal's best interest; and
- (5) disclose your identity as an agent when you act for the principal by writing or printing the name of the principal and signing your own name as "agent" in the following manner:

(Principal's Name) by (Your Signature) as Agent

In addition, the Durable Power of Attorney Act (Subtitle P, Title 2, Estates Code) requires you to:

- (1) maintain records of each action taken or decision made on behalf of the principal;
- (2) maintain all records until delivered to the principal, released by the principal, or discharged by a court; and

(3) if requested by the principal, provide an accounting to the principal that, unless otherwise directed by the principal or otherwise provided in the Special Instructions, must include:

- (A) the property belonging to the principal that has come to your knowledge or into your possession;
- (B) each action taken or decision made by you as agent;
- (C) a complete account of receipts, disbursements, and other actions of you as agent that includes the source and nature of each receipt, disbursement, or action, with receipts of principal and income shown separately;
- (D) a listing of all property over which you have exercised control that includes an adequate description of each asset and the asset's current value, if known to you;
- (E) the cash balance on hand and the name and location of the depository at which the cash balance is kept;
- (F) each known liability;
- (G) any other information and facts known to you as necessary for a full and definite understanding of the exact condition of the property belonging to the principal; and
- (H) all documentation regarding the principal's property.

#### Termination of Agent's Authority

You must stop acting on behalf of the principal if you learn of any event that terminates or suspends this power of attorney or your authority under this power of attorney. An event

that terminates this power of attorney or your authority to act under this power of attorney includes:

- (1) the principal's death;
- (2) the principal's revocation of this power of attorney or your authority;
- (3) the occurrence of a termination event stated in this power of attorney;
- (4) if you are married to the principal, the dissolution of your marriage by a court decree of divorce or annulment or declaration that your marriage is void, unless otherwise provided in this power of attorney;
- (5) the appointment and qualification of a permanent guardian of the principal's estate unless a court order provides otherwise; or
- (6) if ordered by a court, your removal as agent (attorney in fact) under this power of attorney. An event that suspends this power of attorney or your authority to act under this power of attorney is the appointment and qualification of a temporary guardian unless a court order provides otherwise.

#### Liability of Agent

The authority granted to you under this power of attorney is specified in the Durable Power of Attorney Act (Subtitle P, Title 2, Estates Code). If you violate the Durable Power of Attorney Act or act beyond the authority granted, you may be liable for any damages caused by the violation or subject to prosecution for misapplication of property by a fiduciary under Chapter 32 of the Texas Penal Code.

THE AGENT, BY ACCEPTING OR ACTING UNDER THE APPOINTMENT,  
ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN  
AGENT.

**Form 26-38**

This form is provided by section 751.203(b) of the Texas Estates Code. A certification made in compliance with section 751.203(b) of the Texas Estates Code is conclusive proof of the factual matter that is the subject of the certification.

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**Certification of Durable Power of Attorney by Agent**

I, \_\_\_\_\_ (agent), certify under penalty of perjury that:

1. I am the agent named in the power of attorney validly executed by \_\_\_\_\_ (principal) ("principal") on \_\_\_\_\_ (date), and the power of attorney is now in full force and effect.
2. The principal is not deceased and is presently domiciled in \_\_\_\_\_ (city and state/territory or foreign country).
3. To the best of my knowledge after diligent search and inquiry:
  - a. The power of attorney has not been revoked by the principal or suspended or terminated by the occurrence of any event, whether or not referenced in the power of attorney;
  - b. At the time the power of attorney was executed, the principal was mentally competent to transact legal matters and was not acting under the undue influence of any other person;
  - c. A permanent guardian of the estate of the principal has not qualified to serve in that capacity;
  - d. My powers under the power of attorney have not been suspended by a court in a temporary guardianship or other proceeding;

- e. If I am (or was) the principal's spouse, my marriage to the principal has not been dissolved by court decree of divorce or annulment or declared void by a court, or the power of attorney provides specifically that my appointment as the agent for the principal does not terminate if my marriage to the principal has been dissolved by court decree of divorce or annulment or declared void by a court;
- f. No proceeding has been commenced for a temporary or permanent guardianship of the person or estate, or both, of the principal; and
- g. The exercise of my authority is not prohibited by another agreement or instrument.

4. If under its terms the power of attorney becomes effective on the disability or incapacity of the principal or at a future time or on the occurrence of a contingency, the principal now has a disability or is incapacitated or the specified future time or contingency has occurred.

5. I am acting within the scope of my authority under the power of attorney, and my authority has not been altered or terminated.

6. If applicable, I am the successor to \_\_\_\_\_ (predecessor agent), who has resigned, died, or become incapacitated, is not qualified to serve or has declined to serve as agent, or is otherwise unable to act. There are no unsatisfied conditions remaining under the power of attorney that preclude my acting as successor agent.

7. I agree not to:

- a. Exercise any powers granted by the power of attorney if I attain knowledge that the power of attorney has been revoked, suspended, or terminated; or



b. Exercise any specific powers that have been revoked, suspended, or terminated.

8. A true and correct copy of the power of attorney is attached to this document.

9. If used in connection with an extension of credit under Section 50(a)(6), Article XVI, Texas Constitution, the power of attorney was executed in the office of the lender, the office of a title company, or the law office of \_\_\_\_\_.

Date: \_\_\_\_\_

\_\_\_\_\_  
(signature of agent)

*[Reserved]*

## Appendix

### Third-Party Legal Opinion Letters

Lenders often require a borrower's counsel to issue a legal opinion letter to the lender on certain aspects of a loan transaction, including, among other matters, an opinion regarding the borrower's legal status and the enforceability of the lender's loan documents. Historically, the initial form of the legal opinion letter is presented to the borrower's counsel by the lender or its counsel. Although several national, state, and local private attorney organizations and bar association groups have published suggested standard third-party legal opinion letter formats for use in rendering a third-party legal opinion letter, neither a single opinion format nor a single standard for interpreting the opinions included in an opinion letter has been universally accepted by lenders, borrowers, or their respective legal counsel. Information and guidance on the preparation and use of third-party legal opinion letters may be obtained from sources listed in the selected bibliography in this appendix. Additional information can be obtained from the Legal Opinion Resource Center at <http://apps.americanbar.org/buslaw/tribar>.

Several of the articles listed in the bibliography discuss the Texas Supreme Court case of *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 791 (Tex. 1999), which held that attorneys (as well as other professionals) could be liable in Texas for the tort of negligent misrepresentation, as defined by the *Restatement (Second) of Torts* § 552 (1977). Even as the supreme court reaffirmed the availability in Texas of the defense of a lack of privity in legal malpractice cases, it noted several times that section 552 does not require privity to impose liability for negligent misrepresentation or implicate the policy concerns behind the privity rule. See *McCamish*, 991 S.W.2d at 792–93, 795.

As the supreme court pointed out in *McCamish*, an attorney can be liable to a nonclient for negligent misrepresentation based on the issuance of an opinion letter; however, section 552 limits liability to situations in which (1) the attorney who provides the false information is aware of the nonclient and intends that the nonclient rely on the false information and (2) the nonclient justifiably relies on the false information. See *McCamish*, 991 S.W.2d at 793–94. Furthermore, the supreme court expressly recognized that “[a] lawyer may also avoid or minimize the risk of liability to a nonclient by setting forth (1) limitations as to whom the representation is directed and who should rely on it, or (2) disclaimers as to the scope and accuracy of the factual investigation or assumptions forming the basis of the representation or the representation itself.” See *McCamish*, 991 S.W.2d at 794. The foregoing quote explains a good deal of the scope of reliance disclaimers in current third-party opinion letter practice.

## Selected Bibliography

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[This index reflects only statutes and rules cited at text sections in the practice notes.]

### TEXAS

#### *Texas Constitution*

<p>Art. I, § 17. . . . . 2.46</p> <p>Art. I, § 19. . . . . 2.46</p> <p>Art. I, § 26. . . . . 2.223</p> <p>Art. I, § 33. . . . . 2.42</p> <p>Art. VIII, § 1-b. . . . . 2.5</p> <p>Art. VIII, § 1-d. . . . . 2.5</p> <p>Art. VIII, § 1-d-1. . . . . 2.5</p> <p>Art. XI, § 5. . . . . 17.2:3</p> <p>Art. XI, § 7. . . . . 17.2:3</p> <p>Art. XVI, § 11. . . . . 11.13:2</p> <p>Art. XVI, § 15. . . . . 2.95, 5.1:2, 5.13:7</p> <p>Art. XVI, § 37. . . . . 2.163, 21.1:1</p> <p>Art. XVI, § 50. . . . . 2.25, 2.124, 2.128, 2.139, 5.1:2, 8.1:2, 11.9:6, 11.9:9, 11.18:1, 18.3:1</p> <p>Art. XVI, § 50(a)(1). . . . . 11.23</p> <p>Art. XVI, § 50(a)(3). . . . . 5.13:5</p> <p>Art. XVI, § 50(a)(4). . . . . 11.23</p> <p>Art. XVI, § 50(a)(5). . . . . 18.1, 20.1:1, 20.1:2, 21.1:2</p> <p>Art. XVI, § 50(a)(5)(A)-(D). . . . . 20.1:1, 20.4:2</p> <p>Art. XVI, § 50(a)(5)(A). . . . . 20.1:2</p> <p>Art. XVI, § 50(a)(5)(B). . . . . 20.1:2, 20.2:1-20.2:3</p> <p>Art. XVI, § 50(a)(5)(C). . . . . 20.1:2, 20.2:1-20.2:3, 20.4:2</p> <p>Art. XVI, § 50(a)(5)(D). . . . . 20.1:2, 20.2:1-20.2:3</p> <p>Art. XVI, § 50(a)(6). . . . . 11.20:3, 11.20:4, 11.25:13, 11.32, 11.53, 14.2:9</p> <p>Art. XVI, § 50(a)(6)(A). . . . . 11.20:1, 11.20:6, 11.25:9, 11.53</p> <p>Art. XVI, § 50(a)(6)(B). . . . . 11.4, 11.25:2, 11.31, 11.55</p>	<p>Art. XVI, § 50(a)(6)(C). . . . . 11.7, 11.9:2, 11.53</p> <p>Art. XVI, § 50(a)(6)(D). . . . . 11.54, 14.2:9</p> <p>Art. XVI, § 50(a)(6)(E). . . . . 11.6, 11.6:1, 11.25:1</p> <p>Art. XVI, § 50(a)(6)(E)(i)-(iv). . . . . 11.6:5</p> <p>Art. XVI, § 50(a)(6)(E)(iii). . . . . 11.6:8</p> <p>Art. XVI, § 50(a)(6)(F). . . . . 11.5</p> <p>Art. XVI, § 50(a)(6)(G). . . . . 11.8, 11.25:1</p> <p>Art. XVI, § 50(a)(6)(H). . . . . 11.9, 11.9:6, 11.25:3, 11.53, 11.54</p> <p>Art. XVI, § 50(a)(6)(I). . . . . 11.25:3</p> <p>Art. XVI, § 50(a)(6)(J). . . . . 11.14</p> <p>Art. XVI, § 50(a)(6)(K). . . . . 11.10, 11.25:7</p> <p>Art. XVI, § 50(a)(6)(L). . . . . 11.12, 11.12:2, 11.53</p> <p>Art. XVI, § 50(a)(6)(L)(ii). . . . . 11.12</p> <p>Art. XVI, § 50(a)(6)(M)(ii). . . . . 11.18:2, 11.18:3</p> <p>Art. XVI, § 50(a)(6)(M)(iii). . . . . 11.11</p> <p>Art. XVI, § 50(a)(6)(N). . . . . 11.21, 11.51</p> <p>Art. XVI, § 50(a)(6)(O). . . . . 11.13, 11.25:1</p> <p>Art. XVI, § 50(a)(6)(P). . . . . 11.3, 11.3:7, 11.25:9</p> <p>Art. XVI, § 50(a)(6)(P)(v). . . . . 11.3:6</p> <p>Art. XVI, § 50(a)(6)(P)(vi). . . . . 11.3:5</p> <p>Art. XVI, § 50(a)(6)(Q). . . . . 11.20:2</p> <p>Art. XVI, § 50(a)(6)(Q)(i). . . . . 11.17</p> <p>Art. XVI, § 50(a)(6)(Q)(ii). . . . . 11.16</p> <p>Art. XVI, § 50(a)(6)(Q)(iii). . . . . 11.20:4, 11.51</p> <p>Art. XVI, § 50(a)(6)(Q)(iv). . . . . 11.15</p> <p>Art. XVI, § 50(a)(6)(Q)(v). . . . . 11.20:5, 11.25:5, 11.51</p> <p>Art. XVI, § 50(a)(6)(Q)(vi). . . . . 11.20:2</p> <p>Art. XVI, § 50(a)(6)(Q)(vii). . . . . 11.22</p>
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[Decimal numbers refer to *sections* in practice notes.]

[Chapters 1-7, vol. 1; chs. 8-15, vol. 2; chs. 16-22, vol. 3; chs. 23-26, vol. 4]

Art. XVI, § 50(a)(6)(Q)(viii) . . . . .	11.19, 11.56	Art. XVI, § 50(k)(6)(A)–(C) . . . . .	11.31
Art. XVI, § 50(a)(6)(Q)(ix) . . . . .	11.4, 11.25:6, 11.55	Art. XVI, § 50(k)(6)(A)–(D) . . . . .	11.35
Art. XVI, § 50(a)(6)(Q)(x) . . . . .	11.24, 11.25, 11.25:11, 11.53	Art. XVI, § 50(k)(6)(A) . . . . .	11.37
Art. XVI, § 50(a)(6)(Q)(x)(a) . . . . .	11.25:1	Art. XVI, § 50(k)(6)(B) . . . . .	11.37
Art. XVI, § 50(a)(6)(Q)(x)(b) . . . . .	11.25:2, 11.25:3	Art. XVI, § 50(k)(6)(D) . . . . .	11.31
Art. XVI, § 50(a)(6)(Q)(x)(c) . . . . .	11.25:4	Art. XVI, § 50(k)(7) . . . . .	11.43
Art. XVI, § 50(a)(6)(Q)(x)(d) . . . . .	11.25:5, 11.25:6	Art. XVI, § 50(k)(8) . . . . .	11.38, 11.45
Art. XVI, § 50(a)(6)(Q)(x)(e) . . . . .	11.25:7	Art. XVI, § 50(k)(9) . . . . .	11.38, 11.45
Art. XVI, § 50(a)(6)(Q)(x)(f) . . . . .	11.25:8	Art. XVI, § 50(k)(10) . . . . .	11.35
Art. XVI, § 50(a)(6)(Q)(xi) . . . . .	11.25:9	Art. XVI, § 50(k)(11) . . . . .	11.37
Art. XVI, § 50(a)(7) . . . . .	2.219, 11.31, 11.45	Art. XVI, § 50(f) . . . . .	11.41
Art. XVI, § 50(d) . . . . .	10.7	Art. XVI, § 50(m) . . . . .	11.42, 11.45
Art. XVI, § 50(e) . . . . .	11.23	Art. XVI, § 50(o) . . . . .	11.34, 11.36
Art. XVI, § 50(f)(2) . . . . .	11.23	Art. XVI, § 50(p) . . . . .	11.31, 11.39, 11.45
Art. XVI, § 50(f)(2)(A) . . . . .	11.23	Art. XVI, § 50(p)(2)–(4) . . . . .	11.39
Art. XVI, § 50(f)(2)(D) . . . . .	11.23	Art. XVI, § 50(p)(6) . . . . .	11.39
Art. XVI, § 50(g) . . . . .	11.18:1, 11.52	Art. XVI, § 50(q) . . . . .	11.44
Art. XVI, § 50(h) . . . . .	11.4, 11.55	Art. XVI, § 50(t)(1) . . . . .	11.5
Art. XVI, § 50(j) . . . . .	11.26	Art. XVI, § 50(t)(2) . . . . .	11.5
Art. XVI, § 50(k)–(p) . . . . .	2.219	Art. XVI, § 50(t)(3) . . . . .	11.5
Art. XVI, § 50(k)–(r) . . . . .	11.31	Art. XVI, § 50(t)(4) . . . . .	11.5
Art. XVI, § 50(k) . . . . .	11.34, 11.47	Art. XVI, § 50(t)(5) . . . . .	11.5
Art. XVI, § 50(k)(1) . . . . .	11.32	Art. XVI, § 50(t)(6) . . . . .	11.5
Art. XVI, § 50(k)(2) . . . . .	11.31, 11.32	Art. XVI, § 50(t)(7) . . . . .	11.5
Art. XVI, § 50(k)(3)–(11) . . . . .	11.45	Art. XVI, § 50(t)(8) . . . . .	11.5
Art. XVI, § 50(k)(3) . . . . .	11.33	Art. XVI, § 50(u) . . . . .	11.1
Art. XVI, § 50(k)(4) . . . . .	11.31, 11.34	Art. XVI, § 50(v) . . . . .	2.219, 11.31, 11.40, 11.45
Art. XVI, § 50(k)(5) . . . . .	11.43	Art. XVI, § 51 . . . . .	2.128, 11.9:6, 11.9:9
Art. XVI, § 50(k)(6) . . . . .	11.31	Art. XVI, § 59 . . . . .	16.2:3

*Texas Revised Civil Statutes*

Arts. 581–1 to –43 . . . . .	2.226	Art. 5069–1B.002(14) . . . . .	11.5
Art. 4447cc . . . . .	2.82	Art. 5414a . . . . .	2.177



*Texas Agriculture Code*

Ch. 60 .....	2.9	Ch. 63 .....	2.82
§ 60.058 .....	2.9	Ch. 143 .....	2.98
§ 60.063 .....	2.66	§ 146.001 .....	5.7:1
§ 60.0631 .....	2.66		

*Texas Alcoholic Beverage Code*

Ch. 11 .....	2.13	§ 101.75(a) .....	2.13
§ 22.14 .....	2.13	§ 109.33 .....	2.13

*Texas Business & Commerce Code*

§ 1.201(b)(16) .....	9.3:3	§ 3.114 .....	3.1
§ 1.201(b)(25) .....	9.3:3, 9.6:3	§ 3.118 .....	2.152, 6.1:1
§ 1.201(b)(35) .....	9.2:1, 9.3:1	§ 3.201 .....	9.5:4
§ 1.201(b)(36) .....	14.5	§ 3.207 .....	9.18:5
§ 1.204 .....	9.4:2	§ 3.301 .....	9.9, 9.18:5
§ 1.301(a) .....	9.6:2	§ 3.302 .....	6.1:1
§ 1.301(b) .....	9.6:2	§ 3.302(a) .....	9.5:4
§ 1.302(b) .....	2.116	§ 3.302(a)(2)(C) .....	10.1:3
§ 1.304 .....	2.116	§ 3.416 cmt. 3. ....	10.1:3
§ 2.107(c) .....	5.7:1	§ 3.416 cmt. 5. ....	10.1:3
§ 2.312 .....	5.7:3	§ 3.419(a) .....	6.2:8
§ 2.314(a) .....	5.7:3	§ 3.419(b) .....	6.2:8
§ 2.315 .....	5.7:3	§ 3.419(f) .....	6.2:8
§ 2.316 .....	5.7:3	Ch. 4A .....	2.77
§ 2.706(d)(2) .....	14.3:2	Ch. 5 .....	2.148
§ 2.706(d)(3) .....	14.3:2	§ 5.118 .....	9.5:6
§ 2.706 cmt. 9 .....	14.3:2	§ 7.102(a)(5) .....	9.3:3
§ 2.718 .....	2.155	§ 7.106 .....	9.5:5
Ch. 2A .....	2.191, 9.2:3	§ 7.106(a) .....	9.5:5
§ 2A.309 .....	2.100	§ 7.201(b) .....	9.3:3
§§ 3.101–.207 .....	6.1:1, 6.2:4	§ 8.102(a)(15) .....	9.3:3
§ 3.104 .....	6.1:1	§ 8.102(a)(17) .....	9.3:3

[Decimal numbers refer to *sections* in practice notes.]

§ 8.103(c).....	9.11	§ 9.102(a)(30).....	9.3:3
§ 8.106.....	9.5:5	§ 9.102(a)(31).....	9.4:6
§ 8.106(a).....	9.5:4	§ 9.102(a)(33).....	9.3:3
§ 8.106(b).....	9.5:4	§ 9.102(a)(34).....	9.3:3, 16.81:3
§ 8.106(b)(1).....	9.5:4	§ 9.102(a)(35).....	9.3:3, 16.81:3
§ 8.110(d).....	9.6:3	§ 9.102(a)(39).....	9.5:2, 16.81:4
§ 8.301(a)(1).....	9.5:4	§ 9.102(a)(41).....	9.7:1
§ 8.301(a)(2).....	9.5:4	§ 9.102(a)(42).....	9.3:3
§ 8.301(a)(3).....	9.5:4	§ 9.102(a)(44).....	9.3:3
§ 8.303.....	9.5:4	§ 9.102(a)(45).....	9.2:3
§ 8.501.....	9.3:3	§ 9.102(a)(46).....	9.2:3, 9.3:3
Ch. 9.....	2.228	§ 9.102(a)(47).....	9.3:3
§§ 9.101–709.....	8.11	§ 9.102(a)(47)(iii).....	9.3:3
§ 9.102.....	9.3:3	§ 9.102(a)(47)(iv).....	9.3:3
§ 9.102(a)(2).....	9.2:3, 9.3:3, 16.81:3	§ 9.102(a)(48).....	9.3:3
§ 9.102(a)(3).....	9.3:3	§ 9.102(a)(49).....	9.3:3
§ 9.102(a)(5).....	9.2:3	§ 9.102(a)(51).....	9.3:3
§ 9.102(a)(6).....	9.5:3	§ 9.102(a)(54).....	9.5:3
§ 9.102(a)(7).....	9.4:4	§ 9.102(a)(59).....	9.3:3
§ 9.102(a)(8).....	9.3:3	§ 9.102(a)(60).....	9.3:2
§ 9.102(a)(9).....	9.3:3	§ 9.102(a)(62).....	9.3:3
§ 9.102(a)(10).....	9.6:3	§ 9.102(a)(65)(A).....	9.3:3
§ 9.102(a)(11).....	9.3:3	§ 9.102(a)(65)(B).....	9.3:3
§ 9.102(a)(12).....	9.2:1, 9.3:1	§ 9.102(a)(65)(C).....	9.3:3
§ 9.102(a)(13).....	9.2:3	§ 9.102(a)(65)(D).....	9.3:3
§ 9.102(a)(13)(A).....	9.3:3	§ 9.102(a)(65)(E).....	9.3:3
§ 9.102(a)(13)(B).....	9.3:3	§ 9.102(a)(66).....	9.3:3
§ 9.102(a)(14).....	9.3:3	§ 9.102(a)(68).....	9.5:3
§ 9.102(a)(15).....	9.3:3	§ 9.102(a)(68–a).....	9.6:3
§ 9.102(a)(18).....	9.5:3	§ 9.102(a)(70).....	9.3:3, 9.4:4
§ 9.102(a)(20).....	9.2:3	§ 9.102(a)(71).....	9.6:3
§ 9.102(a)(23).....	9.3:3	§ 9.102(a)(72).....	9.3:2
§ 9.102(a)(26).....	9.2:3	§ 9.102(a)(73)(A).....	9.3:2
§ 9.102(a)(28)(A).....	9.3:2	§ 9.102(a)(73)(B).....	9.3:2
§ 9.102(a)(28)(B).....	9.3:2	§ 9.102(a)(73)(C).....	9.3:2
§ 9.102(a)(28)(C).....	9.3:2	§ 9.102(a)(73)(D).....	9.3:2
§ 9.102(a)(29).....	9.2:3, 9.3:3	§ 9.102(a)(73)(E).....	9.3:2

§ 9.102(a)(74) . . . . .	9.3:1, 9.4:1	§ 9.109 cmt. 8. . . . .	9.2:3
§ 9.102(a)(76) . . . . .	9.3:3	§ 9.109 cmt. 15. . . . .	9.3:3
§ 9.102(a)(77) . . . . .	9.2:3, 9.6:3	§ 9.201(a) . . . . .	9.13:1
§ 9.102(a)(78) . . . . .	9.3:3, 9.5:4, 9.5:6	§ 9.202 . . . . .	9.2:2
§ 9.102 cmt. 11 . . . . .	9.6:3	§ 9.203 . . . . .	8.11:1
§ 9.103 . . . . .	9.10:3	§ 9.203(a) . . . . .	9.4:1, 9.4:4, 9.4:5
§§ 9.104–107 . . . . .	9.5:5	§ 9.203(b) . . . . .	9.4:1
§ 9.104(a) . . . . .	9.5:5	§ 9.203(b)(2) . . . . .	9.4:3
§ 9.105 . . . . .	9.5:5	§ 9.203(b)(3)(A) . . . . .	8.11:2, 9.4:4, 9.9
§ 9.106 . . . . .	9.5:5	§ 9.203(b)(3)(B) . . . . .	9.4:5
§ 9.106(a) . . . . .	9.5:5	§ 9.203(b)(3)(C) . . . . .	9.4:5, 9.5:4
§ 9.107 . . . . .	9.5:5	§ 9.203(b)(3)(D) . . . . .	9.4:6
§ 9.108 . . . . .	9.9	§ 9.203(b) cmt. 6 . . . . .	9.4:3
§ 9.108(a) . . . . .	8.11:2, 9.4:4	§ 9.203(f) . . . . .	9.5:6
§ 9.108(b) . . . . .	8.11:2, 9.4:4	§ 9.203(g) . . . . .	9.9
§ 9.108(c) . . . . .	8.11:2, 9.4:4	§ 9.204(a) . . . . .	9.4:3, 9.4:4, 9.10:1
§ 9.108(e) . . . . .	9.4:4, 9.9	§ 9.204(b) . . . . .	9.10:1
§ 9.108 cmt. 2 . . . . .	9.9	§ 9.204(b)(1) . . . . .	9.4:4
§ 9.109(a)(1) . . . . .	2.141, 9.2:1, 9.2:2, 16.81:3	§ 9.204(b)(2) . . . . .	9.4:4
§ 9.109(a)(2) . . . . .	9.2:1, 9.2:3	§ 9.204(c) . . . . .	9.4:4, 9.10:2
§ 9.109(a)(3) . . . . .	9.2:1	§ 9.204 cmt. 5. . . . .	9.4:4
§ 9.109(a)(4) . . . . .	9.2:1, 9.2:3	§ 9.301 . . . . .	9.6:3
§ 9.109(b) . . . . .	9.9	§ 9.301(1) . . . . .	9.6:3, 9.9
§ 9.109(c) . . . . .	9.7	§ 9.301(2) . . . . .	9.6:3
§ 9.109(c)(1) . . . . .	9.2:3	§ 9.301(3)(A) . . . . .	9.6:3
§ 9.109(c)(2) . . . . .	9.2:3	§ 9.301(3)(C) . . . . .	9.6:4
§ 9.109(c)(3) . . . . .	9.2:3	§ 9.302 . . . . .	9.6:3
§ 9.109(d) . . . . .	9.7	§ 9.303(c) . . . . .	9.6:3
§ 9.109(d)(1) . . . . .	9.2:3	§ 9.303 cmt. 5. . . . .	9.6:3
§ 9.109(d)(2) . . . . .	9.2:3	§ 9.304(a) . . . . .	9.6:3
§ 9.109(d)(5) . . . . .	9.2:3	§ 9.304(b) . . . . .	9.6:3
§ 9.109(d)(7) . . . . .	9.2:3	§ 9.305(a)(1) . . . . .	9.6:3, 9.6:4
§ 9.109(d)(8) . . . . .	9.2:3	§ 9.305(a)(2) . . . . .	9.6:4
§ 9.109(d)(10)(A) . . . . .	9.2:3	§ 9.305(a)(3) . . . . .	9.6:4
§ 9.109(d)(11) . . . . .	9.2:3, 16.81:3	§ 9.305(a)(4) . . . . .	9.6:4
§ 9.109(d)(12) . . . . .	9.2:3	§ 9.305(b) . . . . .	9.6:3
§ 9.109(d)(13) . . . . .	9.2:3	§ 9.305(c)(1) . . . . .	9.6:3

[Decimal numbers refer to sections in practice notes.]

§ 9.306	9.6:3	§ 9.316(a)(2)	9.15:2
§ 9.306 cmt. 2	9.6:3	§ 9.316(b)	9.15:2
§ 9.306 cmt. 3	9.6:3	§ 9.317	9.10:3
§ 9.307(b)	9.6:3	§ 9.317(a)(2)	9.5:1
§ 9.307(c)	9.6:3	§ 9.320(b)	9.13:1
§ 9.307(e)	9.6:3	§ 9.324	9.10:3
§ 9.307 cmt. 4	9.6:3	§ 9.328(1)	9.5:4, 9.5:5
§§ 9.308–316	8.11:1	§ 9.328(5)	9.5:4
§ 9.308(a)	9.5:1	§ 9.330(d)	9.9
§ 9.308(d)	9.5:4, 9.5:6	§ 9.334	2.100
§ 9.308(e)	9.9	§ 9.334(a)	9.7:1
§ 9.308 cmt. 2	9.13:1	§ 9.334(b)	8.11:1
§ 9.309	9.5:6, 9.13:1	§ 9.334(h)	2.157
§ 9.309(1)–(8)	9.5:6	§ 9.334 cmt. 4	9.7:1
§ 9.309(4)	9.5:4	§ 9.340	9.2:3
§ 9.309(10)	9.5:6	§ 9.408(a)	9.11
§ 9.309(11)	9.5:6	§ 9.408(d)	9.11
§ 9.309(13)	9.5:7	§ 9.408(e)	9.11
§ 9.309(14)	9.5:6	§ 9.501(a)	8.11:1, 9.13:1, 9.13:2
§ 9.310(a)	9.5:3, 9.13:1	§ 9.501(a)(1)	9.5:3, 9.9
§ 9.311(a)	9.5:8, 9.7	§ 9.502	8.11:1
§ 9.311(b)	9.5:8, 9.13:2	§ 9.502(a)	8.11:1, 9.5:3
§ 9.311(d)	9.5:7	§ 9.502(a)(3)	9.14:3
§ 9.312(a)	9.5:4, 9.5:5, 9.9	§ 9.502(b)	8.11:1, 9.5:3, 9.7:1, 9.14:3, 9.14:5
§ 9.312(b)(1)	9.5:5	§ 9.502(b)(3)	9.9, 9.14:3
§ 9.312(b)(2)	9.5:4, 9.5:5	§ 9.502(c)	2.100, 9.5:3, 9.7:1, 9.14:5
§ 9.312(b)(3)	9.5:4	§ 9.502(d)	9.17
§ 9.312(e)	9.5:6, 9.5:7	§ 9.502 cmt. 2	9.13:1
§ 9.312 cmt. 5	9.5:5	§ 9.503	2.22
§ 9.313(a)	9.5:4, 9.9	§ 9.503(a)	9.5:3
§ 9.313(c)	9.5:4	§ 9.503(a)(1)	9.14:2
§ 9.313(c)(1)	9.5:4	§ 9.503(a)(2)	9.14:2
§ 9.313(e)	9.5:4	§ 9.503(a)(3)	9.14:2
§ 9.313(h)	9.5:4	§ 9.503(a)(4)	9.14:2
§ 9.314(a)	9.5:4, 9.5:5	§ 9.503(a)(5)	9.14:2
§ 9.315(d)	9.5:6, 9.5:7	§ 9.503(c)	9.14:2
§ 9.316(a)	9.15:2	§ 9.503(f)	9.14:2

§ 9.503(g) . . . . .	9.14:2	§ 9.520(c) . . . . .	8.11:1, 9.5:3
§ 9.503(h) . . . . .	9.14:2	§ 9.522(a) . . . . .	9.5:3
§ 9.504 . . . . .	8.11:2, 9.5:3, 9.14:3	§ 9.523(c) . . . . .	9.15:4
§ 9.506(a) . . . . .	9.5:3	§ 9.525(a)(3) . . . . .	2.78
§ 9.506(c) . . . . .	2.22, 9.14:2, 9.15:2	§ 9.525(e) . . . . .	8.11:1
§ 9.507(c) . . . . .	9.14:2, 9.15:2	§ 9.526(b) . . . . .	2.78
§ 9.509(a)(1) . . . . .	9.5:3, 9.14:4	§§ 9.601-.628 . . . . .	14.3, 14.3:6, 14.11
§ 9.509(b) . . . . .	9.5:3, 9.14:4	§ 9.601 . . . . .	6.1:1
§ 9.509(d)(2) . . . . .	9.5:3	§ 9.602 . . . . .	6.1:1, 14.3:6
§ 9.513 . . . . .	9.5:3	§ 9.602(7) . . . . .	14.3, 14.3:3
§ 9.513(a) . . . . .	9.16	§ 9.604(a) . . . . .	2.104, 6.3:6, 8.11:1, 14.2:7, 14.3:1, 14.10
§ 9.513(a)(1) . . . . .	9.15:2	§ 9.604(b) . . . . .	8.11:1
§ 9.513(c) . . . . .	9.16	§ 9.604(c) . . . . .	6.1:1
§ 9.513(c)(1) . . . . .	9.15:2	§ 9.607 . . . . .	14.3:9
§ 9.513(d) . . . . .	9.16	§ 9.607(a) . . . . .	14.3:7
§ 9.514 . . . . .	9.12	§ 9.607(c) . . . . .	14.3:7
§ 9.514(b) . . . . .	9.14:4, 9.15:2	§ 9.609 . . . . .	14.3:8
§ 9.514(d) . . . . .	2.162	§§ 9.610-.619 . . . . .	14.3:2
§ 9.515 . . . . .	9.5:3, 9.15:2	§ 9.610 . . . . .	14.3:9
§ 9.515(a) . . . . .	9.16	§ 9.610(b) . . . . .	14.3, 14.3:2, 14.3:3
§ 9.515(b) . . . . .	9.5:3, 9.16	§ 9.610(c) . . . . .	14.3:2
§ 9.515(c) . . . . .	9.5:3, 9.16	§ 9.610(c)(1) . . . . .	14.3:3
§ 9.515(g) . . . . .	8.11:1	§ 9.610(c)(2) . . . . .	14.3:3
§ 9.516(a) . . . . .	2.78, 9.5:3	§ 9.610(d) . . . . .	14.3:3
§ 9.516(b) . . . . .	9.5:3	§ 9.610(e) . . . . .	14.3:3
§ 9.516(b)(3) . . . . .	9.5:3, 9.14:2	§ 9.610(f) . . . . .	14.3:3, 14.7:4, 14.9:4
§ 9.516(b)(3)(B)(ii) . . . . .	9.5:3	§ 9.610 cmt. 7 . . . . .	14.3:2
§ 9.516(b)(3)(C) . . . . .	8.11:1	§ 9.611(c) . . . . .	14.3:3, 14.7:2, 14.9:2
§ 9.516(b)(3)(D) . . . . .	9.5:3	§ 9.611(d) . . . . .	14.3:3
§ 9.516(b)(4) . . . . .	8.11:1, 9.5:3	§ 9.612(b) . . . . .	14.3:3
§ 9.516(b)(5) . . . . .	8.11:1, 9.5:3	§ 9.613 . . . . .	14.7:2, 14.9:2
§ 9.516(b)(7) . . . . .	9.5:3	§ 9.613(1)(E) . . . . .	14.3:2
§ 9.516(d) . . . . .	9.5:3	§ 9.614 . . . . .	14.7:2, 14.9:2
§ 9.518 . . . . .	9.5:3	§ 9.615 . . . . .	14.3:5
§ 9.519(c)(1) . . . . .	9.5:3	§ 9.616(b) . . . . .	14.3:5
§ 9.519(f)(1) . . . . .	9.5:3	§ 9.616(e) . . . . .	14.3:5
§ 9.519(f)(2) . . . . .	9.5:3		

[Decimal numbers refer to sections in practice notes.]

§§ 9.620–.622.....	14.3:4, 14.8:1	§ 17.42.....	2.50, 2.60
§ 9.620(a)(1).....	14.3:4, 14.8:2	§ 17.46(b).....	2.111
§ 9.620(a)(2).....	14.3:4	§ 22.003.....	14.2:4
§ 9.620(a)(3).....	14.3:4	§ 22.004.....	14.2:4
§ 9.620(a)(4).....	14.3:4	§ 22.005.....	14.2:4
§ 9.620(c).....	14.8:2	§ 22.006.....	14.2:4
§ 9.620(c)(1).....	14.8:2	§§ 23.01–.33.....	2.25
§ 9.620(c)(2).....	14.3:4, 14.8:2	Ch. 24.....	2.25, 2.112
§ 9.620(c)(2)(C).....	14.8:3	§ 26.01.....	2.238, 25.1:2
§ 9.620(d)(1).....	14.8:3	§ 26.02.....	2.50, 2.157, 6.1:1, 8.1:2
§ 9.620(d)(2)(A).....	14.8:3	§ 26.02(a)(2).....	8.10:9
§ 9.620(e).....	14.3:4	§ 26.02(b).....	10.12
§ 9.620(g).....	14.3:4	§ 27.01.....	2.111
§ 9.621(a).....	14.3:4	Ch. 51.....	2.109
§ 9.621(b).....	14.3:4	§ 51.003(b).....	2.50
§ 9.622.....	14.3:9	§ 51.151.....	2.50
§§ 9.623–.628.....	14.3:2	§ 53.001.....	2.233
§ 9.623(b).....	14.3:9	§ 70.4045.....	9.7:2
§ 9.624.....	14.3:3	Ch. 71.....	2.22
§ 9.624(a).....	14.7:1, 14.9:1	§ 71.203.....	2.22, 2.110
§ 9.624(b).....	14.3:4	§ 72.002.....	2.209
§ 9.625(a).....	14.3:3, 14.3:10	Ch. 92.....	2.191
§ 9.625(b)–(g).....	14.3:3	§ 92.051(d).....	2.50
§ 9.625(b).....	14.3:4, 14.3:10	Ch. 102.....	2.232
§ 9.625(e).....	14.3:10	Ch. 271.....	2.41, 9.6:2
§ 9.625(f).....	14.3:10	Ch. 272.....	2.19, 2.41, 2.52
§ 9.626.....	14.3:5	§§ 272.001–.002.....	18.3:5, 19.10, 20.3:2
§ 9.626(a).....	14.3:5	Ch. 273.....	2.19, 2.41, 2.50
§ 9.626(a)(2).....	14.3:2	Ch. 274.....	2.41
§ 9.626(b).....	14.3:5	Ch. 322.....	2.77, 2.271
§ 9.627.....	14.3, 14.3:10	§ 322.003(b).....	2.77
§ 9.5185.....	2.99, 9.5:3	Ch. 601.....	2.54, 2.127, 20.1:4, 20.4:2
§ 9.5211.....	9.14:1	§ 601.002.....	18.3:3
§ 15.50.....	2.58	§§ 601.051–.053.....	18.3:3
Ch. 16.....	2.260	§ 601.051.....	2.55
Ch. 17.....	2.111	§§ 601.052–.053.....	2.50
§§ 17.41–.63.....	2.54, 2.60	§ 601.052(a).....	2.55

§ 601.052(b) . . . . .	2.55	§ 601.053 . . . . .	2.55
------------------------	------	---------------------	------

*Texas Business Organizations Code*

§ 1.002(3) . . . . .	2.274	§ 101.108(a) . . . . .	9.11
§ 1.002(22) . . . . .	9.14:2	§§ 101.353–358 . . . . .	10.5
§ 2.003 . . . . .	2.57	§ 152.102 . . . . .	2.190
§ 2.007 . . . . .	2.57	§§ 152.301–302 . . . . .	2.190
§ 2.101 . . . . .	2.57, 2.154	§ 152.302(c) . . . . .	2.190
§ 2.104(c) . . . . .	10.13	§ 152.405 . . . . .	9.11
§ 9.251 . . . . .	2.154	§ 152.801 . . . . .	2.154
§ 10.251 . . . . .	2.57, 2.178, 2.190, 5.1:1	§ 152.901 . . . . .	2.154
§ 10.252 . . . . .	2.57	§ 152.905 . . . . .	2.154
§ 10.253 . . . . .	2.57	§ 153.103 . . . . .	2.154
Ch. 21 . . . . .	24.1:2	§ 153.251 . . . . .	9.11
§ 21.057(b) . . . . .	24.4	§ 153.351 . . . . .	2.154
§§ 21.411–416 . . . . .	10.5	§§ 200.001–503 . . . . .	2.205
Ch. 22 . . . . .	24.1:2	§ 252.001(2) . . . . .	2.274
§§ 22.001–409 . . . . .	2.178	§§ 252.001–017 . . . . .	2.274
§ 22.102(b) . . . . .	24.4	§ 252.006 . . . . .	23.2
§§ 101.001–622 . . . . .	2.153	Ch. 402 . . . . .	2.33, 23.2

*Texas Civil Practice & Remedies Code*

Ch. 12 . . . . .	2.110	§ 16.011 . . . . .	2.240
§§ 12.001–007 . . . . .	2.2, 2.99, 2.110, 2.139, 9.5:3	§§ 16.021–034 . . . . .	2.6
§ 12.002(c) . . . . .	2.110	§ 16.025 . . . . .	5.6
§ 15.011 . . . . .	2.281	§ 16.033 . . . . .	5.8
§ 15.0115 . . . . .	2.281	§ 16.033(a) . . . . .	2.152
§ 15.020 . . . . .	2.281, 8.10:9	§ 16.033(c) . . . . .	3.10:1
§ 15.065 . . . . .	2.222, 2.288	§§ 16.035–037 . . . . .	10.3
§ 16.003(a) . . . . .	2.152	§ 16.035 . . . . .	2.3, 2.152
§ 16.004(a)(3) . . . . .	2.152	§ 16.035(a) . . . . .	11.37
§ 16.005 . . . . .	2.242	§ 16.035(b) . . . . .	14.4:3
§ 16.008 . . . . .	2.240	§ 16.035(d) . . . . .	11.37
§ 16.009 . . . . .	2.240	§ 16.035(e) . . . . .	2.3

[Decimal numbers refer to sections in practice notes.]

§ 16.036 .....	3.10:1	§ 121.004(b)(2) .....	3.12:9
§ 16.038 .....	2.3	§ 121.004(b)(3) .....	3.12:10
§ 16.051 .....	11.25:12, 11.25:13	§ 121.004(c) .....	3.12:10
§ 16.070 .....	2.248	§ 121.004(d) .....	2.182
§ 17.031 .....	2.104	§ 121.005 .....	2.4, 3.11, 3.12:5
§ 19.008 .....	2.208	§ 121.005(a) .....	3.11:3
§ 30.001 .....	2.48, 11.15	§ 121.005(b) .....	3.12
§ 31.008 .....	2.214	§§ 121.006–008 .....	3.12:4
§ 31.008(g) .....	2.214	§ 121.006 .....	2.4
§ 34.001 .....	2.139	§ 121.006(b) .....	3.11:4
§ 34.041 .....	14.2:2	§§ 121.007–008 .....	2.4
Ch. 35 .....	2.139	§ 121.007 .....	3.2, 3.12, 3.12:2, 3.12:6, 3.12:10
Ch. 36 .....	2.139	§ 121.008 .....	3.10:3, 3.10:4, 3.12, 3.12:2, 3.12:6, 3.12:10
§ 37.004(c) .....	2.263	§§ 121.009–011 .....	2.4
Ch. 43 .....	2,246, 6.4:4	§ 121.009 .....	3.13:2
§ 43.004 .....	2.119	§ 121.010 .....	3.13:2
§ 65.015 .....	2.242	§ 121.011 .....	3.13:3
Ch. 75 .....	2.143	§ 121.012 .....	3.12:11
§§ 80.001–003 .....	2.186	§ 121.016 .....	2.4
Ch. 95 .....	2.143	Ch. 125 .....	2.183
§ 101.022 .....	2.143	§ 129.001 .....	2.168
§§ 121.001–016 .....	2.4	§ 129.002 .....	2.168
§ 121.001 .....	3.11	Ch. 130 .....	2.52
§ 121.001(a) .....	3.11:1	§ 130.002 .....	17.2:4
§ 121.001(b) .....	3.11:1	§ 132.001 .....	3.13:5
§ 121.001(c) .....	3.11:1	§ 132.001(d)–(f) .....	3.13:5
§ 121.001(d) .....	3.11:1, 3.12:10	§ 136.001 .....	2.212
§ 121.002(b) .....	3.11:1	Ch. 154 .....	2.14
§ 121.004 .....	2.181, 3.10:2	§ 154.028 .....	2.104
§ 121.004(a) .....	3.11, 3.11:2	Chs. 171–172 .....	2.19

*Texas Code of Criminal Procedure*

Art. 13.271 .....	2.173	Ch. 62 .....	2.232
Arts. 59.01–14 .....	2.108		



*Texas Education Code*

§ 11.155 ..... 2.46

*Texas Estates Code*

§ 101.001 .....	2.293	§ 114.101 .....	5.11:1
§ 101.002 .....	5.13:6	§ 114.101(6).....	5.11:2
§§ 111.001–.002 .....	2.45	§ 114.102 .....	5.11:10
§ 111.001 .....	2.138, 5.13:6	§ 114.103(a).....	5.11:1
§ 111.001(a) .....	5.13:6	§ 114.103(b).....	5.11:5
§ 111.002 .....	5.13:6	§ 114.103(d).....	5.11:1
§ 112.051 .....	5.13:6	§ 114.104 .....	5.11:1
§ 112.052 .....	5.13:6	§ 114.105 .....	5.11:1
§ 112.053 .....	5.13:6	§ 114.106 .....	5.11:1
§ 112.054(b) .....	5.13:6	Ch. 122 .....	2.64
§ 112.054(c) .....	5.13:6	§ 122.051 .....	2.64
§§ 112.101–106 .....	2.138	§ 122.107 .....	2.64
§ 112.101 .....	5.13:6	§ 132.001(b).....	3.13:5
§ 112.151 .....	5.13:6	§ 203.002 .....	2.7, 2.249
§§ 112.201–208 .....	5.13:6	Ch. 205 .....	2.7
§§ 112.251–253 .....	5.13:6	§ 251.002 .....	2.293
Ch. 114 .....	2.61, 2.261, 5.11	§ 256.001 .....	2.293
§ 114.003 .....	5.11:4	§ 257.001 .....	2.293
§ 114.051 .....	5.11:1	Ch. 356 .....	5.13:4
§ 114.052 .....	5.11:6	§ 356.001 .....	5.13:4
§ 114.053 .....	5.11:1	§ 356.002.....	5.13:4
§ 114.054(a) .....	5.11:3	§ 356.557 .....	5.13:4
§ 114.054(b) .....	5.11:3	Ch. 751 .....	2.72
§ 114.055 .....	5.11:2	§ 751.002 .....	2.72, 3.10:1
§ 114.056 .....	5.11:2	§ 751.004 .....	2.72
§ 114.057 .....	5.11:6	§ 751.051 .....	2.72
§ 114.057(a) .....	5.11:4, 5.11:7, 5.11:8	§ 751.052 .....	2.72
§ 114.057(b) .....	5.11:8	§ 751.053 .....	2.72
§ 114.057(c) .....	5.11:9	§ 751.101 .....	2.72
§ 114.057(c) .....	5.11:5	§ 751.151 .....	2.72, 3.14

[Decimal numbers refer to *sections* in practice notes.]

**Texas Estates Code**

**Statutes and Rules Cited**

§ 752.051 . . . . .	3.8:1	§ 1158.001 . . . . .	5.13:4
§§ 1001.001–.056 . . . . .	2.168	§ 1158.557 . . . . .	5.13:4
§ 1151.001 . . . . .	2.147	§§ 1201.051–.054 . . . . .	2.147
Ch. 1158 . . . . .	5.13:4	§ 1351.001 . . . . .	2.168

*Texas Family Code*

§ 1.104 . . . . .	2.168	§§ 5.001–.108 . . . . .	2.95
§ 3.001 . . . . .	5.1:2	§ 5.001 . . . . .	3.9
§ 3.002 . . . . .	5.1:2	§ 6.501(a) . . . . .	2.95
§ 3.003 . . . . .	5.1:2	§§ 9.006–.014 . . . . .	2.95
§ 3.101 . . . . .	5.1:2	§ 9.011 . . . . .	2.95
§ 3.102 . . . . .	5.1:2	§§ 9.201–.205 . . . . .	2.95
§ 3.104 . . . . .	5.1:2	Ch. 31 . . . . .	2.168
§§ 3.201–.203 . . . . .	2.95	§§ 157.311–.331 . . . . .	2.40, 2.95
§ 3.202 . . . . .	5.1:2	§ 157.312 . . . . .	2.40
§§ 4.001–.010 . . . . .	2.95	§ 157.314 . . . . .	2.40
§§ 4.101–.106 . . . . .	2.95	§ 157.316 . . . . .	2.40
§§ 4.102–.106 . . . . .	5.1:2	§ 157.318 . . . . .	2.40
§§ 4.201–.206 . . . . .	5.13:7	§ 157.323 . . . . .	2.40
§§ 5.001–.102 . . . . .	2.128		

*Texas Finance Code*

§ 11.308 . . . . .	11.1, 11.31	Ch. 158 . . . . .	2.66
§ 14.104 . . . . .	8.4, 11.20:7, 11.53, 20.2:3	§ 158.101 . . . . .	2.66
§ 15.413 . . . . .	11.1, 11.31	Ch. 180 . . . . .	2.174, 6.2:7, 8.4, 20.2:3
Ch. 59, subch. D . . . . .	2.24	§ 180.002(8) . . . . .	11.3:6
§ 124.005 . . . . .	6.2:7, 8.4, 11.3:2, 11.3:4, 20.2:3	§ 180.003(2) . . . . .	11.3:6
Ch. 156 . . . . .	2.174	§ 180.003(a) . . . . .	2.174
§ 156.004 . . . . .	2.66	Tit. 4, subtit. A . . . . .	11.13:2
§ 156.202 . . . . .	2.174	Chs. 301–349 . . . . .	2.276
§ 156.202(a–1) . . . . .	2.174	§ 301.002(a)(4) . . . . .	6.4:3, 11.6:1
§ 156.304 . . . . .	2.66	§ 301.002(a)(14) . . . . .	11.5
§ 157 . . . . .	2.174	§ 302.001 . . . . .	6.4:11, 20.1:3
§ 157.0121 . . . . .	2.174	§ 302.004 . . . . .	6.4:11

[Decimal numbers refer to *sections* in practice notes.]

**Statutes and Rules Cited**

**Texas Government Code**

§ 302.103 .....6.4:3, 20.1:3  
 Ch. 303 .....20.1:3  
 § 303.009(c) .....8.10:9  
 § 303.015(c) .....6.3:3  
 § 306.001(5) .....6.4:3, 8.10:9  
 § 306.006(1) .....6.4:3  
 § 339.004 .....6.2:7, 8.4, 20.2:3  
 § 339.005 .....11.3:2  
 § 341.101 .....11.1  
 §§ 341.102–103 .....11.1  
 §§ 341.103–104 .....6.2:7, 8.4, 11.3:2, 20.2:3  
 § 341.502 .....2.124, 2.157, 20.2:3  
 § 341.502(a) .....6.2:7, 8.4, 11.1, 20.2:3  
 § 341.502(b)–(d) .....8.4  
 § 341.502(b) .....11.20:1  
 § 341.502(c) .....6.2:7  
 Ch. 342 .....11.51  
 § 342.001(4) .....8.4, 11.6:13, 11.20:7, 20.2:3  
 § 342.005 .....6.2:7, 8.4, 8.10:9, 9.10:4,  
 11.1, 11.20:7, 20.2:3  
 § 342.005(3) .....8.4  
 § 342.006 .....8.4, 20.2:3  
 § 342.051 .....2.174, 6.2:7, 8.4, 11.3:2, 20.2:3  
 § 342.051(c)(1) .....6.2:7, 8.4, 11.3:4, 20.2:3  
 § 342.051(f) .....11.3:4  
 § 342.302 .....6.4:3  
 § 342.305 .....6.4:3  
 § 342.307 .....6.2:7, 8.4, 11.6:13, 20.2:3  
 § 342.308 .....6.2:7, 8.4, 11.6:13, 20.2:3  
 §§ 342.404–405 .....8.4

§ 342.404 .....8.4, 11.20:7, 20.2:3  
 § 342.405 .....8.4, 11.20:7, 20.2:3  
 § 342.413 .....8.4, 11.20:7, 20.2:3  
 § 342.502 .....6.2:7, 8.4, 11.6:13, 20.2:3  
 § 342.502(b)(2) .....9.10:4  
 Ch. 343 .....2.66  
 § 343.001(1) .....10.14:2  
 § 343.001(2) .....10.14  
 § 343.001(3) .....10.14:1  
 § 343.002 .....10.14  
 § 343.101(a) .....10.14:1  
 § 343.101(b) .....8.1:2, 10.14:1  
 § 343.104 .....10.14:3  
 § 343.105 .....10.14  
 § 343.201(1)(C) .....10.14:2  
 § 343.201(1)(E) .....10.14:2  
 § 343.201(2) .....10.14:2  
 § 343.202 .....10.14, 10.14:2  
 § 343.203 .....10.14:2  
 § 343.204(a) .....10.14:2  
 § 343.204(b) .....10.14:2  
 § 343.205 .....10.14:2  
 § 345.001(7) .....20.2:1–20.2:3  
 § 345.052 .....2.50  
 § 345.081 .....2.50  
 § 345.304 .....2.50  
 Ch. 351 .....2.5, 2.202  
 §§ 392.001–404 .....2.93, 14.3:3  
 § 392.001(7) .....2.93  
 § 393.202 .....2.50

*Texas Government Code*

§ 27.034 .....2.218  
 § 51.901 .....2.99, 2.110, 9.5:3  
 § 51.902 .....2.110

§ 51.903 .....2.110  
 § 81.079(b) .....1.1:2  
 § 81.101(c) .....2.266

[Decimal numbers refer to sections in practice notes.]

**Texas Government Code**

**Statutes and Rules Cited**

Ch. 83 . . . . .	2.157, 2.266	Ch. 442 . . . . .	2.123
§ 312.011(1) . . . . .	3.13:1	§ 442.016 . . . . .	2.123
§ 402.031 . . . . .	2.46, 2.198	Ch. 469 . . . . .	2.15
§ 405.019 . . . . .	2.181	§ 531.077 . . . . .	2.128
§ 405.021 . . . . .	2.99	§ 551.0015 . . . . .	2.200
§ 405.022 . . . . .	2.110, 9.5:3	§ 552.0036 . . . . .	2.200, 23.2
Ch. 406 . . . . .	2.182	§§ 573.021-.025 . . . . .	11.3:6
Ch. 406, subch. C . . . . .	2.4	§ 602.002 . . . . .	3.13:1
§ 406.002 . . . . .	3.11:1	Ch. 1208 . . . . .	9.2:3
§ 406.003 . . . . .	3.11:1	§§ 1508.001-.010 . . . . .	2.188
§ 406.011 . . . . .	3.11:1	Ch. 2007 . . . . .	2.198
§ 406.013 . . . . .	3.12:10	Ch. 2054 . . . . .	2.78
§ 406.013(a) . . . . .	3.11:1	Ch. 2165 . . . . .	2.237
§ 406.013(d) . . . . .	2.182	Ch. 2167 . . . . .	2.237
§ 406.014(a) . . . . .	3.12:11	Ch. 2206 . . . . .	2.46
§ 406.014(b) . . . . .	2.182	Ch. 2252, subch. D . . . . .	2.29
§ 406.016 . . . . .	2.182	§ 2252.092 . . . . .	2.224
§ 406.0165 . . . . .	2.4	§ 2252.908 . . . . .	2.65
§ 406.0165(b) . . . . .	3.8:2	Ch. 2253 . . . . .	2.163, 2.246
§ 406.017 . . . . .	2.182	Ch. 2306 . . . . .	2.8, 2.254
Ch. 411, subch. H . . . . .	2.150	§ 2306.514 . . . . .	2.8, 2.15
§ 411.004 . . . . .	2.46	§§ 2306.581-.590 . . . . .	2.43
§ 411.203 . . . . .	2.150	§ 6711(g) . . . . .	2.8
§ 411.204 . . . . .	2.150		

*Texas Health & Safety Code*

§ 166.032 . . . . .	3.8:1	§§ 361.531-.539 . . . . .	2.82, 2.140
Ch. 342 . . . . .	2.183	§ 361.538 . . . . .	2.140
§ 342.004 . . . . .	2.291	§§ 361.601-.613 . . . . .	2.82, 2.284
§ 342.008 . . . . .	2.291	Ch. 374 . . . . .	2.70
Ch. 343 . . . . .	2.183	Ch. 382 . . . . .	2.82
§ 343.011 . . . . .	2.291	§ 401.415 . . . . .	2.176
Ch. 361 . . . . .	2.82	§§ 481.001-.205 . . . . .	2.108
§ 361.194 . . . . .	2.122, 2.128	§§ 711.001-.062 . . . . .	2.36
§ 361.197 . . . . .	2.128	§ 711.033 . . . . .	2.46

§ 711.034 .....	2.36	Ch. 765 .....	2.59
Ch. 757 .....	2.195		

*Texas Human Resources Code*

§ 121.003 .....	2.15	§§ 123.001–.010 .....	2.44
-----------------	------	-----------------------	------

*Texas Insurance Code*

§ 151.001(5) .....	17.2:4	§ 1811.053 .....	17.10:4
§ 151.102 .....	17.2:4, 17.6:3	§ 1811.101 .....	17.10:4
§ 151.103 .....	17.2:4	§ 1811.102 .....	17.10:4
§ 151.104 .....	17.2:4, 17.6:3	§ 1811.103 .....	17.10:4
§ 151.105(3) .....	17.2:4	§ 1811.154 .....	17.10:4
§ 151.105(10) .....	17.2:4, 18.2:3	§ 1811.155(a) .....	17.10:4
§§ 544.301–.305 .....	2.170	§ 1811.155(b) .....	17.10:4
§ 544.303 .....	2.170	§ 1811.156 .....	17.10:4
Ch. 549 .....	5.12:7	§ 2210.251(c) .....	2.294
Ch. 557 .....	2.135	§ 2501.003(4) .....	11.21:2
§ 1811.051 .....	17.10:4	§ 3502.201 .....	2.197
§ 1811.052(b) .....	17.10:4	§§ 3503.051–.057 .....	2.53, 2.246

*Texas Labor Code*

§§ 61.081–.085 .....	2.285	Ch. 406 .....	17.5:4
§ 61.0825 .....	2.285	§§ 406.121–.123 .....	18.3:3
Ch. 301 .....	2.67		

*Texas Local Government Code*

Ch. 42 .....	2.16, 2.90	§ 118.0135 .....	3.15
Ch. 43 .....	2.16	§ 118.0525 .....	3.15
§ 43.002 .....	2.282	§ 191.007 .....	3.15
§ 118.011 .....	3.15	§ 191.007(a) .....	3.15
§ 118.011(a)(2) .....	3.15	§ 191.007(c) .....	3.4

§ 191.007(e) . . . . .	3.8:1	§ 232.0032 . . . . .	2.243
§ 191.007(h) . . . . .	3.8:1	§ 232.0033 . . . . .	2.66
§ 191.009 . . . . .	2.78, 3.14	§ 232.0034 . . . . .	2.243
§ 193.008 . . . . .	3.7:5	§ 232.006 . . . . .	2.243
Ch. 195 . . . . .	2.78, 3.14	§§ 232.008–009 . . . . .	2.243
§ 195.003 . . . . .	3.14	§§ 232.021–043 . . . . .	2.43, 2.243
§ 195.006 . . . . .	3.15	§ 232.023 . . . . .	2.243
§ 204.002 . . . . .	3.7:5	§§ 232.071–080 . . . . .	2.43, 2.243
Ch. 211 . . . . .	2.296	§ 232.072 . . . . .	2.243
§ 211.016 . . . . .	2.282	§§ 233.154–155 . . . . .	18.3:3
§§ 212.001–018 . . . . .	2.243	§§ 240.031–035 . . . . .	2.185
§ 212.004(c) . . . . .	3.10:1	§ 240.032 . . . . .	2.185
§§ 212.013–016 . . . . .	2.243	§ 240.0325 . . . . .	2.185
§ 212.0101 . . . . .	2.243	§§ 240.041–048 . . . . .	2.290
§ 212.0105 . . . . .	2.243	§ 240.901 . . . . .	2.101, 17.4:3
§ 212.0146 . . . . .	2.243	§ 242.001 . . . . .	2.243
§ 212.0155 . . . . .	2.243	§ 242.0015 . . . . .	2.243
§§ 212.131–136 . . . . .	2.282	§ 242.0015(a) . . . . .	2.243
§§ 212.151–157 . . . . .	2.66, 2.218	§ 242.002 . . . . .	2.243
§ 212.155 . . . . .	2.218	§ 245.002(b) . . . . .	2.282
§ 212.172 . . . . .	2.16	§ 245.002(d) . . . . .	2.282
Ch. 214 . . . . .	2.183	§ 245.004 . . . . .	2.282
§ 214.101 . . . . .	2.195	§ 250.007 . . . . .	2.67
§§ 214.212–213 . . . . .	2.32	§§ 251.001–002 . . . . .	2.46
§ 214.212 . . . . .	2.32	Ch. 318 . . . . .	2.123
§ 214.214 . . . . .	2.32	§ 331.001 . . . . .	2.46
§ 214.216 . . . . .	2.32	§ 331.003 . . . . .	2.46
§ 214.903 . . . . .	2.67, 2.94	Ch. 334 . . . . .	2.129
Ch. 216 . . . . .	2.186	Ch. 335 . . . . .	2.129
§ 216.003 . . . . .	2.186	§§ 352.1145–115 . . . . .	2.98
§ 216.903 . . . . .	2.186	§ 352.116 . . . . .	2.98
§§ 229.051–053 . . . . .	2.185	§ 373B . . . . .	2.8
§§ 229.054–055 . . . . .	2.185	Ch. 395 . . . . .	2.131
Ch. 231 . . . . .	2.296	§ 552.011 . . . . .	2.46
§§ 232.001–010 . . . . .	2.243	§ 552.013 . . . . .	2.46
§ 232.001 . . . . .	2.243	§ 561.001 . . . . .	2.101
§ 232.002(c) . . . . .	2.243	§ 571.004 . . . . .	2.46

[Decimal numbers refer to sections in practice notes.]

Ch. 573 ..... 2.241

*Texas Natural Resources Code*

§ 21.001(3) ..... 2.177, 16.4	§§ 92.001–007 ..... 2.166
§ 21.012(b) ..... 2.177	§ 111.019 ..... 2.46
Ch. 33 ..... 2.42, 2.82	§ 111.0194 ..... 2.73
§ 33.135 ..... 2.42	§§ 112.011–012 ..... 5.7:1
§§ 52.171–190 ..... 5.14:6	§§ 151.001–006 ..... 5.7:1
Ch. 61 ..... 2.42	§ 191.002 ..... 2.17
§ 61.025 ..... 2.42, 14.2:6	§ 191.094 ..... 2.17
§ 81.0523 ..... 2.166, 2.296	§ 191.133 ..... 2.17
§ 81.0523(b) ..... 2.166	§§ 191.171–174 ..... 2.17
§ 81.0523(d) ..... 2.166	

*Texas Occupations Code*

§ 1001.0031(c) ..... 19.2	§ 1101.757 ..... 2.217
§ 1001.0031(d) ..... 19.2	Ch. 1102 ..... 2.54, 2.199
§§ 1001.056–057 ..... 19.2	Ch. 1103 ..... 2.18
Ch. 1051 ..... 2.20	§§ 1152.001–251 ..... 2.201
§ 1051.0016(b) ..... 19.2	Ch. 1201 ..... 2.54, 2.161, 5.15:6
§ 1051.606 ..... 19.2	§ 1201.003(12) ..... 5.15:6
§ 1051.703 ..... 19.2	§ 1201.003(18) ..... 5.15:6
Ch. 1052 ..... 2.145	§ 1201.003(20) ..... 5.15:6
Ch. 1071 ..... 2.247	§ 1201.003(30)(A) ..... 5.15:6
Ch. 1101 ..... 2.30, 2.206	§ 1201.010 ..... 5.15:6
§ 1101.002 ..... 2.217	§ 1201.205 ..... 5.15:6
§ 1101.151 ..... 2.217	§ 1201.206(e) ..... 5.15:6
§ 1101.351 ..... 2.217	§ 1201.207(b) ..... 5.15:6
§ 1101.553 ..... 2.217	§ 1201.222 ..... 2.161, 5.15:6
§§ 1101.555–559 ..... 2.66	§ 1201.2055 ..... 2.161, 5.15:6
§§ 1101.651–652 ..... 2.66	§ 1201.2075 ..... 2.161, 5.15:6
§ 1101.652(b)(16) ..... 4.13, 16.26, 16.54	Ch. 1202 ..... 2.54
§ 1101.652(b)(29) ..... 4.8, 16.21, 16.49	Ch. 1301 ..... 2.32
§ 1101.653 ..... 2.73	Ch. 1303 ..... 2.54

[Decimal numbers refer to *sections* in practice notes.]

**Texas Occupations Code**

**Statutes and Rules Cited**

§ 1303.254 .....	2.50	Ch. 1955 .....	2.146
Ch. 1901 .....	2.290	Ch. 1958 .....	2.170
Ch. 1902 .....	2.290	§ 1958.154 .....	2.66
Ch. 1951 .....	2.192	Ch. 2308 .....	2.259
Ch. 1954 .....	2.82		

*Texas Penal Code*

§ 32.32(b-1) .....	2.18, 2.173	§ 37.101 .....	2.110
§ 32.49 .....	2.110	§ 46.03 .....	2.150

*Texas Property Code*

§ 2.001 .....	2.161	§ 5.023 .....	2.5, 2.132, 5.1
§ 2.001(b) .....	5.15:6	§ 5.024 .....	2.5, 5.1
§ 5.001(a) .....	5.12:4	§ 5.025 .....	2.218, 2.295, 23.1:3
§ 5.005 .....	2.107	§ 5.026 .....	2.67, 2.218
§ 5.006 .....	2.218	§§ 5.027-.030 .....	2.61
§ 5.007 .....	2.275	§ 5.028(a) .....	5.8
§ 5.007(a) .....	2.275	§ 5.028(a-1) .....	5.8
§ 5.008 .....	2.66	§ 5.028(d)(1) .....	5.8
§ 5.008(b)(6) .....	16.2:3	§ 5.028(d)(2) .....	5.8
§ 5.009 .....	2.151	§ 5.029 .....	5.8
§ 5.010 .....	2.5, 2.66	§ 5.029(a) .....	5.8
§ 5.010(a) .....	2.50	§ 5.029(b)(2) .....	5.8
§ 5.011 .....	2.66	§ 5.030 .....	5.8
§ 5.012 .....	2.66	§§ 5.041-.043 .....	2.114
§ 5.013 .....	2.66	§ 5.041 .....	3.3
§ 5.014 .....	2.66	§ 5.043 .....	2.223
§ 5.016 .....	2.66	§§ 5.061-.080 .....	2.43
§ 5.019 .....	2.66	§§ 5.061-.086 .....	2.55
§§ 5.021-.023 .....	2.61	§ 5.062 .....	2.50, ch. 13
§ 5.021 .....	1, 2.238, 5.1:1, 25.1:2	§ 5.062(a) .....	2.55
§ 5.022 .....	5.1:1	§ 5.062(f) .....	2.55
§ 5.022(b) .....	5.5	§ 5.0621 .....	ch. 13
§ 5.022(c) .....	2.218	§§ 5.063-.085 .....	ch. 13



§ 5.066	2.50	§ 12.0071(f)	2.156
§ 5.069	2.55, ch. 13	§ 12.008	2.156
§ 5.069(d)	2.60	§ 12.009	2.162
§ 5.070	2.55, ch. 13	§ 12.011	2.211
§ 5.072	2.55, ch. 13	§ 12.017	2.213, 2.214
§ 5.074	2.50	§ 12.018	2.91
§ 5.077	ch. 13	§ 13.001	5.1:1
§ 5.078	2.55, ch. 13	§ 13.001(a)	10.1
§ 5.085	2.55, ch. 13	§ 13.004	2.156
Chs. 11–13	2.208	Ch. 14	2.139
§ 11.002	3.12:1	§§ 14.001–.007	2.96
§ 11.002(c)	3.12:1	§ 14.002	2.139, 9.7:3
§ 11.003	3.5	§§ 15.001–.008	2.78
§ 11.003(a)	2.117	§ 15.002(1)	2.78
§ 11.003(b)	2.117	§ 15.002(4)	2.78
§ 11.003(c)	2.117	§ 15.004	2.78
§ 11.004(a)(1)	3.10:1	§ 15.005	2.78
§ 11.005(a)	3.13:4	§ 15.006	2.78
§ 11.005(c)	3.13:4	§ 21.0112	2.144, 2.198
§ 11.007	3.7	§ 21.0121	16.5:1
§ 11.008	2.50, 2.55, 2.61, 2.62, 2.66, 2.157, 2.163, 8.2:11 8.5:4, 8.8:1, 10.1:5, 10.3:2 14.6:4, 20.1:4	§ 21.013	2.281
§ 11.008(a)	2.66, 3.16	§ 21.023	2.198
§ 11.008(b)	3.16, 11.54	§ 21.0421	16.5:1
§ 11.008(c)	3.16, 5.1:1	§ 21.046	25.1:6
§ 11.008(d)	3.16	Ch. 22	2.263
§ 11.008(c)	2.66	Ch. 23	2.189
§ 12.001	2.4, 2.181, 3.10:1, 3.13:1	§§ 23.001–.004	5.10
§ 12.001(d)	3.12:10	§ 23.002	2.281
§ 12.0011	3.8:4, 3.10:1	§ 23.006	2.189, 5.10
§ 12.002	2.243	Ch. 24	2.87, 2.142
§ 12.002(c)	2.243	§ 24.005	2.104
§ 12.003	2.255	§ 24.0051	2.104
§ 12.007	21.1:1	§ 24.0051(d)	2.165
§ 12.007(d)	2.156	§ 24.0062	2.286
§ 12.0071	2.156	Ch. 27	2.216, 20.4:2
		§ 27.001(7)	18.2:2
		§ 27.002	18.2:2

§ 27.004	18.2:2	§ 51.002(b)(3)	14.2:2
§ 27.007	20.4:2	§ 51.002(b-1)	14.2:2
§ 28.002	2.52, 20.3:3	§ 51.002(c)	14.2:2
§ 28.002(a)	21.10	§ 51.002(d)	14.2:2, 14.2:4, 14.5
§ 28.002(b)	21.10	§ 51.002(e)	14.5, 14.5:7
§ 28.002(c)	21.10	§ 51.002(h)	14.2:2
§ 28.003	20.3:3	§ 51.002(i)	2.165, 14.2:2, 24.1:3
§ 28.003(a)	21.10	§ 51.0021	2.104, 14.2:1, 14.5
§ 28.003(b)	21.10	§ 51.0025	2.104, 14.2:1, 14.2:2, 14.6:2
§ 28.004	20.3:3, 21.10	§§ 51.003-005	2.63
§§ 28.005-006	21.10	§ 51.003	2.104, 2.152, 14.2:3
§ 28.006	2.52	§ 51.004	2.104
§ 28.008	20.3:3, 21.10	§ 51.005	2.104, 2.119, 14.2:3
§ 28.009	21.10	§ 51.006	2.104, 5.13:2, 14.2:8
§ 28.009(e)	21.10	§ 51.006(b)	14.2:8
Ch. 29	2.102	§ 51.007	2.104
Ch. 41	2.25, 2.128, 8.1:2	§ 51.0074	14.2:1
§ 41.001	20.1:2, 21.1:2	§ 51.0074(a)	8.2:1
§ 41.001(b)(3)	20.1:2	§ 51.0075	2.104, 14.2:1
§ 41.001(b)(4)	5.13:5	§ 51.0075(a)	14.2:2
§ 41.002	2.128, 11.9:6, 11.9:9	§ 51.0075(b)	2.93, 14.4:5
§ 41.002(c)	11.9:8	§ 51.0075(e)	14.2:2
§ 41.0021	11.20:6	§ 51.0076	14.6:2
§ 41.005	2.128	§ 51.009	2.104, 14.2:1
§ 41.007	2.50, 2.60, 18.3:1, 20.1:2, 20.4:2	§ 51.009(1)	14.2:2
§ 43.001	2.149	§ 51.009(2)	14.2:2
Ch. 51	2.62	§ 51.015	2.165, 14.2:1, 14.2:10, 24.1:3
§ 51.0001	14.2:1	§ 51.016	8.1:2, 14.6:8
§ 51.0001(2)(A)	14.5	§ 51.016(b)	14.6:8
§ 51.0001(2)(B)	14.5	§ 51.016(c)(1)	14.6:8
§§ 51.001-002	2.104	§ 51.016(c)(2)	14.6:8
§ 51.0011	14.2:4	§ 51.016(f)	14.6:8
§ 51.002	1.6:5, 2.63, 6.1:1, 8.1:2, 14.2:1, 14.2:2	§ 51.016(g)	14.6:8
§ 51.002(a)	14.2:2	§ 51.016(h)	14.6:8
§ 51.002(a-1)	14.2:2	§ 51.016(i)	14.6:8
§ 51.002(b)	14.2:2	§ 51.016(j)	14.6:8
§ 51.002(b)(1)	14.2:2	§ 51.016(k)	14.6:8

§ 52.001 .....	2.139	§ 53.058(b).....	21.5:5
§ 52.0012 .....	2.139	§ 53.058(d).....	21.5:5
§§ 52.002–003 .....	2.2	§ 53.058(e).....	21.5:5
§ 52.005 .....	2.214	§ 53.081 .....	18.3:4, 21.3:2
§ 52.006 .....	2.139	§ 53.081(b).....	21.5:3
§ 52.007 .....	2.139	§ 53.084 .....	18.3:4, 21.4:2
§ 52.021 .....	2.214	§ 53.085 .....	18.7:9
§§ 52.041–043 .....	2.25	§ 53.085(d).....	18.2:1, 18.7:9
Ch. 53 .....	2.163, 21.1:1	§ 53.085(e).....	18.2:1, 18.7:9
§ 53.001(8) .....	21.2	§§ 53.101–103.....	18.3:4, 21.4:2
§ 53.001(9) .....	21.2	§ 53.101 .....	18.3:4
§ 53.001(10) .....	21.2	§ 53.103 .....	21.8:4, 21.8:6, 21.9
§ 53.001(15) .....	18.7:7	§ 53.103(a).....	18.3:4
§ 53.021(c) .....	2.20, 2.81, 2.247	§ 53.106 .....	18.3:4, 21.8:5
§ 53.021(d) .....	2.145	§ 53.106(b).....	18.7:7
§ 53.021(e) .....	2.163	§ 53.106(c).....	18.7:7
§ 53.052 .....	18.3:4, 21.3:1, 21.5:6, 21.8:2, 21.8:4, 21.8:5	§ 53.106(d).....	18.7:7
§ 53.053(b) .....	21.8:1	§ 53.107 .....	21.8:5, 21.8:6
§ 53.053(c) .....	21.8:1	§ 53.107(e).....	21.8:5
§ 53.053(d) .....	21.8:1	§ 53.123 .....	2.100
§ 53.053(e) .....	21.8:1	§ 53.124 .....	18.4
§ 53.054(a)(3) .....	21.5:1	§ 53.124(c).....	18.7:5
§ 53.054(a)(8) .....	21.5:1	§ 53.124(d).....	18.7:5
§ 53.055 .....	21.5:1	§ 53.152 .....	21.5:7
§ 53.056 .....	21.3:2, 21.6, 21.9:1	§ 53.158 .....	2.152
§ 53.056(b) .....	18.3:4, 21.3:3, 21.4:2, 21.7:1	§ 53.159 .....	21.5:6
§ 53.056(d) .....	18.3:4, 21.4:2, 21.5:3	§ 53.159(f).....	21.5:6
§ 53.057 .....	18.3:4, 21.5:5, 21.6	§§ 53.201–239.....	2.246
§ 53.057(b) .....	21.6	§ 53.231 .....	2.163
§ 53.057(b)–(d).....	21.6	Ch. 53, subch. K.....	21.2
§ 53.057(b–1) .....	21.6	§ 53.251(a).....	20.1:2
§ 53.057(c) .....	21.5:5	§ 53.252 .....	21.3:2, 21.7:2, 21.9:2
§ 53.057(e) .....	21.6	§ 53.252(b).....	21.3:3
§ 53.057(f) .....	18.3:4, 21.8:7	§ 53.252(c).....	21.5:3
§ 53.057(g) .....	18.3:4, 21.8:5	§ 53.253 .....	21.5:5
§ 53.058 .....	21.5:5	§ 53.253(b).....	21.5:5
		§ 53.253(c).....	21.5:5

§ 53.253(e).....	21.5:5	§ 62.021(a).....	25.9:1
§ 53.254.....	2.50, 2.125, 2.128, 18.3:1, 20.1:1, 20.1:2, 20.2:3, 20.4:2, 21.1:2	§ 62.021(e).....	25.9:1
§ 53.254(a).....	20.1:2	§ 62.022(b)(2).....	25.9:1
§ 53.254(b).....	18.3:3, 20.1:2	§ 62.024.....	25.9:1
§ 53.254(c).....	20.1:2	Ch. 63.....	2.161, 5.15:6
§ 53.254(d).....	21.1:2	Ch. 64.....	10.4
§ 53.254(f).....	21.5:1	§ 64.001.....	9.2:3
§ 53.254(g).....	21.5:4	§§ 70.301–306.....	2.12
§ 53.255.....	2.52, 2.66, 2.125, 18.7:1, 20.1:2, 20.2:1–20.2:3	§ 70.4045.....	2.10
§ 53.255(c).....	20.1:1, 20.1:2	Ch. 71.....	2.85
§ 53.256.....	2.125, 20.2:1–20.2:3	Chs. 72–76.....	2.1
§ 53.256(a).....	18.7:2	Ch. 81.....	2.47, 2.178
§ 53.256(c).....	20.1:1	§ 81.102(a)(2).....	5.15:3
§ 53.256(d).....	18.7:2	Ch. 82.....	2.47, 2.178, 23.2
§ 53.257.....	20.2:1, 20.2:3, 21.6	§ 82.002.....	2.47
§ 53.257(a).....	20.1:2	§ 82.002(a).....	24.1:2
§ 53.257(b).....	20.1:2	§ 82.002(b)–(d).....	24.1:2
§ 53.257(c).....	20.1:1, 20.1:2	§ 82.002(c).....	5.15:3
§ 53.258.....	18.7:3	§ 82.003(a)(5).....	24.3:1
§ 53.258(e).....	20.1:1	§ 82.003(a)(8).....	2.47, 24.1:1
§ 53.259.....	18.7:9	§ 82.003(a)(11).....	24.1:1
§ 53.259(c).....	18.7:9	§ 82.003(a)(11–a).....	24.1:2
§ 53.259(d).....	18.7:9	§ 82.003(a)(12).....	24.3:9
§§ 53.281–287.....	18.7:8	§ 82.003(a)(12)(B).....	24.3:8
§ 53.282(a)(3).....	18.7:8	§ 82.003(a)(18).....	24.3:1
Ch. 54.....	2.142	§ 82.003(a)(19).....	24.3:1
§§ 54.001–.007.....	2.141	§ 82.003(a)(21).....	24.3:1
§ 54.021.....	2.141	§ 82.003(a)(22).....	24.3:9
§ 54.022.....	2.141	§ 82.003(a)(22)(A).....	24.3:9
§§ 54.041–.048.....	2.141	§ 82.003(a)(22)(D).....	24.3:9
Ch. 59.....	2.142	§ 82.003(a)(22)(E).....	24.3:9
§§ 59.001–.046.....	2.229	§ 82.003(a)(22)(F).....	24.3:9
Ch. 62.....	2.18, 2.30	§ 82.005.....	2.5, 2.47
§ 62.003(4).....	25.9:1	§ 82.008.....	2.281
§ 62.021.....	25.9:1	§ 82.051.....	24.1:1
		§ 82.051(g).....	2.47
		§ 82.052.....	24.1:1

§ 82.052(2) . . . . .	24.3:3	§ 82.113(h) . . . . .	24.1:3
§ 82.052(4) . . . . .	24.3:3	§ 82.113(i) . . . . .	24.1:3
§ 82.053 . . . . .	24.1:1	§ 82.113(j) . . . . .	24.1:3
§ 82.054 . . . . .	5.15:3	§ 82.113(l) . . . . .	24.1:3
§ 82.055 . . . . .	24.1:1, 24.3	§ 82.113(m) . . . . .	24.1:3
§ 82.055(5) . . . . .	24.3:8	§ 82.114(c) . . . . .	24.6:4
§ 82.055(6) . . . . .	24.3:3	§ 82.114(f) . . . . .	24.6:4
§ 82.055(7) . . . . .	24.3:3	§ 82.116(a-1) . . . . .	24.6:2
§ 82.055(8) . . . . .	24.3:6	§ 82.116(b) . . . . .	24.6:2
§ 82.055(11) . . . . .	24.3:7	§ 82.117(1) . . . . .	24.3:5
§ 82.055(14) . . . . .	24.3:9	§ 82.152 . . . . .	24.6:1
§ 82.055(15) . . . . .	24.3:9	§ 82.153 . . . . .	24.6:1
§ 82.055(16) . . . . .	24.3:6	§ 82.153(a)(12) . . . . .	24.6:1
§ 82.057(a) . . . . .	24.3:6	§§ 82.156-157 . . . . .	2.47
§ 82.057(c) . . . . .	24.3:6	§ 82.156 . . . . .	24.6:3
§ 82.057(d) . . . . .	24.3:6	§ 82.157 . . . . .	24.6:3
§ 82.059 . . . . .	24.3:9	§ 91.001(c)(1) . . . . .	25.1:2
§ 82.065 . . . . .	24.3:9	§ 91.005 . . . . .	2.142, 2.244
§ 82.066 . . . . .	24.3:9	§ 91.006 . . . . .	2.1, 2.142
§ 82.067(a) . . . . .	24.3:7	§ 92.006 . . . . .	2.50
§ 82.101 . . . . .	2.57, 24.1:1	§ 92.008 . . . . .	2.142, 2.278, 25.5:3
§ 82.102(a)(11) . . . . .	24.3:5	§ 92.008(g) . . . . .	25.1:2
§ 82.102(a)(12) . . . . .	24.3:5	§ 92.0081 . . . . .	2.142, 2.158, 25.5:3, 25.12:5, 25.12:6
§ 82.102(f) . . . . .	24.3:4	§ 92.009 . . . . .	2.142, 2.158
§ 82.103(c) . . . . .	24.3:9	§ 92.0091 . . . . .	2.142, 25.5:3
§ 82.107 . . . . .	24.3:5	§ 92.011(a) . . . . .	25.5:1
§ 82.111 . . . . .	17.4:4	§ 92.016 . . . . .	25.5:2
§ 82.111(a) . . . . .	17.4:4	§ 92.0161 . . . . .	25.5:2
§ 82.111(d) . . . . .	17.4:4	§ 92.0161(g) . . . . .	25.5:2
§ 82.112(c) . . . . .	24.3:5	§ 92.017(b) . . . . .	25.5:2
§ 82.113 . . . . .	24.3:5	§ 92.017(g) . . . . .	2.165, 25.5:2
§ 82.113(a) . . . . .	24.1:3, 24.3:1	§ 92.019 . . . . .	2.142
§ 82.113(b) . . . . .	24.1:3	§ 92.021 . . . . .	25.5:3
§ 82.113(c) . . . . .	24.1:3	§ 92.024 . . . . .	2.142
§ 82.113(d) . . . . .	24.1:3	§§ 92.051-.061 . . . . .	2.142
§ 82.113(e) . . . . .	24.1:3	§ 92.056 . . . . .	25.5:2
§ 82.113(g) . . . . .	2.104, 2.211, 24.1:3, 24.3:5	§ 92.056(g) . . . . .	25.5:2

[Decimal numbers refer to sections in practice notes.]

§ 92.0561 .....	25.5:2	§ 94.053(c)(1) .....	25.1:3
§§ 92.101–109 .....	2.227	§ 94.054 .....	2.142
§§ 92.101–110 .....	2.142	§ 94.055(a) .....	25.8:6
§ 92.105(b) .....	4.16:2	§ 94.055(b) .....	25.8:6
§§ 92.151–170 .....	2.142	§ 94.055(c) .....	25.8:6
§ 92.164 .....	2.50	§ 94.057 .....	2.142
§§ 92.251–262 .....	2.142, 2.234	§§ 94.101–107 .....	2.142
§ 92.255 .....	25.5:3	§§ 94.101–109 .....	25.8
§ 92.301 .....	25.5:3	§§ 94.151–162 .....	25.8
§§ 92.351–355 .....	2.142	§ 94.152 .....	25.8:8
§ 92.2611 .....	2.50	§§ 94.153–154 .....	2.142
§§ 93.002–003 .....	2.142, 2.158, 25.5:3	§ 94.153(a) .....	25.8:8
§ 93.002 .....	2.142, 25.5:3, 25.12:5, 25.12:6	§ 94.153(b) .....	25.8:8
§ 93.002(e) .....	2.1	§ 94.202 .....	2.142
§§ 93.004–009 .....	2.142	§ 94.203(a) .....	25.8:9
§§ 93.004–011 .....	25.9:2	§ 94.203(d) .....	25.8:9
§§ 93.004–012 .....	2.227	§ 101.001 .....	2.29
§ 93.005(a) .....	25.9:2	§§ 111.001–115.017 .....	2.264
§ 93.006(c) .....	25.9:2	§ 111.002(a) .....	2.264
§ 93.007 .....	4.16:2	§ 111.003(a) .....	8.1
§ 93.011(d) .....	25.9:2	§ 112.036 .....	2.223
§ 93.012 .....	25.9:3	§ 113.018 .....	2.264
§ 93.012(a) .....	25.9:3	§ 113.025 .....	2.264
Ch. 94 .....	2.161	§ 114.001 .....	2.264
§ 94.001 .....	25.8	§ 114.081(b) .....	2.38, 10.15
§ 94.002 .....	25.8	§ 114.086 .....	2.38
§ 94.003 .....	25.8:10	§ 114.086(e) .....	10.15
§ 94.007 .....	25.8:3	§ 114.086(i) .....	10.15
§ 94.008 .....	25.8:2	§ 115.002 .....	2.281
§ 94.010(a) .....	25.8:4	Ch. 116 .....	2.272
§ 94.010(b) .....	25.8:4	§ 123.005 .....	2.281
§§ 94.051–057 .....	25.8	§§ 141.001–025 .....	2.273
§ 94.051 .....	25.8:1, 25.8:7	Ch. 142 .....	2.147
§ 94.052(a) .....	25.8:5	§ 142.001 .....	2.168
§ 94.052(b) .....	25.8:7	Ch. 162 .....	2.51
§ 94.053(a) .....	25.1:2	§§ 162.001–033 .....	21.5:3
§ 94.053(b) .....	2.142	§ 162.001(b) .....	20.3:4

[Decimal numbers refer to *sections* in practice notes.]

§ 162.001(c) .....	18.2:1	§ 209.0041 .....	23.1:2
§ 162.002 .....	20.3:4, 21.5:3	§ 209.0042 .....	23.2:1
§ 162.003 .....	18.2:1	§ 209.005 .....	23.2
§ 162.003(a) .....	20.3:4	§ 209.005(a) .....	23.2
§ 162.003(b) .....	20.3:4	§ 209.005(c) .....	23.2
§ 162.006 .....	18.2:1	§ 209.005(i) .....	23.2
§ 162.031 .....	20.3:4	§ 209.005(m) .....	23.2
§ 162.031(a) .....	21.5:3	§ 209.0051 .....	23.2:1
§ 162.031(b) .....	21.5:3	§ 209.0056 .....	23.2:1
§ 162.032 .....	18.2:1, 20.3:4, 21.5:3	§ 209.0057 .....	23.2:1
Ch. 201 .....	2.200, 23.2	§ 209.00591 .....	23.2:1
§ 201.006 .....	23.1:2	§ 209.00592 .....	23.2:1
§ 202.001(1) .....	23.1:2, 24.1:2	§ 209.00593 .....	23.2:1
§ 202.001(2) .....	23.2	§ 209.006 .....	23.2:1, 23.2:2
§ 202.001(4) .....	23.1:1, 24.1:2	§ 209.006(b) .....	2.165
§ 202.006 .....	23.1:2	§ 209.0062 .....	23.2:2
§ 202.006(b) .....	24.1:2	§ 209.0064 .....	23.2:2
§ 202.007 .....	2.218, 23.1:3, 24.3:2	§ 209.008 .....	23.2:2
§ 202.009 .....	23.1:3	§§ 209.009–011 .....	2.200, 23.2:2
§ 202.010 .....	23.1:3, 24.3:2	§ 209.0091 .....	23.2:2
§ 202.011 .....	23.1:3, 24.3:2	§ 209.0092 .....	23.2:2
§ 202.012 .....	23.1:3, 24.3:2	§ 209.0092(b) .....	23.2:2
§ 202.018 .....	23.1:3, 24.3:2	§§ 209.010–011 .....	23.2:2
§ 202.019 .....	23.1, 24.3:2	§ 209.010 .....	23.2:2
Chs. 204–206 .....	2.200, 23.2	§ 209.010(c) .....	23.2:2
§ 205.003 .....	2.243	§ 209.011(m) .....	23.2:2
Ch. 207 .....	2.200	§ 209.011(n) .....	23.2:2
§ 207.001(6) .....	23.2:3	§ 209.014 .....	23.2:1
§ 207.002 .....	23.2:3	Ch. 221 .....	2.60, 2.257
§ 207.002(b) .....	24.6:3	§ 221.002(24) .....	5.15:5
§ 207.003 .....	23.2:3	§ 221.012 .....	5.15:5
§ 207.006 .....	23.2	§§ 221.031–036 .....	2.66
Ch. 209 .....	2.104, 2.200, 2.211	§ 221.071 .....	2.60
§ 209.003 .....	23.2	Ch. 222 .....	2.34
§ 209.003(d) .....	23.2, 24.1:2, 24.1:3	§ 222.006 .....	2.66
§ 209.004 .....	3.10:1, 23.2	§§ 301.001–.171 .....	2.94
§ 209.004(a–1) .....	23.2		

[Decimal numbers refer to sections in practice notes.]

*Texas Tax Code*

§ 11.01 .....	2.5	§ 31.075 .....	2.243
§ 11.13 .....	2.5, 2.128	§§ 32.01–07 .....	2.5
§ 11.41 .....	2.128	§ 32.05 .....	14.4:4
§ 11.43(j) .....	2.128	§ 32.06 .....	2.5, 2.104, 2.202, 8.2:9
§ 11.131 .....	2.5, 2.128	§ 32.065 .....	8.2:9
§ 11.135 .....	2.5, 2.128	§ 33.011 .....	2.5
§§ 11.181–1826 .....	2.5	§ 33.46 .....	5.10
§§ 23.41–60 .....	2.5	Ch. 34 .....	2.5
§ 23.42(a-1) .....	11.2	§ 34.015 .....	2.5
§ 23.47 .....	2.157, 2.184	§§ 34.21–23 .....	2.211
§§ 23.51–59 .....	2.184	§ 34.21 .....	2.104
§§ 23.51–79 .....	2.5	§ 41.413 .....	2.5, 25.11:5
§ 23.56 .....	2.107	§ 42.015 .....	2.5, 25.11:5
§ 23.58 .....	2.157, 2.184	§ 111.020 .....	2.179
§ 23.59 .....	2.5	§ 151.056 .....	18.3:3
§§ 23.71–79 .....	2.5	§ 151.056(g) .....	18.3:3
§ 23.77 .....	2.107	Ch. 156 .....	2.129
§ 23.81–87 .....	2.5	Ch. 312 .....	2.251
§§ 23.9801–9807 .....	2.5	Ch. 313 .....	2.75
§ 25.09 .....	2.47	Ch. 351 .....	2.129
§ 26.11 .....	2.5	Ch. 352 .....	2.129
§ 31.02 .....	2.165		

*Texas Transportation Code*

§ 22.011 .....	2.46	§§ 311.091–096 .....	2.242
Ch. 203 .....	2.242	§§ 314.011–013 .....	2.46
§§ 224.001–008 .....	2.46	Ch. 316 .....	2.242
§ 250.001 .....	2.98	Chs. 391–395 .....	2.186
Chs. 251–286 .....	2.242	§ 430.002 .....	24.3:2
§ 251.057 .....	2.242	Ch. 460 .....	2.262
§ 251.157 .....	2.242	Ch. 501 .....	5.15:6
§ 280.001 .....	2.46	§ 501.002(9) .....	5.15:6
Ch. 311 .....	2.242	§ 501.071 .....	5.7:1

[Decimal numbers refer to *sections* in practice notes.]



§ 545.307 ..... 2.187

*Texas Utilities Code*

Ch. 51 .....	2.252	§ 181.004 .....	2.46
§ 51.002(10) .....	2.252	Ch. 251 .....	2.269
Ch. 54 .....	2.252		

*Texas Water Code*

§§ 5.011–.013 .....	16.61	§ 11.134(b)(3)(B) .....	16.7:3
Ch. 11 .....	16.1, 16.61	§ 11.134(b)(3)(C) .....	16.7:4
§ 11.002(8)(B) .....	16.7:5	§ 11.134(b)(3)(E) .....	16.7:6
§ 11.021 .....	16.2:1	§ 11.134(b)(4) .....	16.7:5
§ 11.021(a) .....	16.2:1, 16.4	§ 11.136 .....	16.8:4, 16.61, 16.62
§ 11.022 .....	16.7	§ 11.142 .....	16.4
§ 11.023(a) .....	16.7:2	§ 11.147(b) .....	16.7:6
§ 11.023(b) .....	16.7:2	§ 11.147(d) .....	16.7:6
§ 11.024 .....	16.7:2	§ 11.147(e) .....	16.7:6
§§ 11.025–.026 .....	16.5:1, 16.61	§ 11.147(f) .....	16.7:6
§ 11.027 .....	16.5:1	§ 11.150 .....	16.7:6
§ 11.040(a) .....	16.8:1	§ 11.151 .....	16.7:6
§ 11.081 .....	16.5:1	§ 11.152 .....	16.7:6
§ 11.082 .....	16.5:1	§ 11.172 .....	16.5:1
§§ 11.0842 .0843 .....	16.5:1	§ 11.173(a) .....	16.5:1
§ 11.085 .....	16.7:6, 16.61	§ 11.173(b) .....	16.5:1
§ 11.085(k)–(l) .....	16.7:6	§ 11.177(b) .....	16.5:1
§ 11.085(q) .....	16.7:6	§ 11.201 .....	16.2:1
§ 11.085(r) .....	16.7:6	§ 11.202(d)–(e) .....	16.2:1
§ 11.085(s) .....	16.7:6	§§ 11.301–.324 .....	16.61
§ 11.086(a) .....	16.5:1	§§ 11.301–.341 .....	16.6
§ 11.086(b) .....	16.5:1	§ 11.322(d) .....	16.6
§ 11.121 .....	16.7	§ 11.324 .....	16.8:4, 16.61, 16.62
§ 11.122 .....	16.8:4, 16.62	§§ 11.325–.3291 .....	16.6, 16.61, 16.66:14
§ 11.134(b) .....	16.7	§ 11.326 .....	16.6, 16.61
§ 11.134(b)(3)(A) .....	16.7:2	§ 11.327(a) .....	16.6, 16.61

[Decimal numbers refer to sections in practice notes.]

§ 11.327(b).....	16.6, 16.61	§ 36.002.....	16.2:2
§ 11.329.....	16.6, 16.61, 16.66:14	§ 36.002(a).....	16.1
§ 11.455.....	16.6, 16.61, 16.66:14	§§ 36.013-.021.....	16.2:3
§ 11.1271.....	16.7:5	§ 36.052(a).....	16.2:3
§ 11.1272(a).....	16.7:5	§§ 36.101-.124.....	16.2:3
§ 11.1501.....	16.7:6	§ 36.101.....	16.2:2, 16.2:3
§ 11.3261.....	16.6, 16.61	§ 36.113.....	16.2:3
§ 11.3271.....	16.5:1, 16.6, 16.62, 16.78:5, 16.81:4	§ 36.116.....	16.2:2, 16.2:3
Ch. 13.....	2.231, 2.289	§ 36.116(b).....	16.2:3
§ 13.242.....	2.231	§ 36.117.....	16.2:3
§ 13.246.....	2.231	§ 36.122.....	16.2:3
§ 13.254.....	2.231	§ 36.205.....	16.2:3
§ 13.257.....	2.66, 2.231	§ 36.1071(a)(8).....	16.2:3
§§ 13.501-.506.....	2.278	§ 36.1071(e).....	16.2:3
§ 13.502.....	2.278	§ 36.1131.....	16.2:3
§ 13.506.....	2.278	§ 36.4051(d).....	16.3:2
Ch. 16, subch. 1.....	2.101	Ch. 49.....	2.175
§§ 16.311-.324.....	17.4:3	§ 49.218.....	2.287
§§ 26.261-.267.....	2.82	§ 49.222.....	2.46
§§ 26.341-.367.....	2.82, 2.268	§ 49.452.....	2.66, 2.277
§ 26.342.....	2.268	§§ 49.3075-.3077.....	2.287
§ 35.004.....	16.2:3	Ch. 51.....	2.287
§ 35.007(a).....	16.2:3	§ 51.309.....	2.287
§ 35.012(a).....	16.2:3	Ch. 54.....	2.46, 2.175
§ 36.001(1).....	16.2:2	§ 54.016(h)(4)(A).....	2.66
§ 36.001(5).....	16.2:1	§ 54.237.....	2.218
§ 36.0015.....	16.2:3	Ch. 59.....	2.175

*Texas Administrative Code*

<i>Title 1</i>		§ 80.9.....	2.66
Ch. 46.....	2.65	Ch. 90.....	11.1
§ 87.40.....	2.182	§§ 90.601-.604.....	6.2:7, 8.4, 20.2:3
Ch. 115.....	2.237	Ch. 152.....	20.1:2
<i>Title 7</i>		§ 152.9.....	20.1:2
Ch. 80.....	2.174	§ 152.11.....	20.1:2

§ 152.13 .....	20.1:2	§ 153.11 .....	11.12
Ch. 153 .....	11.1	§ 153.11(4).....	11.12:1
§§ 153.1–96 .....	11.1	§ 153.12 .....	11.18:1
§ 153.1(11) .....	11.1, 11.6, 11.6:1	§ 153.12(1).....	11.18:1
§ 153.2(2) .....	11.20:6	§ 153.12(2).....	11.18:1
§ 153.2(3) .....	11.20:6	§ 153.13 .....	11.1
§ 153.3(1) .....	11.4	§ 153.13(3)(A) .....	11.18:2
§ 153.3(2) .....	11.4	§ 153.13(4).....	11.18:3
§ 153.3(3) .....	11.4	§ 153.13(5)(A)(i) .....	11.18:4
§ 153.3(4) .....	11.4	§ 153.13(5)(B)(i) .....	11.18:4
§ 153.4(1) .....	11.7	§ 153.13(6).....	11.18:2
§ 153.4(2) .....	11.7	§ 153.14(1)(A) .....	11.11
§ 153.4(3) .....	11.7	§ 153.14(1)(B) .....	11.11
§ 153.5(1) .....	11.6:2	§ 153.14(2).....	11.11
§ 153.5(3) .....	11.1, 11.6:1	§ 153.14(2)(A) .....	11.11
§ 153.5(4) .....	11.1	§ 153.14(2)(B) .....	11.11
§ 153.5(5) .....	11.6:4	§ 153.14(2)(C) .....	11.11
§ 153.5(6) .....	11.1, 11.6:3	§ 153.14(2)(D) .....	11.6:12, 11.11
§ 153.5(7) .....	11.6:3	§ 153.15 .....	11.21:1
§ 153.5(8) .....	11.1, 11.6:5	§ 153.15(1).....	11.21
§ 153.5(9) .....	11.1, 11.6:6	§ 153.15(3).....	11.21
§ 153.5(10) .....	11.6:7	§ 153.16(1).....	11.13:2
§ 153.5(12) .....	11.1, 11.6:9	§ 153.16(2).....	11.12
§ 153.5(13) .....	11.6:13	§ 153.16(3).....	11.13:1
§ 153.5(14) .....	11.6:10	§ 153.16(4)(A) .....	11.13:1
§ 153.5(15) .....	11.6, 11.6:12	§ 153.16(4)(B) .....	11.13:1
§ 153.5(16) .....	11.6:8	§ 153.16(5).....	11.13:1
§ 153.7(2) .....	11.8	§ 153.17(1).....	11.3:4
§ 153.8(1) .....	11.9:1	§ 153.17(2).....	11.3:2
§ 153.8(2) .....	11.9:2	§ 153.17(3).....	11.3, 11.3:4
§ 153.8(3) .....	11.9:4	§ 153.18 .....	11.1, 11.17:4
§ 153.8(4) .....	11.9:3	§ 153.18(1).....	11.17:3
§ 153.8(5) .....	11.9:6	§ 153.18(2).....	11.17:1, 11.17:2
§ 153.9(1) .....	11.14:1	§ 153.20 .....	11.1, 11.20:4
§ 153.9(2) .....	11.14:2	§ 153.22 .....	11.1, 11.20:5
§ 153.10(1) .....	11.10	§ 153.24(1).....	11.22
§ 153.10(2) .....	11.10	§ 153.24(2).....	11.22

§ 153.24(3).....	11.22	§ 153.96(d) .....	11.25
§ 153.24(4).....	11.22	<i>Title 10</i>	
§ 153.25(1).....	11.19	Ch. 49 .....	2.8
§ 153.25(2).....	11.19:1	<i>Title 13</i>	
§ 153.25(3).....	11.19:2	§§ 7.141–.145 .....	3.14
§ 153.41 .....	11.23	<i>Title 16</i>	
§ 153.51 .....	11.18:1	§ 3.91.....	2.82
§ 153.51(1).....	11.18:1	Ch. 68 .....	2.15
§ 153.51(2).....	11.18:1	§ 83.114.....	2.27
§ 153.51(3).....	11.18:1	<i>Title 22</i>	
§ 153.51(5).....	11.18:1	Ch. 535 .....	2.66
§ 153.82 .....	11.5	Ch. 537.....	2.66
§ 153.84 .....	11.1	Ch. 661 .....	2.247
§ 153.84(1).....	11.5	Ch. 663 .....	2.247
§ 153.84(2).....	11.5	Ch. 664 .....	2.247
§ 153.84(3).....	11.5	Ch. 665 .....	2.247
§ 153.85(b).....	11.5	<i>Title 30</i>	
§ 153.86(1).....	11.5	§ 36.5(c) .....	16.5:1
§ 153.86(3).....	11.5	Ch. 281 .....	16.61
§ 153.86(4).....	11.5	Ch. 288 .....	16.61
§ 153.87 .....	11.5	§ 290.38(73) .....	16.19:8
§ 153.88(b).....	11.5	§ 290.41(c) .....	16.19:8
§ 153.88(c).....	11.5	Ch. 295 .....	16.1, 16.61
§ 153.91 .....	11.25:12	§ 295.13.....	16.61
§ 153.92 .....	11.25:11	§ 295.155.....	16.61
§ 153.92(a).....	11.25:11	§ 295.177.....	16.61
§ 153.92(b).....	11.25:11	Ch. 297 .....	16.1, 16.7:4
§ 153.93 .....	11.25:11, 11.25:12	Chs. 297–299.....	16.61
§ 153.94(a).....	11.25:1–11.25:5, 11.25:7	§ 297.1.....	16.61
§ 153.94(b).....	11.25:10	§ 297.18.....	16.61
§ 153.95(a).....	11.25	§ 297.81.....	16.61
§ 153.95(b).....	11.25	§ 297.81(a) .....	16.66:7
§ 153.96 .....	11.25	§ 297.81(b) .....	16.66:7
§ 153.96(a)(2).....	11.25		
§ 153.96(b).....	11.25:8		
§ 153.96(b)(1) .....	11.25:8		
§ 153.96(c).....	11.25:10		

[Decimal numbers refer to *sections* in practice notes.]

§ 297.82 .....	16.62	§ 334.7 .....	2.268
§ 297.83 .....	16.62, 16.78:5	§ 334.9 .....	2.66, 2.268
Ch. 303 ...	16.61, 16.62, 16.66:14, 16.78:5, 16.81:4		
§ 303.44, .....	16.62	<i>Title 31</i>	
Ch. 304 ...	16.61, 16.62, 16.66:14, 16.78:5, 16.81:4	Chs. 501–506 .....	2.82
§ 304.1 .....	16.6		
§ 304.43 .....	16.62	<i>Title 40</i>	
Ch. 333 .....	2.284	§§ 819.121–.135 .....	2.94

*Texas Rules of Civil Procedure*

Rules 500–507 .....	2.87, 2.104	Rule 736.5(b) .....	14.2:9
Rules 510.1–13 .....	2.87, 2.104	Rule 736.5(c) .....	14.2:9
Rules 735–736 .....	11.31	Rule 736.5(d) .....	14.2:9
Rule 735 .....	2.104, 11.37, 23.2:2	Rule 736.6 .....	14.2:9
Rule 735.1 .....	14.2:9	Rule 736.7 .....	14.2:9
Rule 735.2 .....	14.2:9	Rule 736.8(b) .....	14.2:9
Rule 736 .....	2.104, 11.37, 23.2:2	Rule 736.8(c) .....	14.2:9
Rule 736.1(a) .....	14.2:9	Rule 736.9 .....	14.2:9
Rule 736.1(d) .....	14.2:9	Rule 736.11(a) .....	14.2:9
Rule 736.3 .....	14.2:9	Rule 736.11(c) .....	14.2:9
Rule 736.3(a) .....	14.2:9	Rules 756–771 .....	2.189
Rule 736.3(b) .....	14.2:9	Rules 783–809 .....	2.263
Rule 736.4 .....	14.2:9		

*Texas Attorney General Opinions*

No. JC-0386 .....	20.1:2	No. JM-834 .....	2.42, 14.2:6
No. JC-0513 .....	6.2:7, 8.4, 11.1, 20.2:3	No. JM-943 .....	2.266

*State Bar Rules*

Art. X, 9 .....	1.3
-----------------	-----

*Texas Disciplinary Rules of Professional Conduct*

Preamble para. 12. ....	1.4:2, 1.6:2	Rule 1.12(e). ....	1.5:1
Preamble para. 14. ....	1.3	Rule 1.12 cmt. 4. ....	1.5:1
Rule 1.03(b). ....	1.6:1	Rule 1.14. ....	1.5:3
Rule 1.04(a). ....	1.5:3	Rule 1.14(a). ....	1.5:3
Rule 1.04(c). ....	1.5:4	Rule 1.15(a). ....	1.8:1
Rule 1.04(f). ....	1.5:3	Rule 1.15(b). ....	1.8:1
Rule 1.04(g). ....	1.5:3	Rule 1.15(b)(5). ....	1.8:1
Rule 1.04(h). ....	1.5:3	Rule 1.15(d). ....	1.4:3, 1.8:1
Rule 1.04 cmt. 8. ....	1.5:3	Rule 1.15(d) cmt. 4. ....	1.8:1
Rule 1.05(b). ....	1.6:2	Rule 4.02. ....	1.6:5
Rule 1.06. ....	1.5:2	Rule 4.02 cmt. 2. ....	1.6:5
Rule 1.06 cmt. 13. ....	1.5:1	Rule 4.03. ....	1.6:4
Rule 1.07. ....	1.5:2	Rule 6.01 cmt. ....	1.4:2
Rule 1.08(a). ....	1.6:3	Rule 8.04. ....	1.3
Rule 1.08(f). ....	1.5:2	Rule 8.05. ....	1.3
Rule 1.09(a)(2). ....	1.6:2		

**UNITED STATES***United States Code*

<i>Title 4</i>		§ 548. ....	2.112
§ 5 note. ....	23.1:3	<i>Title 12</i>	
<i>Title 7</i>		§ 1701j-3. ....	2.71
§ 499a. ....	2.10, 9.7:2	§ 1701j-3(d). ....	8.2:10
§ 1631. ....	9.7:2, 9.9	§ 1735f-7. ....	2.276, 20.1:3
§§ 3501-3508. ....	2.107	§ 1735f-7a. ....	11.13:2, 20.1:3
<i>Title 9</i>		§ 1825(b)(2). ....	2.105, 14.2:5
§§ 1-16. ....	2.19	§ 1831d. ....	11.3:1
<i>Title 11</i>		§§ 2601-2617. ....	2.54, 2.207, 12.11:1, 20.1:4
§ 547(b). ....	2.104	§ 2607. ....	12.11:4
		§ 2607(d). ....	12.11:4
		§ 2608. ....	12.11:5

**Statutes and Rules Cited**

**United States Code**

§ 2609 ..... 12.11:7  
 § 2609(d) ..... 12.11:7  
 § 2610 ..... 12.7, 12.11:6  
 § 2617(b) ..... 12.11:1  
 §§ 2801–2810 ..... 2.126  
 § 3331 ..... 8.10:5  
 § 3335 ..... 8.10:5  
 §§ 3801–3806 ..... 2.279, 11.13:2  
 §§ 5101–5116 ..... 2.174

*Title 15*

§ 18a ..... 2.121  
 §§ 77a–77aa ..... 2.226  
 §§ 1051–1127 ..... 2.260  
 §§ 1601–1667f ..... 2.54, 2.265, 11.46, 12.1:1,  
 12.1:3, 20.1:3, 20.1:4  
 § 1602(f) ..... 20.2:1–20.2:3  
 § 1603 ..... 12.1:2  
 § 1607 ..... 2.265  
 § 1611 ..... 2.265  
 § 1637(a) ..... 2.92  
 § 1639 ..... 12.1:3  
 § 1640 ..... 2.265, 12.2:3  
 § 1640(f) ..... 12.1:1  
 § 1641(g) ..... 12.1:3  
 §§ 1681–1681x ..... 25.1:5  
 § 1681(d) ..... 25.1:5  
 § 1681(k) ..... 25.1:5  
 § 1681m(a)(1) ..... 25.1:5  
 § 1681s–2 ..... 25.1:5  
 § 1681s–2(a)(7) ..... 14.4:5  
 §§ 1691–1691f ..... 2.83  
 §§ 1692–1692p ..... 2.93, 14.3:3  
 §§ 1701–1720 ..... 2.66, 2.136  
 §§ 2301–2312 ..... 2.54, 5.7:1  
 §§ 2601–2692 ..... 25.10  
 §§ 2601–2695d ..... 2.82

§§ 2641–2656 ..... 2.82  
 § 6701 note ..... 17.4:3  
 § 6809 ..... 6.4:10  
 § 6809(3)(a) ..... 2.92  
 §§ 7001–7031 ..... 12.2:1

*Title 16*

§§ 1531–1544 ..... 2.80, 2.82

*Title 17*

§ 102 ..... 2.56  
 § 106A ..... 2.56, 2.283  
 § 120(b) ..... 2.56

*Title 18*

§ 1963(b)(1) ..... 2.108

*Title 21*

§ 881(7) ..... 2.108

*Title 22*

§§ 3101–3108 ..... 2.107

*Title 26*

§ 42 ..... 2.8  
 § 528 ..... 23.2, 24.1:2  
 § 1014(b)(6) ..... 5.13:7  
 § 1445 ..... 2.107  
 § 1445(a) ..... 4.17:1, 16.30:1, 16.58:1, 16.79:1  
 § 1445(b)(2) ..... 4.17:1, 16.30:1, 16.58:1, 16.79:1  
 § 6039C ..... 2.107, 4.17:1, 16.30:1, 16.58:1, 16.79:1  
 § 6045 ..... 4.16:4, 16.29:4, 16.57:4, 16.78:4  
 § 6045(e) ..... 2.55  
 § 60501(a) ..... 2.35  
 § 60501(b) ..... 2.35  
 § 6050J ..... 2.137  
 § 6323(f)(1)(A) ..... 14.2:5  
 § 6323(f)(2)(B) ..... 9.7:3

[Decimal numbers refer to sections in practice notes.]

§ 6324(a)(1) ..... 2.86  
 § 7425(b) ..... 14.2:5  
 § 7425(c) ..... 14.2:5  
 § 7425(d) ..... 2.104, 14.2:5  
 § 7425(d)(1) ..... 2.97  
 § 7872 ..... 6.2:3

*Title 28*

§ 459 ..... 3.11:1  
 § 636(a)(2) ..... 3.11:1  
 § 1962 ..... 2.139  
 § 2410(c) ..... 2.105, 14.2:5  
 § 2410(e) ..... 2.105

*Title 31*

§§ 5311–5332 ..... 2.107

*Title 33*

§§ 1251–1387 ..... 2.82  
 § 1344 ..... 2.292

*Title 38*

§ 3703 ..... 11.3:3  
 § 3714 ..... 5.12:8

*Title 40*

§§ 3131–3134 ..... 2.163

*Title 42*

§§ 300f to 300j–26 ..... 2.82

§§ 3601–3631 ..... 2.94  
 § 3607(b)(2) ..... 2.94  
 §§ 4001–4129 ..... 2.101  
 §§ 4001–4131 ..... 17.4:3  
 § 4012a(b)(1) ..... 17.4:3  
 § 4104a ..... 2.101  
 §§ 4601–4655 ..... 25.1:6  
 §§ 4851–4856 ..... 2.82, 2.146  
 § 4851b(27) ..... 25.10  
 § 4852d ..... 2.146, 25.10  
 §§ 6901–6992k ..... 2.82, 25.10  
 §§ 7401–7671q ..... 2.82  
 §§ 9601–9675 ..... 2.82, 25.10  
 § 9601 ..... 16.22  
 § 9601(35) ..... 2.134  
 § 9607 ..... 2.143  
 § 9607(b) ..... 2.134  
 § 9607(d) ..... 2.122  
 §§ 12181–12189 ..... 2.15  
 §§ 12701–12898a ..... 2.8

*Title 47*

§§ 151–341 ..... 23.1:3

*Title 49*

§§ 44101–44113 ..... 2.12

*Title 50*

§§ 3901–4043 ..... 2.165

*Code of Federal Regulations*

*Title 12*

§ 34.5 ..... 2.71  
 §§ 34.41–47 ..... 8.10:5  
 § 34.43(a) ..... 11.4  
 § 34.43(b) ..... 11.4

§ 202.7(d) ..... 20.7  
 § 202.14 ..... 2.83  
 § 202.16 ..... 2.83  
 Pt. 203 ..... 2.126  
 Pt. 222 ..... 2.92, 14.4:5



**Statutes and Rules Cited**

**Code of Federal Regulations**

§§ 225.61–67	8.10:5	§ 1024.33(b)	12.11:3
§ 225.63(a)	11.4	§ 1024.33(c)	12.11:3
§ 225.63(b)	11.4	§ 1025.7	12.11:3
Pt. 226	2.54, 2.265, 20.1:4	Pt. 1026	2.207, 11.46, 12.1:1
§ 226.1(c)	2.265	Pt. 1026 app. K	12.1:3
§ 226.3	2.265	Pt. 1026 app. K(d)	11.46
§ 226.23	2.220, 20.2:1, 20.2:3	Pt. 1026 supp. I	12.1:1
§ 226.36	2.174	§ 1026.2	12.2
§ 226.42	2.18	§ 1026.2(a)(6)	12.5
§§ 227.1–16	6.5:2	§ 1026.2(a)(17)	12.1:2
§ 227.14	6.5:2	§ 1026.2(a)(19)	12.2:2
§§ 323.1–7	8.10:5	§ 1026.2(a)(24)	12.4
§ 323.3(a)	11.4	§ 1026.3(a)	12.1:2
§ 323.3(b)	11.4	§ 1026.3(b)	12.1:2, 12.2
§§ 564.1–8	8.10:5	§ 1026.3(h)	12.1:2
§ 564.3(a)	11.4	§ 1026.4	12.4
§ 564.3(b)	11.4	§ 1026.4(c)(7)	12.4
§ 591.5(b)	8.2:10	§§ 1026.5–13	12.1:3
Pt. 1024	2.207, 12.11:1, 12.11:3	§ 1026.6(a)	11.18:2
§ 1024.2	2.207, 12.11:3–12.11:5	§ 1026.16	12.1:4
§ 1024.2(b)	12.11:3	§§ 1026.17–24	12.1:1, 12.2:3
§ 1024.5	2.207, 12.1:2	§ 1026.17	12.1:3, 12.2:1
§ 1024.5(a)	12.11:2	§ 1026.17(a)	12.2:1, 12.7
§ 1024.5(b)	12.11:2	§ 1026.17(b)	12.2:1
§ 1024.6	12.11:3	§ 1026.17(d)	12.4
§ 1024.8(b)(2)	12.12	§ 1026.17(f)	12.2:1
§ 1024.12	12.11:6	§ 1026.18	12.1:3, 12.2:1, 12.3, 12.4
§ 1024.14	12.11:4, 12.11:5	§ 1026.18(a)	12.4
§ 1024.14(a)	12.11:4	§ 1026.18(b)	12.4
§ 1024.14(b)	12.11:4	§ 1026.18(f)	12.4
§ 1024.14(d)	12.11:4	§ 1026.18(q)	12.4
§ 1024.14(e)	12.11:4	§ 1026.19	12.1:2
§ 1024.14(f)	12.11:4	§ 1026.19(a)	12.2:1
§ 1024.14(g)(1)	12.11:4	§ 1026.19(a)(2)(ii)	12.1:3
§ 1024.15	2.207, 12.11:3, 12.11:4	§ 1026.19(b)	12.1:3, 12.4
§ 1024.17	12.11:3	§ 1026.19(e)(1)(iii)	12.1:3
§ 1024.17(f)	12.11:7	§ 1026.19(e)(2)(i)(B)	12.1:3

[Decimal numbers refer to sections in practice notes.]

§ 1026.19(e)(3)(iv)(A) . . . . .	12.1:3	<i>Title 14</i>	
§ 1026.19(f) . . . . .	12.1:3	Pt. 49 . . . . .	2.12
§ 1026.19(f)(2)(i) . . . . .	12.1:3		
§ 1026.19(g) . . . . .	12.11:3	<i>Title 16</i>	
§ 1026.20(a) . . . . .	12.2:2	§ 313.3(k) . . . . .	2.92
§ 1026.20(b) . . . . .	12.1:3	Pt. 321 . . . . .	12.1:4
§ 1026.20(c) . . . . .	12.1:3	Pt. 429 . . . . .	20.1:4
§ 1026.22 . . . . .	12.4	§ 429.1 . . . . .	20.4:2
§ 1026.23 . . . . .	12.2:2	Pt. 433 . . . . .	2.113, 20.1:4, 20.2:1–20.2:3, 20.4:2, 20.4:3
§ 1026.23(a) . . . . .	12.2:2, 12.3	§ 433.1(d) . . . . .	20.1:4
§ 1026.23(a)(3) . . . . .	12.1:3	§ 433.1(e) . . . . .	20.1:4
§ 1026.23(b)(1) . . . . .	12.1:3	§ 433.1(i) . . . . .	20.1:4
§ 1026.23(b)(2) . . . . .	12.1:3	§ 433.2 . . . . .	20.1:4
§ 1026.23(d) . . . . .	12.3	Pt. 444 . . . . .	20.1:4
§ 1026.23(e) . . . . .	12.7	Pt. 460 . . . . .	18.3:5
§ 1026.23(f) . . . . .	12.1:3, 12.2:2	§ 460.16 . . . . .	2.52, 2.66
§ 1026.24 . . . . .	12.1:4		
§ 1026.25 . . . . .	12.7	<i>Title 24</i>	
§ 1026.31 . . . . .	12.1:3	Pt. 91 . . . . .	2.8
§ 1026.32 . . . . .	12.1:3, 12.1:4	Pt. 92 . . . . .	2.8
§ 1026.32(d)(6) . . . . .	12.1:4	§ 100.205 . . . . .	2.94
§ 1026.33 . . . . .	11.46	§§ 100.300–308 . . . . .	2.94
§ 1026.33(a) . . . . .	12.1:3	Pt. 206 . . . . .	11.47
§ 1026.33(b) . . . . .	12.1:3	Pts. 1710–1720 . . . . .	2.66, 2.136
§ 1026.34 . . . . .	12.1:3	Pt. 3500 . . . . .	2.54, 20.1:4
§ 1026.34(a)(4) . . . . .	12.1:4	§ 3500.2 . . . . .	2.54
§ 1026.35 . . . . .	12.1:3, 12.1:4		
§ 1026.35(b) . . . . .	12.1:4	<i>Title 26</i>	
§ 1026.36 . . . . .	12.1:4	§§ 1.1445–1 to –11T . . . . .	2.107
§ 1026.36(c) . . . . .	12.1:4	§ 1.6050I–1 . . . . .	2.35
§ 1026.36(d) . . . . .	12.1:4	§ 1.6050J–1T . . . . .	2.137
§ 1026.36(e) . . . . .	12.1:4	§§ 301.7425–1 to –4 . . . . .	2.97
§ 1026.37 . . . . .	2.207		
§ 1026.38 . . . . .	2.207	<i>Title 28</i>	
§ 1026.39 . . . . .	12.1:3	Pt. 36 . . . . .	2.15
§ 1026.42 . . . . .	12.1:4		

**Statutes and Rules Cited**

**Code of Federal Regulations**

*Title 29*

§ 1910.1001 ..... 2.66, 2.82, 25.10, 25.12:9  
§ 1926.1011 ..... 25.12:9  
§ 1926.1101 ..... 2.66, 2.82, 25.10

*Title 31*

Pt. 50 ..... 17.4:3  
Pts. 595-597 ..... 2.253  
Pt. 595 ..... 2.253  
Pt. 596 ..... 2.253  
Pt. 597 ..... 2.253

*Title 36*

Pt. 1191 ..... 2.15

*Title 38*

§§ 36.4300-4393 ..... 5.12:8

*Title 40*

Pt. 61 ..... 2.82  
Pt. 82 ..... 2.82  
Pt. 122 ..... 2.241  
Pt. 280 ..... 2.268  
Pt. 745 ..... 2.146  
§ 745.113 ..... 2.146, 25.12:8  
Pt. 763 ..... 2.82

*Title 44*

Pts. 59-78 ..... 2.101, 17.4:3

[Decimal numbers refer to sections in practice notes.]

*[Reserved]*

## Cases Cited

[References are to section numbers in the practice notes.]

### A

Acker v. Guinn, 5.14:3  
Adams [*In re*], 11.25  
Adjudication of the Water Rights of Upper  
Guadalupe Segment of Guadalupe River  
Basin [*In re*], 16.4  
Adjudication of Water Rights of Brazos III  
Segment of Brazos River Basin [*In re*], 16.6  
Aiken v. State, 21.4:2  
Alkas v. United Savings Ass'n of Texas, 5.12:5  
Altman v. Blake, 5.14:1  
Amco Trust, Inc. v. Naylor, 8.8  
American National Bank & Trust Co. v. First  
Wisconsin Mortgage Trust, 8.8  
Anderson v. New Property Owners' Ass'n of  
Newport, 23.1:1  
Anderson v. Pioneer Building & Loan Ass'n,  
3.11:1  
Angelo v. Biscamp, 5.12:5  
Arias v. Brookstone, L.P., 21.5:1  
Arredondo v. Mora, 5.13:8

### B

Babb v. McGee, 5.3:1  
Bair Chase Property Co. v. S&K Development  
Co., 6.1:1  
Bar Ass'n of Dallas v. Hexter Title & Abstract  
Co., 1.4:1  
Barker v. Coastal Builders, Inc., 5.8  
Bateman v. Carter-Jones Drilling Co., 14.2:2  
Bayless v. Strahan, 10.2  
Bell v. Smith, 3.3  
Bielss v. Moeller, 5.3:1  
Billington v. Riffe, 5.12:9  
Bishop v. National Loan Investors, L.P., 14.2:2  
Bocchi Americas Associates, Inc. v. Commerce  
Fresh Marketing, Inc, 9.7:2  
Bothwell v. Farmers' & Merchants' State Bank &  
Trust Co., 6.1:1  
Bouchie [*In re*], 11.9:8  
Bresette v. Knapp, 1.4:2

Briscoe v. Bronaugh, 5.3:1  
Brownlee v. Brownlee, 3.13:1  
Buccaneer's Cove, Inc. v. Mainland Bank, 5.8  
Burkitt v. Wynne, 5.15:1  
Burnett [*In re*], 20.1:2  
Butler v. Holt Machinery Co., 6.4:3

### C

Cabintree, Inc. v. Schneider, 21.5:1  
Cavazos v. Munoz, 21.1:2  
Centex Homes v. Buecher, 18.6  
Chan v. Montebello Dev. Co., 19.8 (quote)  
Chandler v. Hartt, 5.10  
Chauncey v. JDR Recovery Corp., 14.4:5  
Check v. Herndon, 3.12:7  
City of Beaumont v. Moore, 5.1  
City of Corpus Christi v. City of Pleasanton,  
16.2:2, 16.2:3  
City of Del Rio v. Clayton Sam Colt Hamilton  
Trust, 16.1, 16.2:2  
City of Grass Valley v. Newmont Mining Corp.,  
16.22  
Clark v. Perez, 5.12:4  
Cockrell v. Texas Gulf Sulphur Co., 5.14:1  
Cooksey v. Sinder, 23.1:1  
Coyote Lake Ranch, LLC v. City of Lubbock,  
16.3:1, 16.19:8  
Cullen Frost Bank v. Dallas Sportswear Co.,  
14.3:7  
Curlee v. Walker, 23.1:1

### D

Dall v. Lindsey, 14.2:2  
Davis v. Canyon Creek Estates Homeowners  
Ass'n, 23.1:1  
Davis v. Huey, 5.12:9  
Day & Co. v. Texland Petroleum, Inc., 5.14:1  
Delley v. Unknown Stockholders of the Brotherly  
& Sisterly Club of Christ, Inc., 5.3:1  
De Martinez v. De Vidaurri, 3.7:1  
Denis v. Kickapoo Land Co., 16.2:1

[Decimal numbers refer to sections in practice notes.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]

Dhanani Investments, Inc. v. Second Master Bilt Homes, Inc., 14.5:1  
 Digby v. Hatley, 25.7  
 Director, Dallas County Child Welfare v. Thompson, 3.11:1  
 Dixon v. Brooks, 6.4:3  
 Donnell v. Otts, 5.2:6, 5.2:7  
 Dresser Industries, Inc. v. Page Petroleum, Inc., 17.1, 17.2:5, 25.1:4  
 Duarte v. Disanti, 24.1:3  
 Duhig v. Peavy-Moore Lumber Co., 5.14:1  
 Duval County Ranch Co. v. Alamo Lumber Co., 1.4:1  
 D. Wilson Construction Co. [*In re*], 2.19  
 Dyegard Land Partnership v. Hoover, 16.2:2  
 Dyson Descendant Corp. v. Sonat Exploration Co., 3.11:1

**E**

Edwards Aquifer Authority v. Bragg, 16.1, 16.2:2  
 Edwards Aquifer Authority v. Day, 16.1, 16.2:1, 16.2:2, 16.3:1, 16.22  
 English v. Fischer, 2.116  
 Enserch Corp. v. Parker, 17.2:5  
 Ethyl Corp. v. Daniel Construction Co., 17.2:5, 25.1:4  
 Etter v. Tuck, 5.3:1  
 Exchange Savings & Loan Ass'n v. Monocrete Proprietary, Ltd., 8.4, 20.2:3  
 Exxon Corp. v. Quinn, 18.3:5

**F**

Fenn v. Boxwell, 5.8  
 Fidelity Savings & Loan Ass'n v. Baldwin, 18.3:3  
 Fidelity Union Fire Insurance Co. v. Cain, 5.3:1  
 Finance Commission of Texas v. Norwood, 11.1, 11.6:1, 11.21  
 Finance Commission of Texas et al. v. Valeric Norwood et al., 11.1, 11.6:1  
 Financial Freedom Senior Funding Corp. v. Horrocks, 11.37  
 First National Bank v. Sledge, 21.2  
 First National Bank v. Whirlpool Corp., 2.100, 21.2  
 Fisk Electric Co. v. Constructors & Associates, 4.9, 16.22, 16.50, 17.2:5

Flag-Redfern Oil Co. v. Humble Exploration Co., 5.13:2, 14.2:8  
 Fleming Foundation v. Texaco, Inc., 16.8:1, 16.21  
 Forestar (USA) Real Estate Group, Inc. v. Lost Pines Groundwater Conservation District, 16.3:2  
 Formosa Plastics Corp. v. Presidio Engineers & Contractors, Inc., 25.1:3  
 F.R. Hernandez Construction & Supply Co. v. National Bank of Commerce, 6.1:1  
 Friendswood Development Co. v. Smith-Southwest Industries, Inc., 16.2:2

**G**

Gannon v. Baker, 5.9  
 Garden Ridge, L.P. v. Advance International, Inc., 19.8  
 Getty Oil Co. v. Jones, 5.14:3  
 Gomez v. Riddle, 20.1:2  
 Graham v. Kuzmich, 16.8:1  
 Greathouse v. Charter National Bank—Southwest, 14.3:5  
 Guelker v. Hidalgo County WCID No. 6, 16.4  
 Gulf, Colorado & Santa Fe Railway Co. v. Carter, 3.12:3  
 Gulf Production Co. v. Continental Oil Co., 3.11:1  
 Gupta v. Ritter Homes, Inc., 18.6  
 Guthrie v. National Homes Corp., 3.1

**H**

Haile v. Holtzclaw, 3.10:1  
 Halliburton Energy Services, Inc. v. NL Industries, 16.22  
 Harlan v. Vetter, 5.1  
 Harris v. Currie, 5.14:1  
 Hart v. Traders & General Insurance Co., 17.1  
 Harwath v. Hudson, 14.2:1, 14.2:2  
 Hebisen v. Nassau Development Co., 25.1:3  
 Henry S. Miller Co. v. Evans, 5.1:2  
 Herrmann v. Lindsey, 16.66:7  
 Hexter Title & Abstract Co. v. Grievance Committee, 2.266  
 Hinckley v. Eggers, 11.20:2  
 Hoefs v. Short, 16.4  
 Homsey v. University Gardens Racquet Club, 5.12:9  
 Houston & T.C. Railway Co. v. East, 16.2:2

[Decimal numbers refer to *sections* in practice notes.]

[Chapters 1-7, vol. 1; chs. 8-15, vol. 2; chs. 16-22, vol. 3; chs. 23-26, vol. 4]

Houston Lighting & Power Co. v. Atchison,  
Topeka & Santa Fe Railway Co., 17.2:5  
Houston Oil Co. of Texas v. Kirkindall, 5.10  
Huddleston v. TCB-Dallas, 14.2:7

**I**

Indian Cave Park Partnership v. Hence, 6.1:1  
*In re* (see name of party)

**J**

Jack B. Anglin Co. v. Tipps, 2.19  
Jeter [*In re*], 20.1:2  
Jinks v. Moppin, 1.4:1  
Joe T. Garcia's Enterprises v. Snadon, 5.8  
Jones [*In re*], 5.8

**K**

Kendall Builders, Inc. v. Chesson, 20.1:2  
Klein v. Humble Oil & Refining Co., 5.2:6  
Koehler v. Pioneer American Insurance Co.,  
14.2:2  
Krenek v. Texstar North America, Inc., 5.12:5

**L**

Lakeside Launches, Inc. v. Austin Yacht Club,  
Inc., 5.15:2  
Lanc v. Elkins, 5.14:2  
LaSalle Bank N.A. v. Sleutel, 14.2:3  
Laster v. First Huntsville Properties Co., 11.9:5  
Lewis v. Dainwood, 14.2:2  
L.H. Lacy v. City of Lubbock, 2.19  
Lichtenstein v. Lichtenstein Building Corp., 5.10  
Little v. Linder, 5.2:6  
Long v. NCNB—Texas National Bank, 14.2:2  
Lower Colorado River Authority v. Texas  
Department of Water Resources, 16.7:1  
Lubel v. J.H. Uptmore & Associates, 25.1:3

**M**

Mansel v. Castles, 3.7:4  
Manz v. Johnson, 5.3:1  
March v. Thiery, 18.6  
Martin v. Bane, 3.12:11

Martin v. Snuggs, 5.8  
Martin v. Uvalde Savings & Loan Ass'n, 5.13:1  
Mathis v. DCR Mortgage III Sub 1, LLC, 6.2:6  
McCracken v. Sullivan, 3.13:4  
McDonald v. Stanfield, 3.12:10  
McGary v. Campbell, 1.4:1  
McKinley v. McKinley, 5.1:2  
Melody Home Manufacturing v. Barnes, 18.6  
Menger v. Ward, 8.8  
Miller, Hiersche, Martens & Hayward, P.C. v.  
Bent Tree National Bank, 14.4:3  
Moayedi v. Interstate 35/Chisam Road, L.P.,  
10.13  
Morgan v. Fox, 5.2:7  
Morrow v. Shotwell, 5.1, 25.1:3  
Morton v. Nguyen, ch. 13  
Moscr v. U.S. Steel Corp., 5.14:1, 5.14:3  
Motiva Enterprises, LLC v. McCrabb, 25.1:6  
Mott v. Boyd, 16.4

**N**

National Resort Communities, Inc. v. Cain, 5.8  
NCNB Texas National Bank v. Carpenter, 11.9:9  
Nevels v. Harris, 6.2:1

**O**

1464-Eight, Ltd. v. Joppich, 5.2:2

**P**

Page v. Structural Wood Components, 18.3:4,  
21.4:2  
Parker v. McKinnon, 5.8  
Pecos County WCID No. 1 v. Williams, 16.2:1,  
16.2:2, 16.17:9, 16.45:9  
Pelt v. U.S. Trust N.A., 11.20:5  
Phillips v. Phillips, 19.8  
Pick v. Bartel, 25.1:3  
Pilarcik v. Emmons, 23.1:1  
Poitevent v. Scarborough, 3.7:4  
Porter v. Wilson, 5.6  
Priester v. JP Morgan Chase Bank, 11.25:12,  
11.25:13  
Prigmore v. Hardware Mutual Insurance Co. of  
Minnesota, 1.4:1  
Punchard v. Masterson, 3.10:2

[Decimal numbers refer to sections in practice notes.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]

## Q

Quintero v. Jim Walter Homes, Inc., 1.5:2

## R

Ray v. Truitt, 5.14:2  
 Reed v. Wylie, 5.14:3  
 Reserve Petroleum Co. v. Hutcheson, 3.10:1  
 RIMCO Enterprises, Inc. v. Texas Electric Service Co., 6.4:3  
 Rio Bravo Oil Co. v. Weed, 5.12:5  
 River Road Neighborhood Ass'n v. South Texas Sports, 25.1:3  
 Robert Burns Concrete Contractors, Inc. v. Norman, 5.13:1  
 Rooms With A View, Inc. v. Private National Mortgage Ass'n, Inc., 11.21:2  
 Rothschild v. Dougher, 3.11:1

## S

Salomon v. Lesay, 11.9:9  
 Sample v. Irwin, 3.11:1  
 San Antonio v. Texas Water Commission, 16.7:6  
 Sanchez v. Telles, 3.10:1  
 Sandel v. Burney, 14.2:2  
 Sayers v. Pyland, 5.13:5  
 Schwarz-Jordan, Inc. v. Delisle Construction Co., 5.12:4  
 Segal v. Emmes Capital, L.L.C., 14.2:3  
 Seiter v. Veytia, 20.1:3  
 Settegast v. Foley Bros. Dry Goods Co., 5.15:2  
 Severance v. Patterson, 2.42  
 Shropshire v. Freeman, 1.4:1  
 Shults [*In re*], 5.13:5  
 Shumway v. Horizon Credit Corp., 14.5:3  
 Simms v. Espindola, 5.3:1  
 Sipriano v. Great Spring Waters of America, Inc., 16.2:3  
 Smith v. Price, 5.3:1  
 Smith v. Strahan, 5.1:2  
 Sorsby v. State, 3.7:2  
 South Texas Water Co. v. Bieri, 16.1  
 Southwest Savings Ass'n v. Dunagan, 5.8  
 Spradlin v. Jim Walter Homes, 20.1:2  
 Staples v. McKnight, 1.8:1

State v. Bradford, 16.4  
 State v. Valmont Plantations, 16.5:3  
 State v. Williams, 5.12:5  
 Stewart Title Guaranty Co. v. Sterling, 8.8  
 Storage & Processors, Inc. v. Reyes, 17.2:5  
 Story v. Marshall, 5.1:2  
 Strayhorn v. Jones, 16.8:1  
 Sugarland Business Center, Ltd. v. Norman, 21.5:1  
 Summers v. Consolidated Capital Special Trust, 8.4  
 Sun Oil Co. v. Whitaker, 5.14:3, 16.21  
 Swayne v. Lone Acre Oil Co., 5.14:5

## T

Taber v. Dallas Co., ch. 13  
 Tacon Mechanical Contractors v. Grant Sheet Metal, Inc., 20.3:4  
 Talbert v. First National Bank, 6.4:3  
 T. & N.O.R.R. Co. v. Galveston County, 17.2:3  
 Tanenbaum v. Economics Laboratory, Inc., 14.3:5  
 Tatum v. Blackstock, 5.8  
 Terran v. Kaplan, 14.4:5  
 Texas Bankers Ass'n v. Ass'n of Community Organizations for Reform Now (ACORN), 11.1, 11.6:1  
 Texas Co. v. Burkett, 16.2:1, 16.2:2  
 Texas Water Rights Commission v. Wright, 16.1, 16.5:1  
 Thompson v. Thompson, 5.14:5  
 Tiller v. Tiller, 5.14:2  
 Tinsley [*In re*], 11.4  
 Togstad v. Vesely, Otto, Miller & Keefe, 1.4:2  
 Toler v. Fertitta, 11.1  
 Turner v. Big Lake Oil Co., 16.4

## U

Uvalde Rock Asphalt Co. v. Warren, 3.11:1

## V

Valdez v. Diamond Shamrock Refining & Marketing Co., 21.5:1  
 Van Voris v. Team Chop Shop, LLC, 17.2:5  
 Villarreal v. Cooper, 1.4:2  
 Vincent v. Bank of America, 11.24

[Decimal numbers refer to *sections* in practice notes.]

[Chapters 1-7, vol. 1; chs. 8-15, vol. 2; chs. 16-22, vol. 3; chs. 23-26, vol. 4]



**W**

Warren v. Swanzy, 3.7:4  
Watkins Land Co. v. Clements, 16.5:2  
Westhoff v. Reitz, 5.10  
White v. Street, 5.3:1  
Williams v. Cruse, 3.12  
Wilson v. Dearing, Inc., 5.8  
Winslow v. Acker, 5.14:2  
Wood v. HSBC Bank USA, N.A., 11.25:13

Woodworth v. Cortez, 5.9  
Wooten v. State, 3.7:2

**Y**

Yates v. Darby, 10.3  
Youngman v. Shular, 5.14:5

**Z**

Zapata v. Torres, 5.3:1

*[Reserved]*

# Subject Index to Forms

[All references in this subject index are to form numbers.]

## A

### **Acceleration of note**

affidavit of mailing of lender's rescission and waiver of, 10-24  
lender's rescission and waiver of, 10-23

### **Acceptance**

affidavit of, 20-4  
of collateral, debtor's consent to, 14-22  
of deed, grantee's, 5-10  
letter, tenant's, 25-16

### **Access and due diligence agreement, 4-23**

### **Acknowledgment**

by foreign service officer, 3-30  
military, 3-31  
of receipt of condominium documents, 24-8  
of signature affixed at direction of person with disability, 3-34  
statutory form for ordinary certificate of, 3-29  
by subscriber, statement of subscribing witness on, 3-33

### **ACORD**

ACORD 25 (Certificate of Liability Insurance), 17-1  
ACORD 28 (Evidence of Commercial Property Insurance), 17-2  
ACORD 45 (Additional Interest Schedule), 17-3

### **Affidavit**

of acceptance, 20-4  
of advancement, 14-19  
bills-paid, 18-12, 19-1  
claiming mechanic's and materialman's lien, 21-4  
of commencement, 18-5  
of completion, 18-7  
of completion and indemnity, 20-3  
of compliance, 11-9  
of debts and liens (and indemnity), 16-13  
of heirship, 26-1  
home equity loan, 14-34, 14-36  
of homestead, 10-9  
of identity, 26-2  
of interpreter, 3-36  
of mailing, 14-9

of mailing of lender's rescission and waiver of acceleration of note, 10-24  
of marital status, 26-3  
nonforeign  
    entity, 26-19  
    individual, 26-20  
of nonproduction, 26-4  
of posting and filing, 14-8  
of return of bid amount, 14-41

### **Agenda**

of public foreclosure sale, 14-14  
    personal property, 14-24  
    residential real property, 14-15

### **Agriculture**

addendum to security agreement (farm products), 9-5  
agricultural lease, 25-8  
grazing lease, 25-9  
hunting lease, 25-7  
prenotification statement (notice of security interest), 9-6  
security agreement (goods, including documents covering goods, equipment, inventory, consumer goods, and farm products), 9-1

### **Alternative payment plan**

agreement, 23-14  
guidelines, 23-13

### **Asbestos**

disclosure notice  
    lease, 25-27  
    sales, 4-8

### **Assignment**

and assumption of contracts, 4-1  
and assumption of lease (water rights), 16-14  
and assumption of leases, 5-21  
of rent, income, and receipts, 10-5

**Association.** *See also* Corporation; Entity, document components; Partnership; Property owners association

unincorporated  
    certificate of resolutions, 26-14  
    document components

[All references in this subject index are to form numbers.]

[Chapters 1-7, vol. 1; chs. 8-15, vol. 2; chs. 16-22, vol. 3; chs. 23-26, vol. 4]

unincorporated, document components—*continued*  
 statement of authority, 3-27  
 trustees, 3-28

**Assumed name**

certificate for  
 incorporated business or profession, 26-5  
 unincorporated business or profession, 26-6  
 document components  
 entity, 3-25  
 natural person, 3-7

**Assumption agreement, 10-22****Attorney-client relationship**

client's consent to business relationship with  
 attorney, letter requesting, 1-11  
 completion of, letter for, 1-14  
 engagement agreement and fee agreement, letter  
 detailing  
 basic, 1-8  
 for simple transaction, 1-11  
 ongoing, 1-9  
 intermediary, letter requesting consent to and  
 outlining fee agreement, 1-7  
 nonrepresentation letter when representing lender or  
 title company, 1-12  
 notice from lender's attorney to borrower, 10-12  
 representation  
 of corporate entity, letter disclosing potential risks  
 and requesting consent to, 1-6  
 letter declining, 1-1  
 letter terminating, 1-13  
 of partnership, letter disclosing potential risks and  
 requesting consent of individual partners to,  
 1-5  
 waiver of potential conflict, letter disclosing and  
 requesting  
 with current client, 1-2  
 with former client, 1-4  
 for multiple representation of title company and  
 third party, 1-3

**B****Bill of sale, 5-16**

blanket, 5-15  
 foreclosure, 14-25

**Bills-paid affidavit, 18-12, 19-1****Boundary line agreement and special warranty deed, 26-7****C****Cash advanced, clauses acknowledging, 8-5****Certificate**

of acknowledgment, ordinary, statutory form for,  
 3-29  
 of formation of nonprofit corporation, 23-3  
 of management, control, and disposition, 26-8  
 of resolutions  
 corporation, 26-9  
 nonprofit, 26-13  
 limited liability company, 26-11  
 partnership  
 general, 26-10  
 limited, 26-12  
 unincorporated association, 26-14  
 of trust, 10-20

**Change order, 18-6****Client conflict disclosure. See also Attorney-client relationship**

letter disclosing and requesting waiver of potential  
 conflict  
 with current client, 1-2  
 with former client, 1-4  
 letter disclosing potential risks and requesting  
 consent  
 of individual partners to representation of  
 partnership, 1-5  
 to representation of corporate entity, 1-6

**Closing certificate, new home, mechanic's lien, 20-6****Closing instructions**

from borrower, 26-15  
 from lender, 26-16  
 from purchaser, 26-17  
 from seller, 26-18

**Collateral**

debtor's consent to acceptance of, 14-22  
 note maker's estoppel certificate, 9-9  
 notice of disposition of, 14-29  
 objection to proposal to accept, in satisfaction of  
 obligation, 14-27  
 transfer of note and lien, 9-8  
 release of, 10-21

**Commercial construction. See also Construction contract, 19-1****Commission rider, real estate, 25-28**

[All references in this subject index are to form numbers.]

[Chapters 1-7, vol. 1; chs. 8-15, vol. 2; chs. 16-22, vol. 3; chs. 23-26, vol. 4]

**Community property.** *See* Married person (spouse)

**Condominium**

association's waiver of right of first refusal,  
     certificate of, 24-9  
 bylaws, 24-4  
 declaration, 24-1  
 documents, acknowledgment of receipt of, 24-8  
 formation, certificate of, 24-3  
 information statement, declarant's, 24-2  
 management certificate, 24-5  
 record of unit, 24-10  
 resale certificate, 24-6  
     waiver of, 24-7  
 rules, 24-11  
 security agreement and transfer of lien, 24-13  
 unanimous written consent for approval of secured  
     loan, 24-12

**Construction**

affidavit  
     of acceptance, 20-4  
     bills-paid, 18-12, 19-1  
     of commencement, 18-5  
     of completion, 18-7  
         request for copy of, 21-12  
     of completion and indemnity, 20-3  
     lien  
         claiming mechanic's and materialman's, 21-4  
         cover letter sending copy of, 21-5  
 certificate  
     home improvement closing, 20-7  
     new home closing, mechanic's lien, 20-6  
 change order, 18-6  
 clauses for contractual mechanic's liens, 20-5  
 commercial construction contract, 19-1  
 contractor  
     disbursement disclosure for residential  
         construction (consumer-owned), 18-3  
     disclosure statement for residential construction,  
         18-1  
     notice (*see* notice, *this heading*)  
     request for information (*see* request, *this heading*)  
     subcontractors and suppliers, list of, 18-2  
 insurance and bond requirements, 19-1  
 lien  
     affidavit, cover letter sending copy of, 21-5  
     against homestead property, notice to owner  
         regarding, 21-3  
     mechanic's  
         contract, 20-1  
         contractual, clauses for, 20-5  
         election regarding right of rescission, 20-8

new home closing certificate, 20-6  
 note, 20-2

mechanic's and materialman's  
     affidavit claiming, 21-4  
     partial release of, 19-1, 21-14  
     release of, 19-1, 21-13

notice

of agreement providing for retainage, 21-7  
 of claim to owner and original contractor, 21-2  
 to original contractor by second-tier claimant,  
     21-1  
 to owner regarding lien against homestead  
     property, 21-3  
 of retainage agreement, 21-8  
 specially fabricated material(s), regarding, 21-6  
 of termination of work or abandonment of  
     performance by original contractor or  
     owner, 21-15

release

conditional, final, 18-10, 19-1  
 conditional, partial, 18-8, 19-1  
 unconditional, final, 18-11, 19-1  
 unconditional, partial, 18-9, 19-1

request

for copy of affidavit of completion, 21-12  
 for information  
     to original contractor, 21-10  
     to owner, 21-9  
     to subcontractor, 21-11

residential construction contract, 18-4  
 retainage agreement, notice of, 21-8  
 subcontractors and suppliers, contractor's list of,  
     18-2

**Contract for sale.** *See* Sales contract

**Corporation.** *See also* Entity, document components  
 bylaws

condominium, 24-4  
 property owners association, 23-4

certificate

of formation  
     condominium, 24-3  
     nonprofit corporation (POA), 23-3  
 of management, control, and disposition, 26-8  
 of resolutions  
     corporation, 26-9  
     limited liability company, 26-11  
     nonprofit corporation, 26-13

consent resolutions, 10-6

document components, corporation, 3-15  
 nonprofit, 3-16

[All references in this subject index are to form numbers.]

[Chapters 1-7, vol. 1; chs. 8-15, vol. 2; chs. 16-22, vol. 3; chs. 23-26, vol. 4]

**Correction instrument, 5-24****D****Decedent.** *See also* Estate

administration deed, 5-14

document components

decedent's estate—personal representative, 3-20

also signing individually, 3-21

trustee—testamentary, 3-19

**Declaration of restrictive covenants of subdivision**

with property owners association, 23-1

without property owners association, 23-2

**Deed**

administration, 5-14

clauses for, 5-9

consideration, 5-6

exceptions to conveyance and warranty, 5-8

reservations from conveyance, 5-7

correction, 5-24

general warranty, 5-1

grantee's acceptance of, 5-10

groundwater rights warranty

for sale of permitted groundwater rights for off-site production, 16-10

for use if grantor owns both groundwater and surface estate, 16-2

guardianship, 5-14

leases, assignment and assumption of, 5-21

in lieu of foreclosure, 5-13

owelty of partition

agreement, 5-12

deed, 5-11

partition, 5-23

quitclaim, 5-5

reservations from conveyance, 5-7

surface water rights conveyance

conditional, 16-19

unconditional, 16-20

survivorship agreement, 5-18

for community property, 5-19

transfer

of escrow funds (and hazard insurance policy), 5-17

of security deposit, notice of, 5-22

transfer on death

partial revocation of, 5-27

revocable, 5-25

revocation of, 5-26

trustee's, 14-16

warranty

general, 5-1

special, 5-3

boundary line agreement and, 26-7

community interest, 5-20

with vendor's lien, 5-2

without warranty, 5-4

property owners association, 23-6

**Deed of trust, 8-1**

clauses, 8-9

extending existing liens, 8-4

home equity loan, 11-4

other indebtedness, 8-6

partial release, 8-7

second-lien, for use with subordinate deeds of trust, 8-8

vendor's lien, 8-3

home equity loan, 11-3

insurance and indemnity agreement, 8-12

leasehold, 8-10

consent to, 8-11

to secure assumption, 8-2

and security agreement, water rights, 16-21

**Demand to pay proceeds of rent, 14-39****Designation of homestead, 26-21**

and affidavit of nonhomestead, 10-8

**Disclaimer, property condition, 26-33****Disclosure.** *See also* Notice

of information on lead-based paint and/or lead-based paint hazards

lease, 25-26

sales, 4-7

property condition, seller's, 4-22

provider, storage tanks, 4-10

**Due diligence agreement, access and, 4-23****E****Easement agreement**

for access, 26-22

reciprocal, 26-23

addendum, easement location, 16-4

consent and subordination to, lienholder, 16-7

for groundwater rights, blanket (for use with on-site groundwater rights warranty deed), 16-3

in gross, 26-25

for utilities, 26-24

[All references in this subject index are to form numbers.]

[Chapters 1-7, vol. 1; chs. 8-15, vol. 2; chs. 16-22, vol. 3; chs. 23-26, vol. 4]

**Election regarding right of rescission**

home equity, 11-6  
 mechanic's lien, 20-8

**Engagement agreement and fee agreement, letter detailing**

basic, 1-8  
     for simple transaction, 1-10  
 ongoing, 1-9

**Entity, document components. *See also***

Corporation; Partnership; Trust  
 cooperative, 3-26  
 entity, 3-24  
 joint venture  
     composition of venturers, 3-14  
     individual venturer, 3-13

**Escrow**

agreement, 26-26  
     agent receipt and, 4-2  
 funds (and hazard insurance policy), transfer of,  
     5-17

**Estate**

administration deed, 5-14  
 certificate of trust, 10-20  
 document components  
     custodian for minor under Uniform Transfers to  
     Minors Act, 3-23  
     decedent's estate—personal representative, 3-20  
     also signing individually, 3-21  
     guardian for ward, 3-22  
     trustee  
     entity, 3-18  
     individual, 3-17  
     testamentary, 3-19  
 survivorship agreement, 5-18  
     for community property, 5-19

**Estoppel certificate**

collateral note maker's, 9-9  
 lender's, 10-10  
 lessee (water rights), 16-15  
 tenant, 25-17

**Expansion space rider, 25-11****Extension agreement**

extension option rider, 25-12  
 modification and, 10-4

**F****Fee agreement**

letter detailing basic engagement agreement and, 1-8  
 letter detailing ongoing engagement agreement and,  
     1-9  
 letter requesting consent to intermediary and  
     outlining fee agreement, 1-7

**Financing. *See* Lending****Financing Statement (UCC1), 9-11**

Financing Statement Addendum (UCC1Ad), 9-12  
 Financing Statement Additional Party (UCC1AP),  
     9-13

**Financing Statement Amendment (UCC3), 9-14**

Financing Statement Amendment Addendum  
     (UCC3Ad), 9-15

**Financing Statement Amendment Additional Party  
(UCC3AP), 9-16****First offer, right of, agreement, 4-27****First refusal, right of, agreement, 4-26****Foreclosure**

affidavit, 14-17  
     of advancement, 14-19  
     home equity loan, 14-34, 14-36  
     of mailing, 14-9  
     of posting and filing, 14-8  
 agenda of public foreclosure sale, 14-14  
     personal property, 14-24  
     residential real property, 14-15  
 bill of sale, 14-25  
     trustee's deed with, 14-16  
 clauses, 14-7  
 collateral  
     debtor's consent to acceptance of, 14-22  
     notice of disposition of, 14-29  
     in satisfaction of obligation, objection to proposal  
     to accept, 14-27  
 declaration, home equity loan, 14-35, 14-37  
 deed, trustee's, 14-16  
 expedited order under rule 736, application for,  
     14-33  
 letter to reinstate default provisions, 14-1  
 nonredemption, affidavit of (property owners  
     association), 23-20  
 notice  
     of acceleration, 14-5  
     home equity loan, 14-32  
     of advancement and demand for payment, 14-18  
     of change of debtor's address, 14-2

[All references in this subject index are to form numbers.]

[Chapters 1-7, vol. 1; chs. 8-15, vol. 2; chs. 16-22, vol. 3; chs. 23-26, vol. 4]

notice—*continued*  
 of default  
   home equity loan, 14-31  
   and intent to accelerate, 14-4  
 of disposition of collateral, 14-29  
 of maturity and demand for payment, 14-3  
 of our plan to sell property, 14-28  
 of public sale, 14-23  
 of sale (property owners association), 23-19  
 of strict foreclosure, 14-26  
 of trustee's sale  
   mortgagee, 14-12  
   mortgage servicer, 14-13  
 order, default, rule 736, 14-38  
 reinstatement agreement, 14-6  
 rule 736 default order, 14-38  
 substitute trustee, appointment of  
   mortgagee, 14-10  
   mortgage servicer, 14-11  
   in notice of trustee's sale (mortgagee), 14-12,  
     14-13  
 trustee's deed, 14-16  
 waiver of rights after default, 14-21

## G

**Groundwater rights.** *See also* Water rights  
 easement agreement for, blanket (for use with on-site  
   groundwater rights warranty deed), 16-3  
 sales contract  
   for off-site production, 16-9  
   for on-site production if seller owns groundwater  
     and surface estate, 16-1  
 warranty deed  
   for sale of permitted groundwater rights for off-  
     site production, 16-10  
   for use if grantor owns both groundwater and  
     surface estate, 16-2

**Guaranty, 10-15**  
 lease, 25-18

**Guardianship.** *See also* Estate; Trust  
 certificate of trust, 10-20  
 document components, guardian for ward, 3-22  
 guardianship deed, 5-14

## H

**Heirship, affidavit of, 26-1**

**Home equity loan**  
 affidavit, 14-34, 14-36  
 compliance certificate and agreement, 11-5  
 declaration, 14-35, 14-37  
 deed of trust, clauses for, 11-4  
 election regarding right of rescission, 11-6  
 extension of credit, 11-2  
   notice concerning, 11-1  
 foreclosure  
   acceleration, notice of, 14-32  
   affidavit, 14-34, 14-36  
   declaration, 14-35, 14-37  
   default, notice of, 14-31  
   expedited order under rule 736, application for,  
     14-33  
   rule 736 default order for, 14-38  
 refinance of existing home equity loan to non-home  
   equity loan, notice concerning, 11-8  
 reverse mortgage, 11-7

**Homestead.** *See also* Home equity loan  
 affidavit, 10-9  
   as release of judgment lien, 26-27  
 designation of, 26-21  
   and affidavit of nonhomestead, 10-8  
 document components—nonhomestead  
   multiple persons, 3-4  
   natural person, 3-3  
   spouses, 3-5  
 liens against homestead property, notice to owner  
   regarding, 21-3

**Hunting lease, 25-7**

## I

**Identity, affidavit of, 26-1**

**Industrial lease, 25-6**

**Information Request (UCC11), 9-18**

**Insurance.** *See also* ACORD  
 addendum to lease  
   long form, 25-34  
   short form, 25-35  
 and indemnity agreement, 8-12  
 notice to applicant, 10-16

**Interpreter, affidavit of, 3-36**

**IRS notice letter, 14-20**

[All references in this subject index are to form numbers.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]



**J****Joint venture**

- document components
  - composition of venturers, 3-14
  - individual venturer, 3-13

**Judgment lien release.** *See* Release of lien

**Jurat,** 3-35

**L**

**Landlord.** *See* Lease

**Lead-based paint**

- and/or lead-based paint hazards, disclosure of information on
  - lease, 25-26
  - sales, 4-7

**Lease**

- assignment, 25-15
- basic, 25-1
- clauses for, 25-10
- dispossession or termination letter, 25-22
- grazing, 25-9
- hunting, 25-7
- industrial, 25-6
- landlord's lien waiver, 25-20
- leasehold deed of trust, 8-10
- lessee estoppel certificate, water rights, 16-15
- manufactured-home community, 25-29
- memorandum of, 25-32
- modification of, 25-31
- notice
  - to change locks, 25-24
  - of default, 25-21
  - lockout posting, 25-23
- office, 25-3
- residential, 25-5
- retail, 25-2
- rider
  - expansion space, 25-11
  - extension option, 25-12
  - to lease or work letter, tenant improvements, 25-25
  - to office lease, parking facility, 25-4
- subcase, 25-19
- subordination, attornment, and nondisturbance agreement, 25-13
- tenant estoppel certificate, 25-17
- tenant's acceptance letter, 25-16

- tenant's subordination to deed of trust lien, 25-14
- termination of, 25-32

**Lending**

- application of prepayment, 6-4
- certificate of trust, 10-20
- clauses
  - extending existing liens, 8-4
  - for loan agreements, 10-18
  - other indebtedness, 8-6
  - for promissory notes, 6-6
- collection and payment agreement, 10-7
- consent and agreement, 9-10
- consent to leasehold deed of trust, 8-11
- landlord's lien waiver, 25-20
- lien
  - clauses extending existing, 8-4
  - subordination of, 10-13
  - transfer of, 10-1
  - waiver, landlord's, 25-20
- lienholder's subordination to oil, gas, and mineral lease, 10-11
- loan agreement, 10-17
- modification and extension agreement, 10-4
- notice
  - of final agreement, 10-14
  - from lender's attorney to borrower, 10-12
  - of lender's interest in water rights and permit, 16-24
  - of penalties for making false or misleading written statement, 10-19
- subordination of lien, 10-13
- transfer of note and lien, 10-1

**Lien, transfer of,** 24-13

**Lien release.** *See* Release of lien

**Limited liability company.** *See* Corporation

**Lis pendens,** 26-28

**Listing agreement**

- exclusive agency, 26-29
- exclusive right to sell, 26-30
- open listing, 26-31

**M**

**Management certificate,** 23-7, 24-5

**Manufactured-home community**

- disclosure, 25-30
- lease, 25-29

[All references in this subject index are to form numbers.]

[Chapters 1-7, vol. 1; chs. 8-15, vol. 2; chs. 16-22, vol. 3; chs. 23-26, vol. 4]

**Married person (spouse)**

affidavit of marital status, 26-3  
 community interest special warranty deed, 5-20  
 document components  
   married person—separate property, 3-6  
   spouses, 3-2  
   nonhomestead, 3-5  
 survivorship agreement for community property, 5-19

**Mechanic's lien.** *See also* Construction

contract, 20-1  
 note, 20-2  
 release of mechanic's and materialman's lien, 19-1, 21-13  
   partial, 19-1, 21-14

**Memorandum**

of contract, 16-16  
 of groundwater loan (for use with Edwards Aquifer Authority), 16-23  
 of lease, 25-33  
 of private foreclosure sale, 14-30

**Military service personnel**

affidavit, home equity loan, 14-34, 14-36  
 declaration, home equity loan, 14-35, 14-37  
 military acknowledgment, 3-31

**Minor**

document components, custodian for minor under Uniform Transfers to Minors Act, 3-23

**Modification and extension agreement,** 10-4

## N

**Nonforeign affidavit**

entity, 26-19  
 individual, 26-20

**Nonhomestead.** *See* Homestead**Note.** *See also* Lending

acceleration of  
   affidavit of mailing of lender's rescission and waiver of, 10-24  
   lender's rescission and waiver of, 10-23  
 clauses  
   payment, 6-2  
   prepayment, 6-3  
   for promissory notes, 6-6  
 notice to cosigner, 6-7  
 promissory, 6-1  
   home equity extension of credit, 11-2

security for payment, 16-5

**Notice**

of acceleration, 14-5  
   home equity loan, 14-32  
 of advancement and demand for payment, 14-18  
 of agreement providing for retainage, 21-7  
 annexation, regarding possible, 4-15  
 of cancellation, sales contract, 4-4  
 of change of debtor's address, 14-2  
 of change of locks letter, 25-24  
 of claim to owner and original contractor, 21-2  
 collateral, of disposition of, 14-29  
 to contractor, original, by second-tier claimant, 21-1  
 to cosigner, 6-7  
 credit, concerning extensions of, 11-1  
 of default, 25-21  
   home equity loan, 14-31  
   and intent to accelerate, 14-4  
 demand for payment  
   of advancement and, 14-18  
   of maturity and, 14-3  
 of disposition of collateral, 14-29  
 extensions of credit, concerning, 11-1  
 false or misleading written statement, of penalties for making, 10-19  
 of final agreement, 10-14  
 of foreclosure, strict, 14-26  
 home equity loan, of default, 25-21  
 homestead property, to owner regarding liens against, 21-3  
 from lender's attorney to borrower, 10-12  
 of lender's interest in water rights and permit, 16-24  
 liability for additional taxes, regarding possible, 4-14  
 lien  
   against homestead property, to owner regarding, 21-3  
   recorded, regarding sale subject to, 4-9  
 of maturity and demand for payment, 14-3  
 of obligation to pay public improvement district assessment, 4-5  
 to original contractor by second-tier claimant, 21-1  
 of our plan to sell property, 14-28  
 of penalties for making false or misleading written statement, 10-19  
 property owners association, of membership in, 23-9  
 of public sale, 14-23  
 to purchaser, 23-8  
   area of alignment of transportation project, property located within, 4-19  
   certain annexed water districts, property located in, 4-18

[All references in this subject index are to form numbers.]

[Chapters 1-7, vol. 1; chs. 8-15, vol. 2; chs. 16-22, vol. 3; chs. 23-26, vol. 4]

coastal area property, regarding, 4-12  
 Gulf Intracoastal Waterway, of property seaward of, 4-13  
 of new home, regarding insulation, 4-6  
 restrictive covenants, regarding, 4-11  
 refinance, existing home equity loan to non-home equity loan, 11-8  
 of rescission of trustee's sale, 14-40  
 retainage, of agreement providing for, 21-7  
 of retainage agreement, 21-8  
 reverse mortgage, 11-7  
 sale  
   of our plan to sell property, 14-28  
   of public sale, 14-23  
   subject to recorded lien, regarding, 4-9  
   of trustee's sale  
     mortgagee, 14-12  
     mortgage servicer, 14-13  
 by second-tier claimant, to original contractor, 21-1  
 specially fabricated material(s), regarding, 21-6  
 of strict foreclosure, 14-26  
 taxes, regarding possible liability for additional, 4-14  
 of termination  
   of contract (water rights), 16-17  
   of work or abandonment of performance by original contractor or owner, 21-15  
 of transfer of security deposit, 5-22  
 of trustee's sale (*see sale, this heading*)  
 utility service provider, for unimproved property in certificated service area of, 4-16  
 of water level fluctuations, 4-20  
 water rights  
   and permit, of lender's interest in, 16-24  
   of termination of contract, 16-17

## O

**Offer, right of first, agreement, 4-27**

### Option

extension, rider, 25-12  
 memorandum of, 4-25  
 to purchase, 4-24

### Owelty of partition

agreement, 5-12  
 deed, 5-11

## P

**Partial release. *See* Release of lien**

### Partition

agreement (*see* Owelty of partition)  
 deed, 5-23

### Partnership

#### general

certificate of resolutions, 26-10  
 document components  
   composition of partners, 3-10  
   individual partner, 3-9

#### limited

certificate of resolutions, 26-12  
 document components  
   entity general partner, 3-12  
   individual general partner, 3-11

representation of, letter disclosing potential risks and requesting consent of individual partners to, 1-5

### Power of attorney

document components, natural person by attorney-in-fact, 3-8  
 revocation of, 26-35  
 special durable, for real estate transactions, 26-36  
 statutory durable, 26-37  
   certification of, 26-38

**Promissory note. *See* Note**

### Property condition

disclaimer, 26-33  
 seller's disclosure, 4-22

### Property owners association

alternative payment plan  
   agreement, 23-14  
   guidelines for, 23-13  
 bylaws of, 23-4  
   condominium, 24-4  
 collection agent fees, notice of, 23-15  
 deed without warranty, 23-6  
 delinquency, notice of to subordinate lienholder, 23-16  
 enforcement action and attorney's fees, notice of, 23-17  
 foreclosure sale, notice of, 23-19  
 guidelines for alternative payment plans, 23-13  
 mailing, affidavit, 23-18  
 management certificate, 23-7  
   condominium, 24-5  
 nonredemption, affidavit, 23-20  
 notice  
   of collection agent fees, 23-15  
   of delinquency to subordinate lienholder, 23-16

[All references in this subject index are to form numbers.]

[Chapters 1-7, vol. 1; chs. 8-15, vol. 2; chs. 16-22, vol. 3; chs. 23-26, vol. 4]

notice—*continued*

- of enforcement action and attorney's fees, 23-17
- of foreclosure sale, 23-19
- of membership in, 23-9
- to purchaser, 23-8

records production and copying policy, 23-12  
 required information applicable to the property  
 including resale certificate, 23-10

## restrictive covenant

- agreement, 23-11
- declaration of
  - subdivision without property owners  
 association, 23-2
  - subdivision with property owners association,  
 23-1

## rules, 23-5

- condominium, 24-11

**Public sale.** *See* Sale, notice of

**Purchase option,** 4-24

## Q

**Quitclaim,** 5-5. *See also* Deed

## R

**Records production and copying policy,** 23-12

**Real estate commission rider,** 25-28

**Refusal, right of first, agreement,** 4-26

**Reinstatement agreement,** 14-6

**Release of lien,** 10-2

- collateral transfer of note and lien, release of, 10-21
- conditional, final (construction), 18-10, 19-1
- conditional, partial (construction), 18-8, 19-1
- judgment, 26-34
  - homestead affidavit as, 26-27
- mechanic's and materialman's, 21-13
- partial, 10-3
  - clauses, 8-7
  - judgment, 26-32
  - mechanic's and materialman's, 21-14
  - water rights
    - off-site production, 16-11
    - on-site production, 16-8

- release of collateral transfer of note and lien, 10-21
- unconditional, final, 18-11
- unconditional, partial, 18-9

**Rent, demand to pay proceeds of,** 14-39

**Request**

- for copy of affidavit of completion, 21-12
- for information
  - to original contractor, 21-10
  - to owner, 21-9
  - to subcontractor, 21-11

**Residential construction.** *See also* Construction  
 contract, 18-4

**Residential lease,** 25-5. *See also* Lease

**Resolutions, consent,** 10-6

**Reverse mortgage,** 11-7

**Rider**

- expansion space, 25-11
- extension option, 25-12
- to office lease, parking facility, 25-4
- real estate commission, 25-28

**Right of first offer agreement,** 4-27

**Right of first refusal agreement,** 4-26

**Rules**

- condominium owners association, 24-11
- property owners association, 23-5

## S

**Sale, notice of**

- public, 14-23
- trustee's
  - mortgagee, 14-12
  - mortgage servicer, 14-13

**Sales contract**

- letter of intent, 4-3
- notice
  - annexation, regarding possible, 4-15
  - of cancellation, 4-4
  - of obligation to pay public improvement district  
 assessment, 4-5
  - to purchaser, 23-8
    - area of alignment of transportation project,  
 property located within, 4-19
    - certain annexed water districts, property  
 located in, 4-18

[All references in this subject index are to form numbers.]

[Chapters 1-7, vol. 1; chs. 8-15, vol. 2; chs. 16-22, vol. 3; chs. 23-26, vol. 4]

coastal area property, regarding, 4-12  
 Gulf Intracoastal Waterway, of property  
 seaward of, 4-13  
 of new home, regarding insulation, 4-6  
 restrictive covenants, regarding, 4-11  
 taxes, regarding possible liability for additional,  
 4-14  
 for unimproved property in certificated service  
 area of utility service provider, 4-16  
 utility district, 4-17  
 real estate sales contract, 4-1  
 storage tanks disclosure provider, 4-10

**Security deposit, notice of transfer of, 5-22****Security interest and agreement**

addendum to security agreement (farm products),  
 9-5  
 listing of potential buyers, commission merchants,  
 and selling agents, 9-7  
 prenotification statement (notice of security interest),  
 9-6  
 security agreement  
 accounts, chattel paper, general intangibles,  
 commercial tort claims, 9-2  
 goods, including documents covering goods,  
 equipment, inventory, consumer goods, and  
 farm products, 9-1  
 instruments, investment property, 9-3  
 interest in noncorporate entity, 9-4  
 and transfer of lien, condominium association,  
 24-13  
 water rights, 16-22

**Single person, document components, 3-1**

**Spouse.** *See* Married person (spouse)

**Subordination, attornment, and nondisturbance agreement, 25-13****Surface use**

surface damage payment addendum, 16-5  
 surface use restrictions addendum, 16-6

**Surface water rights.** *See also* Water rights

conveyance  
 conditional, 16-19  
 unconditional, 16-20  
 sales contract, 16-18

**Survivorship agreement, 5-18**

for community property, 5-19

**T**

**Tenant.** *See* Lease

**Termination notice**

notice of termination of contract (water rights), 16-17  
 notice of termination of work or abandonment of  
 performance by original contractor or owner,  
 21-15  
 termination of lease, 25-32  
 termination of right of possession letter, 25-22

**Title company**

lender or, nonrepresentation letter when representing,  
 1-12  
 and third party, letter disclosing and requesting  
 waiver of potential conflict for multiple  
 representation of, 1-3  
 transfer of escrow funds (and hazard insurance  
 policy), 5-17

**Transfer of lien, and security agreement, 24-13****Transfer on death deed.** *See also* Deed

partial revocation of, 5-27  
 revocable, 5-25  
 revocation of, 5-26

**Trust.** *See also* Estate

certificate of trust, 10-20

**Truth-in-lending notice of right of rescission  
(notice of right to cancel)**

general, 12-1  
 refinancing, 12-2

**U****UCC**

UCC1 (Financing Statement), 9-11  
 UCC1Ad (Financing Statement Addendum), 9-12  
 UCC1AP (Financing Statement Additional Party),  
 9-13  
 UCC3 (Financing Statement Amendment), 9-14  
 UCC3Ad (Financing Statement Amendment  
 Addendum), 9-15  
 UCC3AP (Financing Statement Amendment  
 Additional Party), 9-16  
 UCC5 (Information Statement), 9-17  
 UCC11 (Information Request), 9-18

**Unincorporated association.** *See also* Association  
 certificate of resolutions, 26-14

[All references in this subject index are to form numbers.]

[Chapters 1-7, vol. 1; chs. 8-15, vol. 2; chs. 16-22, vol. 3; chs. 23-26, vol. 4]

## W

**Waiver**

of condominium resale certificate, 24-7  
 lien, landlord's, 25-20  
 of rights  
   consumer, 4-21  
   after default, 14-21

**Warranty deed. See also Deed**

general, 5-1  
 special, 5-3  
 with vendor's lien, 5-2

**Water level fluctuations, notice of, 4-20****Water rights**

addendum  
   surface damage payment, 16-5  
   surface use restrictions, 16-6  
 affidavit of debts and liens (and indemnity), 16-13  
 groundwater  
   sales contract  
     on-site production, if seller owns groundwater  
     and surface estate, 16-1

  permitted off-site production, 16-9  
 warranty deed  
   blanket easement agreement, on-site, 16-3  
   if grantor owns groundwater and surface estate,  
     16-2  
     permitted off-site production, 16-10  
 lessee estoppel certificate, 16-15  
 lien, partial release of  
   off-site production, 16-11  
   on-site production, 16-8  
 notice of lender's interest in, and permit, 16-24  
 notice of termination of contract, 16-17  
 permittee's instruction letter to water authority,  
   16-25  
 permit transfer request, 16-12  
 sales contract, 16-18  
 surface  
   conveyance  
     conditional, 16-19  
     unconditional, 16-20

**Witness, statement of subscribing**

on acknowledgment by subscriber, 3-33  
 in presence of subscriber, 3-32

[All references in this subject index are to form numbers.]

[Chapters 1-7, vol. 1; chs. 8-15, vol. 2; chs. 16-22, vol. 3; chs. 23-26, vol. 4]

## List of Forms by Title

[All references in this list are to form numbers.]

### A

Access and Due Diligence Agreement, 4-23  
Acknowledgment by Foreign Service Officer, 3-30  
Acknowledgment of Receipt of Condominium Documents, 24-8  
Acknowledgment of Signature Affixed at Direction of Person with Disability, 3-34  
ACORD 25 Certificate of Liability Insurance, 17-1  
ACORD 28 Evidence of Commercial Property Insurance, 17-2  
ACORD 45 Additional Interest Schedule, 17-3  
Addendum to Security Agreement [Farm Products], 9-5  
Additional Clauses for Contractual Mechanic's Liens, 20-5  
Additional Clauses for Deeds, 5-9  
Additional Clauses for Deeds of Trust, 8-9  
Additional Clauses for Deeds of Trust (Home Equity Loan), 11-4  
Additional Clauses for Foreclosure Documents, 14-7  
Additional Clauses for Leases, 25-10  
Additional Clauses for Loan Agreements, 10-18  
Additional Clauses for Promissory Notes, 6-6  
[Administration/Guardianship] Deed, 5-14  
Affidavit Claiming Mechanic's and Materialman's Lien, 21-4  
Affidavit in Support of Petitioner's Application for an Expedited Order Under Rule 736, 14-34  
Affidavit of Acceptance, 20-4  
Affidavit of Advancement, 14-19  
Affidavit of Commencement, 18-5  
Affidavit of Completion and Indemnity, 20-3  
Affidavit of Compliance (Pursuant to Section 50(1)(2), Article XVI, Texas Constitution, 11-9  
Affidavit of Debts and Liens [and Indemnity], 16-13  
Affidavit of Facts Concerning Identity of Heirs, 26-1

[All references in this list are to form numbers.]

[Chapters 1-7, vol. 1; chs. 8-15, vol. 2; chs. 16-22, vol. 3; chs. 23-26, vol. 4]

Affidavit of Homestead, 10-9  
Affidavit of Identity, 26-2  
Affidavit of Interpreter, 3-36  
Affidavit of Mailing, 14-9, 23-18  
Affidavit of Mailing of Lender's Rescission and Waiver of Acceleration of Note, 10-24  
Affidavit of Marital Status, 26-3  
Affidavit of Nonproduction, 26-4  
Affidavit of Nonredemption, 23-20  
Affidavit of Posting and Filing, 14-8  
Affidavit of Return of Bid Amount, 14-41  
Agenda of Public Foreclosure Sale, 14-14  
Agenda of Public Foreclosure Sale of Residential Real Property, 14-15  
Agenda of Public Foreclosure Sale [Personal Property], 14-24  
Agricultural Lease, 25-8  
Alternative Payment Plan Agreement, 23-14  
Application for an Expedited Order Under Rule 736 on a Home Equity, Reverse Mortgage, or Home Equity Line  
of Credit Loan, 14-33  
Application of Prepayment, 6-4  
Appointment of Substitute Trustee[s] [Mortgagee], 14-10  
Appointment of Substitute Trustee[s] [Mortgage Servicer], 14-11  
Asbestos Disclosure Notice [Lease], 25-27  
Asbestos Disclosure Notice [Sales], 4-8  
Assignment and Assumption of Lease [Water Rights], 16-14  
Assignment and Assumption of Leases, 5-21  
Assignment of Rent, 10-5  
Assumed [Business/Professional] Name Certificate for Incorporated Business or Profession, 26-5  
Assumed [Business/Professional] Name Certificate for Unincorporated Business or Profession, 26-6  
Assumption Agreement, 10-22

**B**

Bill of Sale, 5-16, 14-25

[All references in this list are to form numbers.]

[Chapters 1-7, vol. 1; chs. 8-15, vol. 2; chs. 16-22, vol. 3; chs. 23-26, vol. 4]



Blanket Bill of Sale, 5-15

Blanket Easement Agreement for Groundwater Rights [For Use with Groundwater Rights Warranty Deed (On Site)], 16-3

Boundary Line Agreement and Special Warranty Deed, 26-7

Bylaws of [name of association] [, Inc.], 24-4

Bylaws of [name of property owners association] [, Inc.], 23-4

## C

Certificate of Condominium Association's Waiver of Right of First Refusal, 24-9

Certificate of Formation of [name of corporation], a Texas [For-Profit/Nonprofit] Corporation, 24-3

Certificate of Formation of [name of corporation], a Texas Nonprofit Corporation, 23-3

Certificate of Management, Control, and Disposition, 26-8

Certificate of Resolutions [Corporation], 26-9

Certificate of Resolutions [General Partnership], 26-10

Certificate of Resolutions [Limited Liability Company], 26-11

Certificate of Resolutions [Limited Partnership], 26-12

Certificate of Resolutions [Nonprofit Corporation], 26-13

Certificate of Resolutions [Unincorporated Association], 26-14

Certification of Durable Power of Attorney by Agent, 26-38

Certification of Trust, 10-20

Change Order, 18-6

Clauses Acknowledging Cash Advanced, 8-5

Clauses Extending Existing Liens, 8-4

Closing Instructions [from Borrower], 26-15

Closing Instructions [from Lender], 26-16

Closing Instructions [from Purchaser], 26-17

Closing Instructions [from Seller], 26-18

Collateral Note Maker's Estoppel Certificate, 9-9

Collateral Transfer of Note and Lien, 9-8

Collection and Payment Agreement, 10-7

Commercial Construction Contract [Short Form—Guaranteed Maximum Price], 19-1

Community Interest Special Warranty Deed, 5-20

[All references in this list are to form numbers.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]

Conditional Final Release, 18-10  
 Conditional Partial Release During Construction, 18-8  
 Condominium Information Statement [**name of condominium**], a Condominium, 24-2  
 Consent and Agreement, 9-10  
 Consent Resolutions, 10-6  
 Consent to Leasehold Deed of Trust, 8-11  
 Consideration Clauses, 5-6  
 Contractor's Disbursement Disclosure for Residential Construction (Consumer-Owned), 18-3  
 Contractor's Disclosure Statement for Residential Construction, 18-1  
 Contractor's List of Subcontractors and Suppliers, 18-2  
 Correction Instrument [Nonmaterial Correction], 5-24  
 Cover Letter Sending Copy of Lien Affidavit, 21-5

## D

Debtor's Consent to Acceptance of Collateral, 14-22  
 Declaration in Support of Petitioner's Application for an Expedited Order Under Rule 736, 14-35  
 Declaration of [**name of condominium**], a Condominium, 24-1  
 Declaration of Nonforeign Status—Entity, 26-19  
 Declaration of Nonforeign Status—Individual, 26-20  
 Declaration of Restrictive Covenants of the [**name of subdivision**] Subdivision [without Property Owners Association], 23-2  
 Declaration of Restrictive Covenants of the [**name of subdivision**] Subdivision [with Property Owners Association], 23-1  
 Deed in Lieu of Foreclosure, 5-13  
 Deed of Trust, 8-1  
 Deed of Trust [Home Equity Loan], 11-3  
 Deed of Trust and Security Agreement [Water Rights], 16-21  
 Deed of Trust to Secure Assumption, 8-2  
 Deed without Warranty, 5-4, 23-6  
 Default Order, 14-38  
 Demand to Pay Proceeds of Rent, 14-39

[All references in this list are to form numbers.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]

- Designation of Homestead, 26-21
- Designation of Homestead and Affidavit of Nonhomestead, 10-8
- Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards [Lease], 25-26
- Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards [Sales], 4-7
- Document Components: Cooperative, 3-26
- Document Components: Corporation, 3-15
- Document Components: Custodian for Minor under Uniform Transfers to Minors Act, 3-23
- Document Components: Decedent's Estate by Personal Representative Also Signing Individually, 3-21
- Document Components: Decedent's Estate—Personal Representative, 3-20
- Document Components: Entity, 3-24
- Document Components: Entity with Assumed Name, 3-25
- Document Components: General Partnership—Composition of Partners, 3-10
- Document Components: General Partnership—Individual Partner, 3-9
- Document Components: Guardian for Ward, 3-22
- Document Components: Joint Venture—Composition of Venturers, 3-14
- Document Components: Joint Venture—Individual Venturer, 3-13
- Document Components: Limited Partnership—Entity General Partner, 3-12
- Document Components: Limited Partnership—Individual General Partner, 3-11
- Document Components: Married Person—Separate Property, 3-6
- Document Components: Multiple Persons—Nonhomestead, 3-4
- Document Components: Natural Person—Assumed Name, 3-7
- Document Components: Natural Person by Attorney-in-Fact, 3-8
- Document Components: Natural Person—Nonhomestead, 3-3
- Document Components: Nonprofit Corporation, 3-16
- Document Components: Single Person, 3-1
- Document Components: Spouses, 3-2
- Document Components: Spouses—Nonhomestead, 3-5
- Document Components: Trustee—Entity, 3-18
- Document Components: Trustee—Individual, 3-17
- Document Components: Trustee—Testamentary, 3-19
- Document Components: Unincorporated Association—Statement of Authority, 3-27
- Document Components: Unincorporated Association—Trustees, 3-28

[All references in this list are to form numbers.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]

**E**

- Easement Agreement for Access, 26-22
- Easement Agreement for Reciprocal Access, 26-23
- Easement Agreement for Utilities, 26-24
- Easement in Gross Agreement, 26-25
- Easement Location Addendum, 16-4
- Election Regarding Right of Rescission, 11-6, 20-8
- Escrow Agent Receipt and Escrow Agreement, 4-2
- Escrow Agreement, 26-26
- Exceptions to Conveyance and Warranty, 5-8
- Expansion Space Rider, 25-11
- Extension Option Rider, 25-12

**F**

- [Final] Bills-Paid Affidavit, 18-12
- Foreclosure Affidavit, 14-17

**G**

- General Warranty Deed, 5-1
- Grantee's Acceptance of Deed, 5-10
- Grazing Lease, 25-9
- Groundwater Rights Sales Contract [For Sale of Groundwater Rights in Place for On-Site Production If Seller Owns Groundwater and Surface Estate], 16-1
- Groundwater Rights Sales Contract [For Sale of Permitted Groundwater Rights for Off-Site Production], 16-9
- Groundwater Rights Warranty Deed [For Sale of Permitted Groundwater Rights for Off-Site Production], 16-10
- Groundwater Rights Warranty Deed [For Use If Grantor Owns Both Groundwater and Surface Estate], 16-2
- Guaranty, 10-15, 25-18
- Guidelines for Alternative Payment Plans, 23-13

[All references in this list are to form numbers.]

[Chapters 1-7, vol. 1; chs. 8-15, vol. 2; chs. 16-22, vol. 3; chs. 23-26, vol. 4]

**H**

Home Equity Compliance Certificate and Agreement, 11-5  
Home Equity Extension of Credit [Promissory Note], 11-2  
Home Improvement Closing Certificate, 20-7  
Homestead Affidavit as Release of Judgment Lien, 26-27  
Hunting Lease, 25-7

**I**

Important Notice to Borrowers Related to Your Reverse Mortgage, 11-7  
Industrial Lease, 25-6  
Insurance Addendum to Lease [Long Form], 25-34  
Insurance Addendum to Lease [Short Form], 25-35  
Insurance and Indemnity Agreement, 8-12  
Insurance Notice to Applicant, 10-16  
IRS Notice Letter, 14-20

**J**

Jurat, 3-35

**L**

Landlord's Lien Waiver, 25-20  
Lease [Basic], 25-1  
Lease Assignment, 25-15  
Leasehold Deed of Trust, 8-10  
Lender's Estoppel Certificate, 10-10  
Lender's Rescission and Waiver of Acceleration of Note, 10-23  
Lessee Estoppel Certificate [Water Rights], 16-15  
Letter Declining Representation, 1-1  
Letter Detailing Basic Engagement Agreement and Fee Agreement, 1-8  
Letter Detailing Basic Engagement Agreement and Fee Agreement for Simple Matters, 1-10

[All references in this list are to form numbers.]

[Chapters 1-7, vol. 1; chs. 8-15, vol. 2; chs. 16-22, vol. 3; chs. 23-26, vol. 4]

Letter Detailing Ongoing Engagement Agreement and Fee Agreement, 1-9

Letter Disclosing and Requesting Waiver of Potential Conflict for Multiple Representation of Title Company and Third Party, 1-3

Letter Disclosing and Requesting Waiver of Potential Conflict with Current Client, 1-2

Letter Disclosing and Requesting Waiver of Potential Conflict with Former Client, 1-4

Letter Disclosing Potential Risks and Requesting Consent of Individual Partners to Representation of Partnership, 1-5

Letter Disclosing Potential Risks and Requesting Consent to Representation of Corporate Entity, 1-6

Letter for Completion of Attorney-Client Relationship, 1-14

Letter of Intent, 4-3

Letter Requesting Client's Consent to Business Relationship with Attorney, 1-11

Letter Requesting Consent to Intermediary and Outlining Fee Agreement, 1-7

Letter Terminating Attorney-Client Relationship, 1-13

Letter to Reinstate Default Provisions, 14-1

Lienholder Consent and Subordination to Easement Agreement, 16-7

Lienholder's Subordination to Oil, Gas, and Mineral Lease, 10-11

Lis Pendens, 26-28

Listing Agreement [Exclusive Agency], 26-29

Listing Agreement [Exclusive Right to Sell], 26-30

Listing Agreement [Open Listing], 26-31

Listing of Potential Buyers, Commission Merchants, and Selling Agents, 9-7

Loan Agreement, 10-17

Lockout Notice Posting, 25-23

**M**

Management Certificate, 23-7, 24-5

Manufactured-Home Community Disclosure, 25-30

Manufactured-Home Community Lease, 25-29

Mechanic's Lien Contract, 20-1

Mechanic's Lien Note, 20-2

Memorandum of Contract, 16-16

[All references in this list are to form numbers.]

[Chapters 1-7, vol. 1; chs. 8-15, vol. 2; chs. 16-22, vol. 3; chs. 23-26, vol. 4]

Memorandum of Groundwater Loan [For Use with Edwards Aquifer Authority], 16-23  
Memorandum of Lease, 25-33  
Memorandum of Option, 4-25  
Memorandum of Private Foreclosure Sale, 14-30  
Military Acknowledgment, 3-31  
Military Status Affidavit, 14-36  
Military Status Declaration, 14-37  
Modification and Extension Agreement, 10-4  
Modification of Lease, 25-31

**N**

New Home Closing Certificate, 20-6  
Nonrepresentation Letter When Representing Lender or Title Company, 1-12  
Notice Concerning Extensions of Credit, 11-1  
Notice Concerning Refinance of Existing Home Equity Loan to Non-Home Equity Loan under Section 50(f)(2),  
Article XVI, Texas Constitution, 11-8  
Notice for Unimproved Property in a Certificated Service Area of a Utility Service Provider, 4-16  
Notice from Lender's Attorney to Borrower, 10-12  
Notice of Acceleration, 14-5  
Notice of Acceleration [Home Equity Loan], 14-32  
Notice of Advancement and Demand for Payment, 14-18  
Notice of Agreement Providing for Retainage, 21-7  
Notice of Cancellation, 4-4  
Notice of Change of Debtor's Address, 14-2  
Notice of Change of Locks Letter, 25-24  
Notice of Claim to Owner and Original Contractor, 21-2  
Notice of Collection Agent Fees, 23-15  
Notice of Default, 25-21  
Notice of Default [Home Equity Loan], 14-31  
Notice of Default and Intent to Accelerate, 14-4  
Notice of Delinquency to Subordinate Lienholder, 23-16

[All references in this list are to form numbers.]

[Chapters 1-7, vol. 1; chs. 8-15, vol. 2; chs. 16-22, vol. 3; chs. 23-26, vol. 4]

Notice of Enforcement Action and Attorney's Fees, 23-17

Notice of Final Agreement, 10-14

Notice of Foreclosure Sale, 23-19

Notice of Lender's Interest in Water Rights and Permit, 16-24

Notice of Maturity and Demand for Payment, 14-3

Notice of Membership in Property Owners Association Concerning the Property at [street address and name of residential community], 23-9

Notice of Obligation to Pay Public Improvement District Assessment to [name of municipality or county levying assessment] Concerning the Property at [street address], 4-5

Notice of Our Plan to Sell Property, 14-28

Notice of Penalties for Making False or Misleading Written Statement (Pursuant to Section 343.105, Texas Finance Code), 10-19

Notice of Rescission of Trustee's Sale, 14-40

Notice of Retainage Agreement, 21-8

Notice of Strict Foreclosure, 14-26

Notice of Termination of Contract [Water Rights], 16-17

Notice of Termination of Work or Abandonment of Performance by Original Contractor or Owner, 21-15

Notice of Transfer of Security Deposit, 5-22

Notice of Trustee's Sale [Mortgagee], 14-12

Notice of Trustee's Sale [Mortgage Servicer], 14-13

Notice of Water Level Fluctuations, 4-20

Notice Regarding Insulation to Buyer of New Home, 4-6

Notice Regarding Possible Annexation, 4-15

Notice Regarding Possible Liability for Additional Taxes, 4-14

Notice Regarding Sale Subject to a Recorded Lien, 4-9

Notice Regarding Specially Fabricated Material[s], 21-6

Notice to Cosigner, 6-7

Notice to Original Contractor by Second-Tier Claimant, 21-1

Notice to Owner Regarding Liens against Homestead Property, 21-3

Notice to Purchaser[s], 23-8

Notice to Purchaser of Property Located in Certain Annexed Water Districts, 4-18

Notice to Purchaser of Property Seaward of Gulf Intracoastal Waterway, 4-13

[All references in this list are to form numbers.]

[Chapters 1-7, vol. 1; chs. 8-15, vol. 2; chs. 16-22, vol. 3; chs. 23-26, vol. 4]



Notice to Purchaser Regarding Coastal Area Property, 4-12

Notice to Purchaser Regarding Restrictive Covenants, 4-11

Notice to Purchaser That Property Is Located within the Area of the Alignment of a Transportation Project, 4-19

Notification of Disposition of Collateral, 14-29

**O**

Objection to Proposal to Accept Collateral in [Full/Partial] Satisfaction of Obligation, 14-27

Office Lease, 25-3

Option to Purchase [For Use with Real Estate Sales Contract], 4-24

Other Indebtedness Clauses, 8-6

Owely of Partition Agreement, 5-12

Owely of Partition Deed, 5-11

Owner Affidavit of Completion, 18-7

**P**

Parking Facility Rider to Office Lease, 25-4

Partial Release Clauses, 8-7

Partial Release of Judgment Lien, 26-32

Partial Release of Lien, 10-3

Partial Release of Lien [Water Rights Off-Site Production], 16-11

Partial Release of Lien [Water Rights On-Site Production], 16-8

Partial Release of Mechanic's and Materialman's Lien, 21-14

Partial Revocation of Transfer on Death Deed, 5-27

Partition Deed, 5-23

Payment Clauses, 6-2

Permittee's Instruction Letter to Water Authority, 16-25

Permit Transfer Request, 16-12

[Posted] Notice of Public Sale, 14-23

Prenotification Statement [Notice of Security Interest], 9-6

Prepayment Clauses, 6-3

Promissory Note, 6-1

[All references in this list are to form numbers.]

[Chapters 1-7, vol. 1; chs. 8-15, vol. 2; chs. 16-22, vol. 3; chs. 23-26, vol. 4]

Property Condition Disclaimer, 26-33

**Q**

Quitclaim, 5-5

**R**

Real Estate Commission Rider, 25-28

Real Estate Sales Contract, 4-1

Record of Unit \_\_\_\_\_ of \_\_\_\_\_, a Condominium, 24-10

Records Production and Copying Policy, 23-12

Reinstatement Agreement, 14-6

Release of Collateral Transfer of Note and Lien, 10-21

Release of Judgment Lien, 26-34

Release of Lien, 10-2

Release of Mechanic's and Materialman's Lien, 21-13

Request for Copy of Affidavit of Completion, 21-12

Request for Information to Original Contractor, 21-10

Request for Information to Owner, 21-9

Request for Information to Subcontractor, 21-11

Required Information [Issued on [date]] Applicable to the Property Including Resale Certificate, 23-10

Resale Certificate, 24-6

Reservations from Conveyance, 5-7

Residential Construction Contract, 18-4

Residential Lease, 25-5

Restrictive Covenant Agreement, 23-11

Retail Lease, 25-2

Revocable Transfer on Death Deed, 5-25

Revocation of Power of Attorney, 26-35

Revocation of Transfer on Death Deed, 5-26

Right of First Offer Agreement, 4-27

Right of First Refusal Agreement, 4-26

[All references in this list are to form numbers.]

[Chapters 1-7, vol. 1; chs. 8-15, vol. 2; chs. 16-22, vol. 3; chs. 23-26, vol. 4]

Rules of [name of condominium owners association] [, Inc.], 24-11

Rules of [name of property owners association] [, Inc.], 23-5

## S

Second-Lien Clauses for Use with Subordinate Deeds of Trust, 8-8

Security Agreement [Accounts, Chattel Paper, General Intangibles, Commercial Tort Claims], 9-2

Security Agreement [Goods, Including Documents Covering Goods, Equipment, Inventory, Consumer Goods,  
and Farm Products], 9-1

Security Agreement [Instruments, Investment Property], 9-3

Security Agreement [Interest in Noncorporate Entity], 9-4

Security Agreement [Water Rights], 16-22

Security Agreement and Transfer of Lien (from Condominium Association), 24-13

Security for Payment, 6-5

Seller's Disclosure of Property Condition, 4-22

Special Durable Power of Attorney for Real Estate Transactions, 26-36

Special Warranty Deed, 5-3

Statement of Subscribing Witness in Presence of Subscriber, 3-32

Statement of Subscribing Witness on Acknowledgment by Subscriber, 3-33

Statutory Durable Power of Attorney, 26-37

Statutory Form for Ordinary Certificate of Acknowledgment, 3-29

Storage Tanks Disclosure Provider, 4-10

Sublease, 25-19

Subordination, Attornment, and Nondisturbance Agreement, 25-13

Subordination of Lien, 10-13

Surface Damage Payment Addendum, 16-5

Surface Use Restrictions Addendum, 16-6

Surface Water Rights Conveyance—Conditional, 16-19

Surface Water Rights Conveyance—Unconditional, 16-20

Surface Water Rights Sales Contract, 16-18

Survivorship Agreement, 5-18

Survivorship Agreement for Community Property, 5-19

[All references in this list are to form numbers.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]

T

Tenant Estoppel Certificate, 25-17  
Tenant Improvements Rider to Lease or Work Letter, 25-25  
Tenant's Acceptance Letter, 25-16  
Tenant's Subordination to Decd of Trust Lien, 25-14  
Termination of Lease, 25-32  
Termination of Right of Possession Letter, 25-22  
Transfer of Escrow Funds [and Hazard Insurance Policy], 5-17  
Transfer of Note and Lien, 10-1  
Trustee's Deed [with Bill of Sale], 14-16  
Truth-in-Lending Notice of Right of Rescission [Notice of Right to Cancel—General], 12-1  
Truth-in-Lending Notice of Right of Rescission [Notice of Right to Cancel—Refinancing], 12-2

U

UCC1 (Financing Statement), 9-11  
UCC1Ad (Financing Statement Addendum), 9-12  
UCC1AP (Financing Statement Additional Party), 9-13  
UCC3 (Financing Statement Amendment), 9-14  
UCC3Ad (Financing Statement Amendment Addendum), 9-15  
UCC3AP (Financing Statement Amendment Additional Party), 9-16  
UCC5 (Information Statement), 9-17  
UCC11 (Information Request), 9-18  
Unanimous Written Consent of Condominium Association Board of Directors for Approval of Secured Loan  
under Texas Property Code § 82.102(f), 24-12  
Unconditional Partial Release During Construction, 18-9  
Unconditional Release on Final Payment, 18-11  
Utility District Notice, 4-17

V

Vendor's Lien Clauses, 8-3

[All references in this list are to form numbers.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]

W

Waiver of Condominium Resale Certificate, 24-7

Waiver of Consumer Rights, 4-21

Waiver of Rights after Default, 14-21

Warranty Deed with Vendor's Lien, 5-2

[All references in this list are to form numbers.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]

*[Reserved]*

# Subject Index

[References are to section numbers in the practice notes.]

## A

### **Abandonment of property by tenant, 2.1**

**Abstracts of judgment, 2.2, 2.139**  
to perfect child support liens, 2.40  
release of, 2.214. (*See also* Release of lien)

### **Accessibility, standards for, 2.15, 2.94**

### **Accounts, 9.5:3**

### **Acknowledgment**

generally, 3.10  
administrator or executor of estate, 3.10:3, 3.11:4, 3.12:6  
attorney-in-fact, 3.10:3, 3.11:4, 3.12:6  
authorized officers, 3.11, 3.11:1, 3.12:3  
disqualifications, 3.11:1  
caption, 3.12, 3.12:2  
corporations, 3.10:3, 3.11:4, 3.12:6  
date, 3.12, 3.12:8  
definition of, 3.10:2  
durable power of attorney, 3.10:1  
filing fees, 3.15  
foreign, 3.11:1, 3.12:1  
guardian, 3.10:3, 3.11:4, 3.12:6  
by handwriting, 3.13:3  
identifications of persons, 3.12, 3.12:5, 3.12:7  
long-form certificate, 3.10:2, 3.10:4, 3.12  
of mark, 3.8:2, 3.8:3  
mechanic's lien affidavit, 21.5:1  
military personnel, 3.11:1  
necessity for, 3.10:1  
notary public, 2.4, 3.11:1, 3.11:2, 3.12:1, 3.12:8, 3.12:10  
online notarization of, 2.4  
out of state, 2.181, 3.11:1  
partnership, 3.10:3, 3.11:4, 3.12:6  
personal appearance, 3.11:2, 3.12, 3.12:4  
proof by subscribing witness, 3.13:2  
recording, 2.4, 3.10:1, 3.14  
recordkeeping, 3.12:11  
requirements for taking, 3.11, 3.12  
seal of officer, 3.12, 3.12:10  
short-form certificate, 3.10:2, 3.10:3, 3.12  
signature of officer, 3.12, 3.12:9  
trustee, 3.10:3, 3.11:4, 3.12:6

### **Ad valorem tax**

appraisal of land for, 2.184  
benefits to encourage economic development, 2.75  
escrow arrangement for paying, 5.12:7  
exemptions, 2.5  
paid by lender, recording requirements, 8.2:9  
proration of, 2.5, 4.13, 16.29:2, 16.57:2, 16.78:2

### **Adverse possession, 2.6**

### **Affidavit**

of acceptance by owner, 20.6  
bills-paid, for residential construction, 18.7:9  
of commencement for residential construction, 18.4, 18.7:5  
of completion of residential construction, 18.7:7, 20.6  
constitutional lien, 21.1  
false, penalties for, 18.2, 18.7:9  
foreclosure (*see under* Foreclosure, notice)  
form of, 3.13:1  
of heirship, 2.7  
of homestead, 10.7  
homestead lien, 2.50  
of lost note, 11.22  
to pay ad valorem taxes, 8.2:9  
release of lien by, 2.213  
satisfaction of fee simple determinable condition, 5.12:4  
statutory mechanic's or materialman's lien, 21.2, 21.3:1–21.3:3  
contractual retainage claims, time limits, 18.3:4, 21.6  
filing, 21.5:1  
nonresidential projects, 21.7:1  
residential projects, 21.7:2

### **Affordable housing, 2.8**

### **After-acquired property, security agreement, 9.4:4, 9.10:1, 9.14:3**

### **Agricultural development districts, 2.9** disclosure to purchaser, 2.66

**Agricultural land. *See also* Farm products**  
fences and gates, 2.98  
foreign ownership, 2.107  
landowner's liability, 2.143

[Decimal numbers refer to sections in practice notes.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]

lease, 25.7

**Agricultural liens**, 2.10, 9.2:3, 9.6:3, 9.7:2

**Agricultural use exemption**, 2.5, 2.157, 2.184, 11.2

**Aircraft**

lien, 2.12

security interest, 9.5:8, 9.7, 9.13:2

**Alcoholic beverage permit**, 2.13

**Alternative dispute resolution**, 2.14. *See also*

Arbitration, when agreement voidable  
for residential construction, 18.2:2

**American Institute of Architects (AIA), use of form**, 19.3, 20.6

**American Land Title Association**, 4.8:2

**Amounts, form for writing**, 3.1

**Annexation**, 2.16

land use in annexed area, 2.282

**Antiquities**, 2.17

**Appraisal**

of land for ad valorem tax, 2.184

requirements for, 8.10:5

home equity loans, 11.4

tenant's right to protest, 25.11:5

**Appraisers**

coercion of, prohibited, 12.1:4

licensing and certification of, 2.18, 2.199

lien, creation of, by, 25.9:1

**Arbitration, when agreement voidable**, 2.19

**Architect/engineer**

role, 19.3

services, 19.2

**Architects**

American Institute of Architects (AIA), use of form,  
19.3, 20.6

lien against real estate, 2.20

statutes of repose, 2.240

validity of indemnity agreements limited in  
construction contracts, 2.133, 17.2:4

**Architectural barriers**, 2.15

**Architectural control committee (ACC)**, 23.3:6

**Architectural works, copyright protection for**,  
2.56

**Army Corps of Engineers**, 2.292

**Artesian water**, 16.2:1

**Asbestos materials**

disclosure of, 2.66

in lease, 25.6, 25.10, 25.12:9

statutes affecting, 2.82

**Assignment**

and assumption of leases, 5.13:8, 16.12, 16.42

of contract, 4.15, 16.28, 16.56, 16.77

home equity lending (*see* Home equity lending)

in lease, 25.12

of rent, income, and receipts, 10.4

**Associations**

nonprofit, 2.274

property owners, 2.200, ch. 23

**Assumed names**, 2.22

**Assumption agreement**, 10.17

**Astronomical observatories**, 2.23

**Attachment, perfection by**, 9.4:6, 9.5:6

in water rights transactions, 16.81:4

**Attorney-client relationship**

conflict of interest, 1.5:1, 1.5:2

disengagement letter, 1.8:2

engagement letter, 1.5:4

fee arrangements, 1.5:2, 1.5:4, 1.5:5

fees, 1.5:3, 1.5:4. (*See also* Attorney's fees)

attorney subject to fair debt collection practices,  
2.93

nonpayment of, 1.8:1

grievance procedure, 1.1:2, 1.3

responsibilities of attorney

clarifying nonrepresentation, 1.6:4, 10.10

consent required for multiple representation, 1.5:2

during consultation, 1.4:2

contacting one represented by counsel, 1.6:5

declining representation, 1.4:2–1.4:4

disclosing conflicts, 1.5:1

entering into transactions with clients, 1.6:3

home equity loan transaction, 11.51

keeping client informed, 1.6:1

recordkeeping, 1.5:3, 1.5:6

standard of conduct, 1.1

terminating, 1.8

what constitutes, 1.4:1–1.4:3

**Attorney-in-fact**

acknowledgment for, 3.10:3, 3.11:4, 3.12:6

acting under valid power of attorney, 11.21

[Decimal numbers refer to *sections* in practice notes.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]



**Attorney's fees.** *See also* Attorney-client relationship  
 for action involving promissory note, 6.1:1  
 for home equity loans, 11.5, 11.6:3  
 responsibility for, when sales contract terminated,  
 4.14, 16.27, 16.55, 16.76  
 in security agreements, 9.10:4  
 for transactions involving fraud, 2.111

**Automatic teller machines,** 2.24

## B

**Bankruptcy,** 2.25  
 effect of, on correction deed, 5.8  
 foreclosure subject to, 2.104  
 release of lien, 2.214

**Barriers, architectural,** 2.15

**Beaches.** *See* Coastal property

**Beauty shop leases,** 2.27

**Billboards,** 2.186

**Bill of sale**  
 deed of trust combined with, 5.12:2  
 effect of, 5.7:1  
 implied warranties, 5.7:3  
 motor vehicle, 5.7:1  
 preparing, to transfer title to personal property, 5.7:2  
 recording, 5.7:1

**Blind trust,** 2.29

**Book entry system,** 14.2:2

**Borrowing resolutions,** 10.5

**Brokers, real estate,** 2.30. *See also* Mortgage loan originator  
 disclosure requirements, 2.66  
 fees for home equity loan, 11.6:3  
 lien, requirements for, 25.9:1  
 real estate commissions, 4.13, 16.26, 16.54, 16.75

**Brownfields statute,** 2.82, 2.284

**Building codes,** 2.32

**Building standards,** 18.2:2

**Business entities,** 2.33

## C

**Camping resorts,** 2.34  
 disclosure requirements, 2.66

**Captions,** 3.2, 3.12:2

**Cash proceeds,** 2.35

**Cemeteries,** 2.36

**Certificates of convenience and necessity,** 2.37,  
 2.231

**Certification of trust,** 2.38, 10.15

**Certified or registered mail,** 2.212  
 affidavit of completion of residential contract, 18.7:7  
 foreclosure notices, 14.5  
 required for special notices regarding mechanic's  
 lien, 21.5:5

**Child care centers,** 2.146

**Child support lien,** 2.40, 2.95

**Chlorofluorocarbons (CFCs), statutes affecting,**  
 2.82

**Choice-of-law provisions,** 2.41, 2.50  
 construction contracts, 2.52  
 governing security interests, 9.6  
 promissory notes, 6.4:9

**Client.** *See* Attorney-client relationship

**Closing**  
 checklist, 4.17:3, 16.30:2, 16.58:2, 16.79:2  
 date, 4.5, 16.18, 16.46, 16.67  
 documents, 4.6, 4.13, 16.19, 16.26, 16.47, 16.54,  
 16.68, 16.75  
   preparing, 4.6:3, 16.29:3, 16.57:3, 16.78:3  
 earnest money (*see* Earnest money)  
 escrow fund, transfer of, 5.12:7  
 expenses, 4.16:1, 16.29:1, 16.57:1, 16.78:1  
   home equity loan, 11.6  
 functions at, 4.16, 16.29, 16.57, 16.78  
 funding disbursements, 4.16:4, 16.29:4, 16.57:4,  
 16.78:4  
 home equity lending (*see* Home equity lending)  
 instructions, 4.16:6, 16.29:6, 16.57:6, 16.78:6  
 insurance requirements before, 4.17:2  
 IRS reporting requirements, 4.16:4, 16.30:1, 16.58:1,  
 16.79:1  
 notices, statements, and certificates, 4.6:3, 16.19:3,  
 16.47:3, 16.68:3

[Decimal numbers refer to *sections* in practice notes.]

[Chapters 1-7, vol. 1; chs. 8-15, vol. 2; chs. 16-22, vol. 3; chs. 23-26, vol. 4]

recording documents, 4.16:5, 16.29:5, 16.57:5, 16.78:5  
 representations, 4.6:1, 16.19:1, 16.47:1, 16.68:1  
 review of documents after, 4.17:4, 16.30:3, 16.58:3, 16.79:3  
 seller-financed, duties of buyer in, 4.4:5  
 seller financing addendum, 4.6:4, 16.19:7, 16.47:4, 16.68:4  
 seller's records, 4.6:2, 16.19:2, 16.47:2, 16.68:2  
 title commitment and survey, 4.8, 16.21, 16.45:3, 16.49, 16.70  
 title company's responsibilities, 16.17:2, 16.29, 16.45:2, 16.57, 16.66:2, 16.78. (*See also* Escrow agent; Title; Title company)

**Coastal property, 2.42**

easements to, 2.42  
 environmental statutes, 2.82  
 foreclosure, 14.2:6  
 notices for property transactions, 2.42  
 windstorm inspection of structures, 2.294

**Collateral**

categories of, 9.3:3, 9.9  
 classification and description of, 9.4:4, 9.14:3  
 defined, 9.2:1, 9.3:1  
 possession or control of, 9.4:4–9.4:6, 9.5:4, 9.5:5

**Collateral for home equity loan. *See* Home equity lending****Collateral transfer of note and lien, 9.18, 14.11**

generally, 9.18:1  
 endorsement of, 9.18:5  
 estoppel certificate, 9.18:6  
 foreclosure sale, 14.11  
 instructions for preparing, 9.18:2  
 perfecting security interest, 9.18:3  
 recording, 9.18:4

**Collection and payment agreement, 8.5:2, 10.6****Colonias, 2.43. *See also* Contract for deed; Economically distressed counties****Commercial construction. *See* Construction, commercial contract****Commercially reasonable, 14.3, 14.3:2, 14.3:3, 14.3:7, 14.3:10****Community homes for disabled persons, 2.44****Community land trusts, 2.8****Community property. *See under* Property****Condemnation, 2.46, 11.9:1, 25.1:6****Condominium**

generally, 24.1:1  
 assessments, 24.3:5  
     defined, 24.1:1, 24.3:1  
     liens, foreclosure of, 24.1:3  
 association income, assignment of, 24.3:4  
 bylaws, 24.4  
 common elements, 24.3:3  
     defined, 24.3:1  
 creating, 24.1:1  
 declarant rights, 24.3:8, 24.3:9  
 declaration, 24.3  
     amendment of, 24.3:7  
     definitions in, 24.3:1  
 definition of, 24.1:2  
 description in warranty deed, 5.15:3  
 development rights, 24.3:8  
 foreclosure of, 24.1:3  
 as incidental collateral in home equity loan, 11.9:1  
 information statement, 24.6:1  
 insurance, 17.4:4  
 management certificate, 24.6:2  
 notice of right of rescission regarding, 12.2:2  
 record of unit, 24.6:4  
 redemption rights after foreclosure, 2.104, 2.211, 24.1:3  
 resale certificate, 24.6:3  
 restrictions on use, 24.3:2  
 rules, 24.5  
 statutes affecting, 2.47, 24.1:2  
 voting rights, 24.3:6

**Confidentiality notice**

generally, 2.49, 3.16  
 conspicuous text, 2.50  
 contract for deed, 2.55  
 deeds, 2.61, 5.1:1  
 deeds of trust, 2.62, 8.2:11, 8.5:4  
 disclosures, 2.66  
 leasehold deed of trust, 8.8:1  
 loan documents, 2.157, 10.1:5  
 mechanic's lien contract, 2.163, 20.1:4  
 modification or extension agreement, 10.3:2  
 transfer of lien, 10.1:5  
 trustee's deed, 14.6:4

**Consideration**

amount of, form for writing, 3.1  
 deed in lieu of foreclosure, 5.13:2  
 description in warranty deed, 5.2:1–5.2:7  
 in gift deed, 5.9  
 note as, 5.3:2–5.3:5

[Decimal numbers refer to *sections* in practice notes.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]

partition clause, 5.10  
in sales contract, 4.4:5, 16.17:7, 16.45:7, 16.66:10

**Consignments, covered by UCC chapter 9, 9.2:1**

**Conspicuous Rule, 17.2:5, 25.1:4**

**Conspicuous text, 2.50**

**Construction**

accounts, 2.51

anti-indemnity statute, 18.2:3

asbestos regulations, 2.82

building codes, 2.32

commercial contract

architect and engineering services, 19.2

choice of and venue, 19.10

contract price, 19.4

default and remedies, 19.8

insurance, 19.7

payment and performance bonds, 19.6

retainage, 19.5

role of architect/engineer, 19.3

warranties, 19.9

construction payment bonds, 2.53, 2.246

contractors (*see also* Subcontractors)

disclosure statement, 18.7:1

liability, 2.143, 18.2:2

list of subcontractors and suppliers, 18.7:2

reserving right to nonjudicial foreclosure, 8.2:7

responsibilities of, 18.2, 21.1

statutes of repose, 2.240

contract provisions, 2.52

validity of indemnity agreements limited, 2.133

loan, secured by deed of trust, 8.11:2

financial statement requirement, 8.10:4

insurance provisions, 8.10:7

mechanic's lien (*see* Mechanic's lien)

nonresidential project, time limits and deadline, 21.8,  
21.9:1

residential

claim, limitation in foreclosure, 2.152

liability for defects in, 2.216

notices, 4.10, 18.2:2

wood shingles, restrictive covenant for, void,  
2.295

residential contract (*see also under* Mechanic's lien)

bills-paid affidavit, 18.7:9

change order, 18.3:3, 18.5, 18.7:6

commencement of, 18.4, 18.7:5

completion of, 18.7:7, 20.6

cooling-off period, 12.2:2, 12.3

delays, 18.5

disbursement disclosure statement, 18.7:3

effect on homestead, 18.1, 18.2:2, 18.3:1, 21.1

foundation responsibility, 18.3:5

functions of, 18.1, 18.7:4, 20.1:1

indemnity, 18.2:3

insurance considerations, 18.3:4

lien waiver, 18.7:8

notice of cancellation in, 18.3:3

participants in project, 21.3, 21.3:1–21.3:3, 21.5:6

penalties, 18.2, 18.7:9

price adjustments, 18.5

price structures, 18.3:2

"punch list," 18.5

retainage of contract price, 18.3:4

statutory lien, 21.2

statutory notices, 18.2:2

survey required, 18.3:5

timetable for project, 21.9:2

use of, 20.1:1, 20.4:2

warranties, 18.6

trust fund statute, 20.3:4

windstorm inspection, 2.294

**Consumer Credit Commissioner, Office of.** *See*  
*under* Home equity lending

**Consumer laws**

generally, 2.54, 2.207

construction on homestead property, protection for,  
18.1, 18.3:3

credit reporting, 2.69, 2.92, 25.1:5

deceptive trade practices actions, 2.60

fair debt collection practices, 2.69, 2.93, 14.4:5

federal disclosures, 12.1:3, 12.11:3, 20.1:4

restrictions of, on mechanic's lien transactions,  
20.1:1

right of rescission, 2.220, 18.1. (*See also* Right of  
rescission, notice of)

Texas provision for remodeling, 20.1:4

truth in lending (*see* Truth in lending)

**Consumer loans, 6.2:7, 8.4, 20.2:3**

**Consumer Price Index, 25.11:3**

**Contract.** *See also* Contract, sales; Contract for deed

choice-of-law provisions, 2.41, 2.50, 2.52

confession-of-judgment provisions, 2.48

conspicuous text, 2.50

good faith and fair dealing, 2.116

home improvement, notice requirements, 2.125

retainage notice, 18.3:4, 21.5:5, 21.6

mechanic's lien (*see under* Mechanic's lien)

mediation provision, 2.14

notices in, 2.50, 2.113. (*See also* Notice)

partition as binding, 5.10

[Decimal numbers refer to *sections* in practice notes.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]

for services, validity of indemnity agreements  
 limited, 2.133  
 time requirement to bring suit, 2.248

**Contract, executory.** *See also* Contract for deed  
 warranty deed with vendor's lien as, 5.3:1

**Contract, sales.** *See also* Contract; Contract for deed  
 generally, 4.1–4.3, 16.12–16.15, 16.42, 16.43,  
 16.62–16.64

assignment provision, 4.15, 16.28, 16.56, 16.77  
 closing (*see* Closing)

commission agreement, 4.13, 16.26, 16.54, 16.75

consideration, 4.4:5, 16.17:7, 16.45:7, 16.66:10

county for performance, 4.4:8

description of property, 4.4:2, 16.17:8, 16.45:8

earnest money (*see* Earnest money)

environmental matters, 4.6:1, 4.8:1, 4.9, 4.10,

16.19:1, 16.22, 16.47:1, 16.50, 16.68:1, 16.72

indemnity provisions, 4.9, 16.22, 16.50, 16.71

involving foreign persons, 4.17:1, 16.30:1, 16.58:3,  
 16.79:3

parties' obligations concerning property, 4.11, 16.24,  
 16.52, 16.73

postclosing considerations, 4.17:4, 16.30:3, 16.58:3,  
 16.79:3

representations in, 4.6:1, 4.10, 16.19:1, 16.23,  
 16.47:1, 16.51, 16.68:1, 16.72

seller-financed transaction, 4.4:5, 16.17:7, 16.45:7,  
 16.66:10

addendum, use of, 4.6:4, 16.19:7, 16.47:4, 16.68:4  
 termination of, 4.9, 4.12, 16.22, 16.25, 16.50, 16.53,  
 16.71, 16.74

remedies for, 4.14, 16.27, 16.55, 16.76

title and survey, 4.8, 16.21, 16.45:3, 16.49, 16.70

title commitment review, 4.8:1, 16.21:1, 16.49:1,  
 16.70

title company, designation of, 16.17:2, 16.29,  
 16.45:2, 16.57, 16.66:2, 16.78

Uniform Commercial Code search, review of, 4.8:3,  
 16.21:4, 16.49:4

**Contract for deed.** *See also* Contract; Contract,  
 sales

generally, ch. 13

colonias, regulations for, 2.43

confidentiality notice, 2.55

notice requirement, 2.50, 2.55

**Contractors.** *See* Construction

**Control, perfection by,** 9.4:6, 9.5:5

**Cooperative unit, notice of right of rescission  
 regarding,** 12.2:2

**Copyrights,** 2.56

perfecting security interest in, 9.7

**Corporations and partnerships**

acknowledgment, 3.10:3, 3.11:4, 3.12:6

filing federal tax lien notice for, 9.7:3

guaranty authorized by, 10.13

name of, in financing statement, 9.5:3

names of parties in deeds, 3.9, 6.3:6

nonprofit, 2.178

resolutions, 10.5

statutes affecting, 2.33, 2.57

**Correction deed,** 2.61, 5.8

**Cosigner, notice to,** 6.5:2

**County boundary, jurisdiction over watercourse,**  
 2.287

**County transportation authority,** 2.262

**Covenant.** *See also* Warranty

not to compete, 2.58

restrictive, 2.66, 2.218

enforceability of, 5.12:9

not added by correction deed, 5.8

for wood shingles, void, 2.295

of security agreement and financing statement, 9.7:1

**Credit services agreement, notice of cancellation,**  
 2.50

**Criminal record checks,** 2.59

## D

**Damages**

landlord's duty to mitigate, 2.1, 2.142

liquidated, 4.4:7, 16.17:14, 19.8, 16.45:13, 16.66:12  
 provisions, 2.155

**Date**

closing, 4.5, 11.38, 16.18, 16.46, 16.67

of consumer transaction, 12.4

for instruments, 3.3

in acknowledgment, 3.12, 3.12:8

**Debt collection**

attorneys as debt collectors, 2.93

notice, foreclosure, 14.4:5

statutes affecting, 2.93

**Debtor, address of,** 14.2:2, 14.5

**Deceptive trade practices, actions for,** 2.60

[Decimal numbers refer to *sections* in practice notes.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]

**Declarant rights, condominium**, 24.3:8, 24.3:9

**Deed.** *See also* Warranty deed; Warranty deed with vendor's lien  
 acceptance of, 5.13:1  
 "as is" conveyance, 5.12:3  
 assumption, waiver of implied vendor's lien in, 5.12:1  
 confidentiality notice, 2.61, 5.1:1  
 contract for (*see* Contract for deed)  
 corporate seal on, 5.1:1  
 correction, 2.61, 5.8  
 escrow fund, transfer of, 5.12:7  
 gift, 5.9  
 for groundwater conveyance, 16.21, 16.42  
 guardianship, 5.13:4  
 in lieu of foreclosure, 14.2:8  
 manufactured housing, 5.15:6  
 meaning of "grant" or "convey" in, 2.5, 5.1  
 name of corporate officer, 3.9  
 original, effect of correction deed on, 5.8  
 partition, 5.10  
 preparing, legal requirements, 2.61, 2.157, 2.266  
 quitclaim, 5.6  
 recording and filing, 3.14, 3.15  
 requirements for corporations, 2.57, 5.1:1  
 restrictions  
   colonias, 2.43  
   against discrimination, 2.67  
 strips and gores provision, 5.12:5  
 for surface water conveyance, 16.62  
 timeshare, 5.15:5  
 trustee's, 14.6:4

**Deed of trust.** *See also* Deed; Deed of trust to secure assumption; Leasehold deed of trust  
 additional clauses, 8.10  
 advantage of use of, 8.1  
 affidavit and notice of advancement, 14.6:6  
 appraisal of real property, 8.10:5  
 bill of sale combined with, 5.12:2  
 cash advanced acknowledged in, 8.2:9  
 confidentiality notice, 2.62, 8.2:11, 8.5:4  
 "dragnet" or "other indebtedness" clause, 8.4  
 due-on-sale clause, 8.1:1, 8.2:10, 8.4, 8.6, 8.10:11  
 effect of, 8.1  
 effect of deed in lieu of foreclosure on, 5.13:2  
 financial statement, requirement, 8.10:4  
 foreclosure (*see* Foreclosure)  
 further assurances, agreement for, 8.10:6  
 future advances, 8.10:1  
   clause, 8.1:1  
 home equity loan, 11.54

homestead, lien on, 8.1:2  
 income-producing property  
   insurance clauses, 8.10:7  
   recordkeeping, 8.10:3  
 insurance provisions, 8.4, 8.10:7  
 lien  
   created on fixtures, 9.7:1  
   extension and renewal clauses, 8.2:8  
   filing of financing statement, 9.14:5  
 loan proceeds, use of, 8.10:9  
 mechanic's lien contract, use in, 8.2:7  
 note secured by, 5.3:3, 6.5:1. (*See also* Note)  
   description, 8.2:2  
 partial release of lien in, 8.10:2  
 parties, designation of, 8.2:1  
 preparing, legal requirements, 2.157, 2.266  
 prior liens, 8.2:4  
 recording and filing, 3.14, 3.15, 8.11:1  
 repayment of loan, "no personal liability," 8.10:10  
 as security agreement and financing statement, 8.1, 8.11, 9.8  
   collateral classification, 8.11:1  
   filing of, 9.14:5  
   modifications and clauses, 8.11:2  
 security interest in, 14.10  
 "subject to" transaction, 8.10  
 subordinate  
   drafting considerations, 8.5  
   effect of, 8.3  
   lien financing, 8.4  
   prohibiting, by lender, 8.10:8  
 subordination of lien, 10.11  
   by tenant, 25.12:2  
 tax and insurance reserve clause, 8.1:1  
 trustee  
   designation of, 6.3:6  
   duties of, 8.1:2  
   multiple appointments of, 8.2:1  
 with vendor's lien clause, 5.3:2, 8.2:6  
 water rights transactions, use for, 16.81, 16.81:2  
 wraparound mortgage (*see* Wraparound mortgage)

**Deed of trust to secure assumption.** *See also* Deed; Deed of trust; Leasehold deed of trust  
 additional clauses, 8.7:1, 8.10  
 drafting considerations, 8.7  
 effect of, 8.6  
 reference to, in deed, 5.2:3  
 "subject to" transaction, 8.10  
 warranty deed provisions, use with, 8.7:2

**Default.** *See also* Foreclosure  
 curing in wraparound note, 8.5:3

on home equity loan  
 amounts advanced after, 11.5  
 cross-default provisions prohibited, 11.13:1  
 promissory note, 6.4:5  
 of security interest, statutory procedure, 8.11:1  
 termination of contract, 4.14, 16.25, 16.53, 16.74  
 when earnest money uncollectible, 4.3, 16.16, 16.44,  
 16.65

**Defense, innocent-landowner, to environmental liability**, 2.134. *See also* Remedies

**Deficiency judgment**, 2.119  
 after foreclosure, 2.63  
 limitations for, 2.152

**Deposit accounts**, 9.2:3, 9.3:3, 9.4:6, 9.5:5

**Depository institution, failed**, 2.91

**Disabled persons**  
 notary public's signature for, 3.8:2  
 statutes affecting access requirements, 2.15, 2.94

**Disciplinary Rules of Professional Conduct, Texas**, 1.1

**Disclosure**  
 of asbestos materials, 2.66, 25.6, 25.10, 25.12:9  
 brokers, requirements for, 2.66  
 coastal property, 2.42  
 concerning contracts for deed (*see* Contract for deed)  
 concerning home insulation, 2.52, 2.66, 18.3:4  
 confidentiality notice, 2.66  
 federal laws and regulations, 12.1:3, 12.2:1, 12.11,  
 20.1:4  
 by financial institutions making federal home  
 mortgage loans, 2.126  
 for group ownership of real estate, 2.226  
 home equity loan, notice, 11.18:1, 11.20:3  
 one-day notice, 11.17:2  
 home loans, 2.66  
 interstate land sales, 2.66, 2.136  
 of lead-based paint, 2.82, 2.146, 25.10, 25.12:8  
 manufactured-home community lease, 25.8:1  
 of pipelines and hazardous substances, 2.66  
 property conditions, 2.66  
 for purchases from foreign persons, 4.17:1, 16.30:1,  
 16.58:1, 16.79:1  
 for purchases of unimproved real property, 2.66  
 for purchases within agricultural development  
 districts, 2.66  
 rental-purchase agreements, 2.50  
 sellers, requirements for, 2.66  
 of storage tanks, 2.66, 2.268  
 truth in lending (*see* Truth in lending)

of utility district, 2.66, 2.277  
 variable rate, 6.3:3  
 when selling condominiums, 2.47

**Discrimination**, 2.67  
 cause of action against creditor for, 2.83  
 statutes affecting fair housing, 2.94

**Documents, electronic filing of**, 2.78, 3.14, 3.15

**Dodd-Frank Act**, 2.69  
 generally, ch. 12

**Dry cleaners**, 2.70

**Due-on-sale provisions**, 2.71  
 in deed of trust, 8.1:1, 8.2:10, 8.4, 8.6, 8.10:11  
 federal restrictions, 8.2:10

**Durable power of attorney**, 2.72  
 acknowledgment required, 3.10:1

## E

**Earnest money**  
 additional, 4.9, 16.22, 16.50, 16.66:9  
 amount of, 4.5, 16.17:6, 16.45:6, 16.66:9  
 investment of, 4.7, 16.20, 16.48, 16.69  
 termination of contract, 4.12, 16.25, 16.53, 16.74  
 if uncollectible, 4.3, 16.16, 16.44, 16.65

**Easement**  
 groundwater rights, 16.12, 16.19:8  
 on partition, 2.189  
 pipeline, 2.73  
 sanitary control, 16.19:8  
 telecommunications, 2.252  
 in townhouse property, 5.15:4  
 warranty deed clauses, 5.15:2

**Economically distressed counties**, 2.43, 2.74

**Economic development**, 2.75

**Electronic chattel paper**, 9.3:3, 9.4:6, 9.5:5

**Electronic commerce**, 2.77

**Electronic communication, confidentiality of**,  
 1.7:1

**Electronic filing of documents**, 2.78, 3.14, 3.15

**Electronic records**, 2.271

**Eminent domain**, 2.46  
 agricultural development districts, power of, 2.9

[Decimal numbers refer to *sections* in practice notes.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]

pipeline easement created by, 2.73

**Endangered species, 2.80**

**Engineers**

lien against real estate, 2.81

statutes of repose, 2.240

validity of indemnity agreements limited in  
construction contracts, 2.133, 17.2:4

**Environmental matters**

disclosure of (*see* Disclosure)

innocent-landowner defense to liability, 2.134

inspection, 4.9, 4.10, 16.22, 16.23, 16.50, 16.51,  
16.71, 16.72

representations, 4.6:1, 4.8:1, 16.19:1, 16.21:1,  
16.47:1, 16.49:1, 16.68:1, 16.70

statutes affecting leases, 25.10

statutes affecting real estate transactions, 2.82

stormwater permits, 2.241

**Environmental Protection Agency, disclosure  
format for leases, 25.12:8**

**Equal credit opportunity, 2.69, 2.83**

**Equity lending. *See* Home equity lending**

**Escheat, 2.1, 2.85**

**Escrow agent**

as closing agent, 4.4:3, 4.16

deposit of earnest money with, 4.7

designation of, 4.4:3, 4.16

responsibilities, 4.4:3, 4.16, 4.16:5, 4.17:4

**Estate**

right of survivorship and agreement, 5.13:6

sale of property, requirements, 5.13:4

**Estate of decedent, 2.293**

collection of debt from, 2.93

disclaimer of interest in, 2.64

**Estoppel certificate**

lender's, 8.4, 10.8, 20.2:3

as security for loan, 9.18:6

tenant's, 25.12

third-party agreement in mechanic's lien transaction,  
20.6

for water rights transaction, 16.12, 16.41

**Ethics opinions, 1.2**

**Eviction, 2.87. *See also* Lockout**

**Excavators, 2.269**

**Express negligence rule, 17.2:5, 25.1:4**

**Extension agreement, 8.2:2, 10.3**

cautions, 10.3:1

clauses for existing liens, 8.2:8

preparing, 10.3:2

**Extension of credit, home equity loan, 11.53**

**Extraterritorial jurisdiction, 2.90**

**F**

**Fair Credit Reporting Act, 2.92**

**Fair housing, statutes affecting, 2.94**

**Fair notice doctrine, 17.2:5, 17.7:4, 25.1:4**

**False statements. *See also* Fraud**

home loans, 10.14

**Family law**

child support liens, 2.40, 2.95

provisions affecting real property transfers, 2.95

**Family violence, termination of lease in event of,  
25.5:2**

**Farm products. *See also* Agricultural liens**

choice of law, 9.6:3, 9.6:4

defined, 9.3:3

security agreement, 9.9

security interest in creating and perfecting, 9.7:2

**Federal Deposit Insurance Corporation (FDIC),  
2.105, 11.4, 14.2:5**

**Federal Housing Administration (FHA), 11.3:2**

**Federal Lien Registration Act, 2.96**

**Federal mortgage loan regulation, 2.54, 2.69,  
11.3:2**

**Federal National Mortgage Association (Fannie  
Mae) policy, 11.6:11, 11.9:3, 11.9:7**

**Federal Reserve System, 12.2:3, 12.4**

**Federal Trade Commission**

anti-holder-in-due-course

notice, 2.113, 20.4:2, 20.4:3

rule, 20.1:4

approval from, for large transactions, 2.121

home insulation disclosure requirements, 18.3:5

**Fees**

attorney's (*see* Attorney's fees)

filing, 3.14, 3.15

[Decimal numbers refer to *sections* in practice notes.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]

groundwater conservation district, 16.2:3, 16.29:2  
 home equity loan, 11.6  
 restrictive covenants, 23.1:1  
 truth-in-lending document preparation, 12.7  
 unearned, prohibition against, 12.11:4  
 upcharges prohibited, 12.12

**Fee simple estate, evidence of**, 5.12:4

**Fences and gates, requirements for**, 2.98

**Filing.** *See also* Recording

electronic, 2.78, 3.14  
 federal tax lien notices, 9.7:3  
 fees, 3.14, 3.15  
 financing statement, 8.11:1, 9.5:3, 9.14:5,  
   9.17  
   form UCC1, 9.13, 9.14:5  
   form UCC3, 9.15:2  
 instruments, 3.14, 3.15  
 IRS requirements (*see* Internal Revenue Service)  
 master form mortgage, 2.162  
 mechanic's lien documents, 20.4:2, 21.5:1  
   homestead property, 21.1  
 notice of constitutional lien, 21.1

**Finance Commission, Texas**, 2.174

**Financial institutions**

credit reporting, 2.69, 2.92  
 eligibility to make home equity loans, 11.3:1  
 federal guidelines, 2.69, 11.4  
 notice of final agreement, 10.12  
 notice requirements, 2.157

**Financial statements**, 8.10:4

**Financing**

borrowing resolutions, 10.5  
 disclosures, 12.2, 12.2:2, 12.4  
 documents for closing (*see* Closing)  
 home equity (*see* Home equity lending)  
 refinancing, 12.2:2  
 seller, 4.4:5, 16.17:7, 16.45:7, 16.66:10  
   addendum, use of, for, 4.6:4, 16.19:7, 16.47:4,  
   16.68:4  
   implied vendor's lien in, 5.3:1  
   subordinate deed of trust, use of, for, 8.3  
 subordinate lien, 8.4, 20.2:3  
 third-party (*see* Third-party lender)  
 variable interest rates, 2.279

**Financing statement.** *See also* Security agreement

general considerations, 9.13:1  
 addendum, 9.15:1  
 assumed name in, 2.22

as constructive notice of security interest, 9.13:2  
 contents of, 9.5:3  
 continuation, extension, lapse, and termination of,  
   9.5:3, 9.15:2  
 in deed of trust, 6.1:4, 8.1, 8.11  
 filing of, 8.11:1, 9.5:3, 9.13, 9.14:5  
 fixture filings, 2.100, 9.5:3, 9.14:3, 9.14:5  
 form UCC1  
   filing of, 9.13, 9.14:5  
   use of, 9.14:1–9.14:3  
 form UCC3  
   filing of, 9.15:2  
   purpose of, 9.15:2, 9.16  
 fraudulent, 2.110, 9.5:3  
   filing of, 2.99  
 master assignment of, 2.162  
 modifications and clauses, 8.11:2  
 names of parties, 9.14:2, 9.15:2  
 in note, when necessary, 6.5:1  
 prefiling, 9.17  
 refusal to accept, 9.5:3  
 searches, use of form UCC11, 9.15:4  
 signatures, 9.14:4

**Fixtures.** *See also* Security agreement

generally, 2.100  
 collateral used as, 8.11:1, 9.7:1  
 description of, in financing statement, 9.5:3, 9.14:3  
 filing, financing statement covering, 9.14:5  
 lien under deed of trust, 9.7:1  
 priorities conflicts, 9.6:3, 9.6:4, 9.7:1  
 what constitutes, 9.7:1

**Flag, display of American**, 23.1:3

**Flood insurance**, 2.101, 17.4:3

**Force majeure clause**, 20.4:2

**Forcible entry and detainer.** *See* Eviction

**Foreclosure.** *See also* Default

generally, 2.104, 14.1, 14.2:1, 14.4:1  
 in bankruptcy, 2.104  
 bid, 14.2:2  
 bill of sale, 14.7:4, 14.9:4  
 coastal property, 14.2:6  
 collateral transfer of note, 14.11  
 condominium, redemption rights, 2.104, 2.211  
 condominium assessment liens, 24.1:3  
 deed in lieu of, effect of, 5.13:2, 14.2:8  
 deed of trust, 2.104, 8.1:2, 8.10:10, 14.2, 25.12:2  
   subordinate liens, 8.10:8  
 deficiency judgment after, 2.63  
 guarantor's rights, 2.119

[Decimal numbers refer to *sections* in practice notes.]

[**Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4**]



- eviction after, 2.104
  - filing federal tax lien, requirement for, 2.97
  - governmental interests, 2.105, 14.2:5
  - home equity loan, 2.104, 11.54
  - of junior lien, 2.105
  - of landlord's lien, 2.141
  - lender's collection rights, 8.10:10, 14.3:7
  - limitations, 2.152, 14.3:4, 14.4:3
    - for FDIC interests, 2.105, 14.2:5
  - mechanic's lien note, 20.8
  - military personnel, property owned by, 2.165, 14.2:2, 14.2:10
  - by mortgage servicer, 14.1, 14.6:2
  - nonjudicial sale, rescission of, 14.6:7
  - notice, 14.2:1, 14.2:2, 14.5
    - of acceleration, 14.5:4
    - and affidavit of advancement, 14.6:6
    - affidavit of mailing, 14.5:7
    - affidavit of posting and filing, 14.5:6
    - debt collection, 14.4:5
    - default and intent to accelerate, 14.5:3
    - of demand for payment, 14.5:2
    - to Internal Revenue Service, 2.137, 14.2:5, 14.6:7
    - letter to reinstate default provisions, 14.5:1
    - of private sale of personal property, 14.3:2, 14.3:3, 14.9:2
    - of public sale of personal property, 14.3:2, 14.3:3, 14.7:2
    - reinstatement agreement, 14.5:5
    - residential property, 14.2:4
    - of strict foreclosure of personal property, 14.8:1
    - of trustee's sale, 14.2:2, 14.6:2
    - waiver of, after default, 14.7:1, 14.9:1
  - personal property, 14.3, 14.3:2–14.3:10
    - agenda of public sale, 14.7:3
    - bill of sale, 14.7:4, 14.9:4
    - cautions, 14.3:6
    - document review, 14.4:2
    - included in deed of trust, 14.2:7
    - memorandum of private sale, 14.9:3
    - notice of private sale, 14.3:3
    - notice of public sale, 14.3:3, 14.7:2
    - posted notice of sale, 14.7:2
    - right of redemption, 14.3:9
    - right of repossession, 14.3:8
    - strict foreclosure, 14.8
    - suit for deficiency, 14.3:5
  - private sales, laws governing, 14.3:2
  - public sales, laws governing, 14.3:2
  - purchaser, 14.2:2
  - real and personal property, 2.104, 14.2:7, 14.3:1, 14.10
    - applicable documents, 14.4:1
    - real property, 14.2
      - affidavit, deed of trust, 14.6:5
      - agenda of public sale, 14.6:3
      - IRS notice letter, 14.6:7
      - notice and affidavit of advancement, 14.6:6
      - notice of trustee's sale, 14.6:2
      - substitute trustee, appointment of, 14.6:1
      - suit for deficiency, 14.2:3
      - trustee's deed, 14.6:4
    - redemption rights, 2.211
    - review of documents, 14.4:2
    - secured party's collection rights, 14.3:7
    - secured party's liability, 14.3:10
    - statutory requirements for sale, 8.1:1, 14.2:2
    - strict, 14.8
      - law governing, 14.3:4
      - personal property, 14.8
    - of superior lien, effect on subordinate lien, 8.4, 20.2:3
    - tax, 2.5, 2.102
      - searches, 14.4:4
    - of tax lien, 8.2:9
    - title insurance, 14.4:4
    - trustee's deed in, 14.6:4, 5.13:3
- Foreign investments**, 2.107
- NAFTA requirements, 2.180
- Foreign state financial institutions**, 11.3:1
- Forfeiture laws**, 2.108
- Franchises**, 2.109
- Fraud**, 2.111, 2.112
- home equity loan, 11.7
  - lien and financing statement, 2.110
    - filing, 2.99
  - mortgage loan, 2.173
- Fraudulent filings**, 2.110, 9.5:3
- Future advance clause**, 8.10:1
- Future estates**, 2.114
- Future indebtedness, clause in deed of trust**, 8.1:1

## G

- General intangibles**, 9.3:3, 9.11
- General Land Office, Texas**, 2.255

[Decimal numbers refer to *sections* in practice notes.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]

**Gift deed, 5.9****Golf courses, 2.243****Good faith and fair dealing, 2.116****Governmental entities**

contracting with, disclosure of interested parties,  
2.65

sale of trust property to, 2.224

**Grantee**

designation of, in deed, 5.1

mailing address of, 2.117, 3.5

**Grievance procedure**

duty to notify client, 1.1:2

rules governing Texas attorneys, 1.3

**Groundwater, 16.1. See also Surface water**

authority, 16.17:4, 16.45:4

conservation districts, 16.2:3

    permitting, 16.3:2

definition, 16.2:1, 16.17:9

due diligence, 16.3:3

hydrogeological testing of, 16.17:12

ownership of, 16.1, 16.2:2

price of, 16.17:13, 16.45:12

recording, 16.8:4, 16.12

reserved, 16.17:11, 16.45:11

sale of, 16.11, 16.41

seller's permit, 16.17:5, 16.45:5

severability, 16.3:1

**Groundwater contract for sale (on-site), 16.12,**

16.13, 16.15–16.20

assignment, 16.28

closing, 16.26, 16.29

    ad valorem taxes, 16.29:2

    expenses, 16.29:1

    fees, 16.29:2

    funding, 16.29:3

    payoff, 16.29:1

    recording, 16.29:5

default, 16.27

inspection period, 16.22

memorandum of contract form, 16.19:9

postclosing, 16.30:3

representations and warranties, 16.23

surface use considerations, 16.14

survey, 16.21

    review of, 16.21:3

termination, 16.25

termination of contract form, 16.19:10

title, 16.21

    abstract of, 16.21:2

    commitment, 16.21:1

UCC search, 16.21:4

**Groundwater districts, 16.2:3****Groundwater rights contract for sale (off-site),**

16.42–16.48

assignment, 16.56

closing, 16.54, 16.57

    ad valorem taxes, 16.57:2

    expenses, 16.57:1

    fees, 16.57:2

    funding, 16.57:3

    payoff, 16.57:1

    recording, 16.57:5

default, 16.55

inspection period, 16.50

memorandum of contract form, 16.47:5

postclosing, 16.58:3

representations and warranties, 16.51

survey, 16.49:3

termination, 16.53

termination of contract form, 16.47:6

title, 16.49

    abstract of, 16.49:2

    commitment, 16.49:1

UCC search, 16.49:4

**Guarantor**

notice of sale, not entitled to, 14.2:2

waiver of right of offset, 10.13

**Guaranty**

general considerations, 10.13

as additional collateral prohibited in home equity  
loan, 11.9:2

clause in note, 6.4:4

in lease transaction, 25.12

limited, 10.13

mortgage insurance, 2.197

resolutions, 10.5

**Guardian**

acknowledgment for, 3.10:3, 3.11:4, 3.12:6

of minor or incapacitated person, 2.147, 2.168

**Guardianship deed, 5.13:4****Gulf Intracoastal Waterway, 2.42****H****Habendum clause, warranty deed, 5.1****Hague Convention, 3.12:1**

[Decimal numbers refer to *sections* in practice notes.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]

**Handguns, license to carry, 2.150**

**Handicapped persons.** *See* Disabled persons

**Hazardous waste**

federal and state liens for cleanup actions, 2.122  
 industrial, 25.6  
 statutes affecting, 2.82, 25.10

**Headings for instruments, 3.4**

**Health-care insurance receivables, 9.3:3, 9.5:6**

**Heirship, affidavit of, 2.7**

**Highway Commission, Texas, 2.186**

**Historical Commission, Texas, 2.123**

**Historic structures, 2.123**

**Home construction.** *See* Construction, residential contract

**Home equity lending**

acceleration restriction, 11.14  
 affidavit of lost note, 11.22  
 amortization restriction, 11.12  
 appraisals, requirements for, 11.4  
 assignment of lien, 11.22  
 assignment of rents as additional collateral, 11.54  
 assignment of wages as security for, restricted, 11.16  
 attorney's fees, 11.5, 11.6:3  
 authorized lenders, 11.3  
 balloon payments not prohibited, 11.12  
 blanks left in documents prohibited, 11.20:4, 11.51  
 broker  
   closing not allowed at office of, 11.21:1  
   fees of, 11.6:3  
   regulation of, 11.3:5  
 certificate and agreement, 11.55  
 closed account, 11.5  
 closing expenses, 11.6  
 collateral  
   additional, 11.54  
   guaranty as additional, prohibited, 11.53  
   incidental, 11.9:1  
   restrictions against additional, 11.4, 11.6:11, 11.9  
 collection costs, 11.5  
 condemnation proceeds, 11.9:1, 11.54  
 condominium, undivided interest in, 11.9:1  
 confession of judgment, 11.15  
 cooling-off period, 11.18:1  
 copies of documents, 11.20:5  
 cross-collateral provisions, 11.9:3, 11.55  
 cross-default provisions prohibited, 11.14:1  
 cure provisions, 11.25

acknowledgment of fair market value, violation of restriction for, 11.25:6  
 additional collateral, violation of restriction against, 11.25:3  
 borrower's notification of lender's failure to comply, requirements for, 11.25:12  
 burden of proof to show cure, 11.25:10  
 "catch-all," 11.25:8  
 delivery of documents, violation of requirement for, 11.25:4  
 fees, prepayment penalties, or interest, violation of restriction on, 11.25:1  
 loan-to-value ratio, violation of restriction on, 11.25:2  
 noncurable violations, 11.25:9  
 number of home equity loans, violation of restriction on, 11.25:7  
 prohibited amount, percentage, term, or other provision, violation of restriction against, 11.25:4  
 qualifying agricultural homestead, violation of restriction on, 11.25:3  
 timeliness of cure, 11.25:11  
 "death penalty" provision, 11.24, 11.53  
 deed of trust, 11.54  
 default, amounts advanced after, 11.5  
 disclosures, 11.18:1, 11.18:2, 11.20:3  
 discount points, 11.6:3, 11.12:2  
 emergency, 11.11, 11.18:3  
 escrow funds, 11.6:10, 11.9:1  
 evaluation fees, 11.6:5  
 excess acreage, 11.9:6  
 extension of credit (promissory note), 11.53  
 fair market value of homestead, 11.4, 11.55  
 family defined for, 11.9:9  
 Fannie Mae policy, 11.6:11, 11.9:3, 11.9:7  
 FDIC-insured institutions, 11.4  
 federal guidelines, 11.4  
 fec limit, secondary mortgage loan subject to, 11.6:13  
 fees, 11.6  
   paid by lender, 11.6:4  
 FHA, eligibility to make loans, 11.3:2  
 financial institutions, eligibility to make loans, 11.3:1  
 foreclosure, 2.104, 11.54, 14.2:9  
   deed of trust, 8.1:2  
 forfeiture, 11.24, 11.53  
 fraud, 11.7  
 frequency restriction, 11.11  
 guaranty as additional collateral prohibited in, 11.9:2, 11.53

[Decimal numbers refer to *sections* in practice notes.]

[Chapters 1-7, vol. 1; chs. 8-15, vol. 2; chs. 16-22, vol. 3; chs. 23-26, vol. 4]

- homestead
- additional collateral prohibited, 11.9, 11.53
  - disclosure of constitutional limitations, 11.18:1
  - effect on, 2.124, 2.128, 11.1, 18.3:1, 20.1:2
  - family or single adult, 11.9:9
  - maximum acreage, 11.9:6
  - not to exceed 80 percent of fair market value, 11.4, 11.55
  - partition, subdivision, and replatting, 11.4
  - recovery only against, 11.7
  - rural single adult, 11.9:9
  - tenancy in common, undivided interest in, 11.9:5
  - urban or rural, 11.9:6, 11.9:8
- Homestead Update* website, 11.9:8, 11.9:9
- HUD-approved mortgagees, eligibility to make loans, 11.3:2
- improvement lien, 11.10
- instructions for completing forms, 11.51
- insurance, 11.1, 11.6:8
- provision, 11.54
- interest, 11.6:1, 11.12
- prepaid, 11.12:2
  - rates, 11.13:1, 11.13:2, 11.53
  - restriction on, 11.13
  - variable rates, 11.3:1, 11.53
- junior-lien requirements, 11.6:1, 11.20:7
- lender's recovery for borrower's failure to perform loan covenants, 11.12:1, 11.14:1
- line of credit, 11.5
- loan document requirements, 11.20
- loan-to-value restriction, 11.4, 11.55
- lost note, 11.22
- maintenance fees, 11.6:6
- model forms, 11.1, 11.20:1
- modification of, 11.6:12, 11.11
- as multiple advance loan, 11.5
  - as nonrecourse loan, 11.7, 11.53
- nonseverability provision, 11.24
- notice concerning extension of credit, 11.52
- number of loans, restriction on, 11.10
- Office of Consumer Credit Commissioner (OCCC), 8.4, 11.1, 11.3:2, 11.20:1, 20.2:3
- commentary, 11.3:1, 11.3:5, 11.5, 11.8, 11.20:3, 11.20:7
  - voluntary optional fees, 11.6:2
  - website, 11.18:1, 11.52
- one-day disclosure, 11.18:2
- open-end account, restriction against, 11.5
- option to purchase, 11.9:7
- origination fees, 11.6:3
- oweity lien, 11.10
- place of closing, 11.21, 11.51
- plain language, 11.20:1
- power of attorney, 11.15, 11.20:6, 11.21
- prepayment penalties prohibited, 11.8
- proceeds, as additional collateral, 11.9:1
- proceeds used to pay off existing debt, 11.17
- purchase-money lien, 11.10
- recording fees, 11.6:7
- redlining restriction, 11.3:7
- refinancing of debt, 11.23
- regulatory opinion and commentary, 11.1
- relatives as authorized lenders, 11.3:6
- release of lien, 11.22
- replatting fees, 11.6:11
- restrictions, generally, 11.1
- right of offset, 11.9:4
- right of rescission, 11.19
- notice regarding, 11.56
- same creditor payoffs, 11.17
- voluntary, 11.17:3
- savings clause, 11.54
- servicing fees, 11.6:9
- signatories, 11.20:6
- state-regulated lenders, eligibility to make loans, 11.3:4
- statute of limitations, 11.26, 11.37
- subordinate lien transaction, 11.54
- subsequent events, fees for, 11.6:12
- tax lien, 11.10
- tenancy in common, undivided interest in, 11.9:5
- title insurance coverage, 11.1
- transfer of note, 11.22
- Truth in Lending Act, 11.19:2, 11.27
- VA-guaranteed loan, 11.3:3
- waiver of citation, 11.15
- when preempted by federal law, 11.24
- written agreement required, 11.20:1
- Home improvement contract.** *See also*
- Construction, residential contract equity lien, 11.10
  - financing or refinancing, 20.1:1
  - homestead rights, 2.128, 18.1, 18.3:3
  - notice requirements, 2.52, 2.125
  - right of rescission, notice of, 12.2:2, 12.4
  - Texas consumer protection laws for remodeling, 20.1:4
  - violations of Property Code, 2.60
- Home insulation disclosure,** 2.52, 2.66, 18.3:4
- Home loans,** 11.20:8, 10.14
- disclosures, 10.14
  - high-cost, 10.14:2
  - low-rate, 8.1:2, 10.14:1

[Decimal numbers refer to *sections* in practice notes.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]

**Home solicitation transaction, 2.127**  
 cancellation notice, 2.50, 2.54, 18.3:3  
 Texas consumer protection laws, 20.1:4

**Homestead.** *See also under* Home equity lending  
 abstract of judgment, effect on, 2.139  
 affidavit, 10.7  
 bankruptcy exemption, 2.25  
 construction contract, effect on, 18.1, 18.3:1, 18.3:3  
 equity lending (*see* Home equity lending)  
 exemption claimed for, 20.1:2  
 improvement contracts, 2.128  
   notice, 2.50  
 laws affecting, 18.1, 20.1:2, 21.1  
 mechanic's lien transactions, effect on, 20.1:1, 21.1  
   signatures required, 20.7  
 notice to owner regarding liens against, 21.5:3,  
   21.5:4  
 owelty, effect on, 2.128, 18.3:1  
 provisions in family law, 2.95  
 purchase-money lien, effect of, on, 2.128, 5.13:5,  
   11.10  
 when encumbered, 2.128, 5.13:5, 8.1:2

**Hotel occupancy taxes, 2.129**

**House trailers.** *See* Housing, manufactured

**Housing, low-income**  
 assistance programs, 2.254  
 federal income tax credits, 2.8

**Housing, manufactured, 2.54, 2.161**  
 deed requirements, 5.15:6  
 manufactured-home community lease, 25.8  
   eviction, 25.8:9  
   landlord's obligations, 25.8:8  
   renewal, 25.8:6, 25.8:7  
   requirements, 25.1:2, 25.1:3, 25.8, 25.8:1–25.8:5  
 notice of right of rescission regarding, 12.2:2  
 security interest, 9.13:2  
 utility expenses for tenants, 2.278

**Housing and Community Affairs, Texas**  
   Department of, 2.8, 2.254

**Housing and Urban Development, Department of**  
 disclosure format for leases, 25.12:8  
 home equity lenders approved by, 11.3:2  
 housing projects, 2.8

**Housing for elderly, 2.94, 2.254**

**HUD forms, 12.11:3**

## I

**Impact fees, 2.131**

**Inadvertent transmission of information, 1.7:3**

**Indemnities, 2.133, 17.2**  
 anti-indemnity laws, 17.2:4  
 by cities and counties, prohibited, 17.2:3  
 construction contracts and, 17.2:4, 17.6:1  
 types, 17.2:2

**Information statement, condominium, 24.6:1**

**Inspection, property, 2.199, 2.206**  
 by buyer, 4.9, 16.22, 16.50, 16.71  
 seller's records for, 4.6:2, 16.19:2, 16.47:2, 16.68:2  
 windstorm, 2.294

### Insurance

additional insured, 17.6:4, 17.6:5, 17.7  
 amount of proceeds  
   actual cash value, 17.4:5  
   agreed value, 17.4:5  
   coinsurance, 17.4:5  
   debris removal, 17.4:5  
   ordinance or law coverage, 17.4:5  
   replacement cost, 17.4:5  
 boilers, 17.4:3  
 builder's risk, 17.4:3  
 business auto, 17.5:3  
 business income, 17.4:3  
 casualty and public liability, for residential  
   construction, 18.3:4  
 categories, 17.3  
 certificates of, 17.10  
 claim payment, endorsed by lender, 2.135  
 condominium, 17.4:4  
 contractual liability, 17.5:2  
 debris removal, 17.4:5  
 deductible, 17.8  
 disclosure provisions, 12.4  
 earthquake, 17.4:3  
 escrow fund, transfer of, 5.12:7  
 evidence of, 17.10  
 farm property, 17.4:4  
 flood, 2.101, 17.4:3  
 glass, 17.4:3  
 home equity lending, 11.1, 11.6:8, 11.9:1  
 homeowner's, 17.4:4  
 hunting, 17.5:10  
 in lease, 25.1:4  
 liability, 17.5  
   employer's, 17.5:5

[Decimal numbers refer to sections in practice notes.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]

liability—*continued*  
 excess, 17.5:9  
 machinery, 17.4:3  
 mortgagee clause, 17.4:3  
 mortgage guaranty, 2.197  
 policy, clause concerning, in deed of trust, 8.4, 8.10:7  
 primary and noncontributory, 17.6:7  
   in mechanic's lien contract, 20.2:3  
 property, 17.4  
 prorations, 5.12:7  
 ratings, 17.9  
 requirements before closing, 4.17:2  
 reserve account for payment of premiums, 8.5:1  
 reserve clause in deed of trust, 8.1:1  
 residential, 17.4:4  
 signs, 17.4:3  
 standard policy forms, 17.5:2  
 tenant's, 17.4:4  
 title (*see under* Title)  
 umbrella, 17.5:9  
 workers' compensation, 17.5:4

**Insurance, State Board of**, 2.294, 8.4, 20.2:3

**Insurance, Texas Department of**  
 information for title insurance, 4.8:1, 16.21:1,  
 16.49:1, 16.70  
 procedural rules for home equity lending, 11.1

**Intangibles**  
 general, 9.3:3, 9.11  
 payment, 9.2:1, 9.2:3, 9.3:3

**Interest**  
 commercial loans, 8.10:9  
 home equity loan (*see* Home equity lending)  
 imputed to loan, 6.2:3  
 Internal Revenue Code provisions for loans, 6.2:3  
 in promissory note, 6.3:3  
 rates in mechanic's lien transactions, 20.3:1  
   fixed-rate, simple, 20.1:1  
 truth-in-lending documents, 12.4  
 usury (*see* Usury)  
 variable rates, 2.279, 6.3:3  
   disclosure statements, 12.4

**Interest on Lawyers' Trust Accounts (IOLTA)**,  
 1.5:3

**Interior designers**  
 statutes of repose, 2.240

**Internal Revenue Service**  
 filing federal tax lien with, 2.97  
 information return, filing of, 2.137, 4.16:4, 16.29:4,  
 16.57:4, 16.78:4

notice to, in foreclosure, 14.2:5, 14.6:7  
 payment to, for transactions involving foreign  
 persons, 16.30:1, 16.58:1, 16.79:1  
 reporting of cash proceeds to, 2.35  
 requirements for filing returns for foreigners, 2.107

**Interstate land sales, disclosure requirements**,  
 2.66, 2.136

**Inventory, defined**, 9.3:3

**Investment property**  
 defined, 9.3:3  
 perfection of security interest in, 9.4:6, 9.5:5, 9.5:6

## J

**Joint tenancy with right of survivorship**, 2.138,  
 5.13:6

**Judgment lien**  
 what constitutes, 2.139  
 when canceled, 2.25

**Jurat**  
 form of, 3.13:1  
 mechanic's lien affidavit, 21.5:1  
 requirements for, 3.13:1

## K

**Kickbacks, prohibition against**, 12.11:4

## L

**Landfills**, 2.140  
 statutes affecting, 2.82

**Landlord-tenant relationship. *See also* Lease;  
 Tenant**  
 credit reporting, 25.1:5  
 governed by Property Code, 2.142, 25.1:1  
 liens, 2.142  
 repairs on leased property, 2.50

**Landowner liability**, 2.134, 2.143

**Landowner's Bill of Rights**, 2.144

**Landscape architecture**, 2.145

[Decimal numbers refer to *sections* in practice notes.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]

**Land Title Association, Texas**, 4.8:1, 16.21:1,  
16.49:1, 16.70

**Land use, vested rights**, 2.282

**Late charges**, 6.4:3, 11.6:1

**Lawyer's Creed, Texas**, 1.1:1

**Lead-based paint**

disclosure of, 2.82, 2.146  
in lease, 25.10, 25.12:3

**Lease**

generally, 25.1  
additional clauses, 25.11  
additional forms, 25.12  
agricultural, 25.7  
assessment charges, 25.9:3  
assignment and assumption of, 5.13:8  
beauty shops, 2.27  
commercial  
    broker's and appraiser's lien, 25.9:1  
    change-of-lock notice, 25.12:6  
    lockout notice, 25.12:5  
condemnation, 25.1:6  
conspicuousness rule, 25.1:4  
definition of, 25.1:1  
description of property, 25.1:3  
environmental matters, 25.10  
expansion option, 25.11:4  
express negligence rule, 25.1:4  
extension of, 25.11:5  
fair notice doctrine, 25.1:4  
governed by Property Code, 25.1:1  
hunting, 25.7, 25.7:1, 25.7:2  
improvements to property, 25.12:7  
indemnity provisions, 25.1:4  
industrial, 25.6  
insurance, 17.6:5, 17.7, 25.1:4  
liability for landowner, 2.134, 2.143  
manufactured-home communities, 2.142, 25.1:2,  
    25.1:3, 25.8, 25.8:1–25.8:10  
margin tax, 25.11:6  
military personnel, notice to, 2.165  
mineral (*see* Minerals, lease)  
modification, 25.12:10  
office, 25.4  
personal property, 2.191  
preparing, 25.2  
rebuilding obligations, 25.1:4  
rent increases, periodic, 25.11:3  
rent payment by check, 25.5:1, 25.8:3  
repairs, 2.50, 25.5:3  
residential, 25.5

retail, 25.3

risk allocation, 25.1:4

security deposits, 2.227, 25.9:2

shopping centers, 2.233, 25.3

smoke detectors in residential lease, 25.5:2

with state entities, 2.237

subletting or assignment, 2.244

subordination, 10.16, 25.11:2, 25.12:1, 25.12:2

tax obligations and protests, 25.11:5

tenant's acceptance letter, 25.12:3

termination, 25.5:2, 25.12:11

waiver of subrogation, 25.1:4

**Leasehold deed of trust.** *See also* Deed; Deed of trust; Deed of trust to secure assumption

additional clauses, 8.10

confidentiality notice, 8.8:1

consent to, 8.8, 8.9

inconsistencies with lease provisions, 8.8

Leasehold Mortgagee Policy Endorsement, 8.8:2

title insurance, 8.8:2

use of, 8.1, 8.8

**Legal Ethics and Professionalism website, Texas Center for**, 1.2

**Legal incapacity**, 2.147

**Lending, home equity.** *See* Home equity lending

**Letters of credit**, 2.148

rights, 9.3:3, 9.4:6, 9.5:4–9.5:6

**Liability**

assumption clause for VA loans, 5.12:8

contractor's, for residential construction, 18.2, 18.7:9

for defects in residential construction projects, 2.216

for failure to provide information in construction projects, 21.5:6

for landowners, 2.134, 2.143

foreign entity, 2.106

insurance, 17.3:1

owner's

    in residential construction, 18.3:3, 18.3:5

    for unpaid claims, 21.4

of secured party in foreclosure, 14.3:10

**Libraries**, 2.149

**Library and Archives Commission, Texas State**, 3.14

**Licensing and Regulation, Texas Department of**, 2.15

**Lien.** *See also* Mechanic's lien

aircraft, 2.12

[Decimal numbers refer to *sections* in practice notes.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]

- appraiser's, 25.9:1  
 architect's, 2.20  
 assignment of, in refinancing, 11.22  
 broker's, 25.9:1  
 child support, 2.40, 2.95  
 collateral transfer of (*see* Collateral transfer of note and lien)  
 contractual landlord's, waiver of, 25.12:4  
 deed-of-trust (*see* Deed of trust)  
 engineer's, 2.81  
 federal and state, for hazardous waste cleanup actions, 2.122  
 federal tax, 2.97  
     affecting homestead rights, 2.128  
     foreclosures subject to, 2.104  
     notice to IRS, 14.2:5, 14.6:7  
 first  
     assumption of, with warranty deed with vendor's lien, 5.8  
     effect of extension agreement on, 10.3  
     home equity loan, 11.3:5, 11.10  
 fraudulent, 2.110  
 home improvement contract, notice requirements, 2.50, 2.125, 12.2:2, 12.4  
 homestead, 8.1:2. (*See also under* Home equity lending)  
     affidavit, 2.50  
 junior liens, foreclosure of, 2.105. (*See also under* subordinate, *this heading*)  
 landlord-tenant, 2.141  
 manufactured housing, 5.15:6  
 mineral property, 2.166  
 purchase-money, affecting homestead rights, 2.128, 5.13:5, 11.10  
 release of (*see* Release of lien)  
 review of title commitment, 4.8:1, 16.21:1, 16.49:1, 16.70  
 second, execution of, with warranty deed with vendor's lien, 5.8  
 secondary (*see under* subordinate, *this heading*)  
 to secure owelty payments, 5.13:5  
 subordinate  
     in deed of trust, 8.4, 8.10:8, 10.11, 11.6:1, 11.20:7, 11.54  
     in mechanic's lien documents, 20.2:3  
     not extinguished by deed in lieu of foreclosure, 14.2:8  
     payments on note, 8.5:2  
 superior, foreclosure of, 8.4, 20.2:3  
 surveyor's, against real estate, 2.247  
 tax, transfer of, 8.2:9  
 tenant's property, 2.142  
 transfer of (*see* Transfer of lien)  
 vendor's  
     in deed of trust, 5.3:2, 8.2:6  
     extension of, 8.2:8  
     implied, 5.3:1  
     implied, waiver of, 5.12:1  
     provided for in deed, 5.2:3  
     and superior title, 5.3:1  
 wage, 2.285  
 waiver of claims against owner for residential construction, 18.7:8  
 warehouseman's, 2.286  
 water rights lien documents, generally, 16.81  
 wraparound, clause, 8.5:1. (*See also* Wraparound mortgage)
- Life tenant**, 2.151, 5.14:5
- Limitations**  
 for correction deed, 5.8  
 deed in lieu of foreclosure, 5.13:2, 14.2:8  
 for execution of note, 8.2:2  
 foreclosure actions, 2.152  
     FDIC interests, 2.105, 14.2:5  
     real and personal property, 14.4:3  
     strict, 14.3:4  
 home equity lending, 11.4, 11.25:13, 11.37  
 note extensions, effect on, 10.3, 10.3:1  
 promissory note, 6.1:1  
 quitclaim deed, 5.6  
 for suit on contract, 2.248
- Limited liability companies**, 2.33, 2.153  
 resolutions, 10.5
- Line of credit, home equity**, 11.5
- Lis pendens**, 2.156, 21.1
- Loan documents.** *See also* Closing; Note  
 business or personal use, 8.10:9  
 confidentiality notice, 2.157, 10.1:5  
 preparing, legal requirements, 2.157, 2.266  
     home equity loan, 11.20  
     repayment of loan, "no personal liability for," 8.10:10  
     water rights, generally, 16.81
- Loan estimate**, 12.11:3  
 permitted tolerances in, 12.11:3
- Local permits**, 2.282
- Lockout**, 2.142, 2.158  
 commercial lease, 25.12:5  
 restrictions in residential lease, 25.5:2

[Decimal numbers refer to *sections* in practice notes.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]



Lost or found property, 2.1, 2.159  
 Lottery winnings, security interest in, 9.5:6  
 Low-income housing. *See* Housing, low-income

## M

Management certificate, condominium, 24.6:2  
 Manufactured housing. *See* Housing, manufactured  
 Margin tax, lease provisions for, 25.11:6  
 Marital property. *See* Property, community  
 Mark, as signature, 3.8:2, 3.8:3  
 Master form mortgage, 2.162  
 Mechanic's lien. *See also* Truth in lending generally, 2.163  
 cautions in using form, 20.2:3, 20.3:1–20.3:5  
 confidentiality notice, 2.163, 20.1:4  
 consumer protection laws, 20.1:1, 20.1:4  
 contract  
   additional clauses for contract price, 20.5  
   additional documents used with, 20.6  
   affecting homestead rights, 2.128, 18.3:1, 18.3:3, 20.1:2  
   affidavits of completion and acceptance, 20.6  
   conflict in, subject to laws of another state, 20.3:2  
   construction clauses, 20.4:2  
   executing and filing, 20.4:2  
   foreclosure, 20.8. (*See also* Foreclosure)  
   right-of-cancellation notice, 20.4:2  
   statutory notices, 20.4:2  
   used with deed of trust, 8.2:7  
   used with promissory note, 6.5:1  
   used with residential construction contract, 20.1:1  
 contractor and third-party creditor relationship, 20.1:4  
 disputes about amount owed, 20.3:3  
 federal disclosure laws, 20.1:4  
 financing procedures  
   first lien to contractor, 20.2:2  
   first lien to third-party lender, 20.2:1  
   second lien to third-party lender, 20.2:3  
 home loan requirements, 20.3:5  
 homestead (*see also* Homestead)  
   effect on, 20.1:1  
   laws governing, 20.1:2  
 inception date for residential construction, 18.4, 18.7:5

interest rates, 20.1:1, 20.3:1  
 limitations for foreclosure, 2.152  
 note  
   Federal Trade Commission notice, 2.113, 20.4:3  
   notices, federal regulations, 20.6, 20.7. (*See also under* Notice)  
   payment clauses, 20.4:3  
   use of, 20.4:3  
 right of rescission, 12.2:2, 20.1:4  
 statutory  
   construction project participants, 21.3, 21.3:1–21.3:3  
   contractual retainage by owner, 21.5:5, 21.6  
   notice (*see under* Notice)  
   release by claimant, 21.5:7  
   requests for information, 21.5:6  
   specially fabricated materials, 21.5:5  
   time deadlines, 21.2, 21.6–21.8  
   timetables, 21.9  
 Texas constitutional, 21.1:1  
 use of forms, affecting homestead, 20.1:1  
 usury laws affecting transactions, 20.1:3  
 when subordinate to prior lien, 20.2:3, 20.6

## Mediation, 2.14

MERS. *See* Mortgage Electronic Registration System (MERS)

Military installations. *See* Outdoor lighting

Military personnel, 2.165  
 foreclosure of property owned by, 2.165, 14.2:2, 14.2:10  
 termination of lease by, 25.5:2

## Minerals

conveyance of, 5.14:1  
 financing statement  
   description, 9.14  
   filing of, 8.11:1, 9.5:3  
 lease  
   between grantor and grantee, 5.14:4  
   leasehold estate, 5.14:2  
   lienholder's subordination, 10.9  
   special problems, 5.14:6  
 lien on property, 2.166  
 rights, 2.166  
 royalty  
   clause in deed, 5.14:2, 5.14:6  
   rights of life tenant, 5.14:5  
 surface use, restrictions, 5.14:3

## Mini-warehouse facilities, 2.229

[Decimal numbers refer to sections in practice notes.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]

**Minors**

guardian for, 2.147, 2.168  
transfers to, 2.273

**Mobile homes.** *See* Housing, manufactured

**Modification and extension agreement**, 8.2:2, 10.3  
cautions, 10.3:1  
clauses for existing liens, 8.2:8  
confidentiality notice, 10.3:2  
preparing, 10.3:2

**Mold assessors and remediators**, 2.170

**Mortgagee, definition of**, 14.2:2

**Mortgage Electronic Registration System (MERS)**, 2.172, 14.2:2, 20.2:3

**Mortgage fraud**, 2.173

**Mortgage loan originator**, 2.174, 11.3, 11.3:5,  
11.21:1  
disclosure requirements, 2.66

**Mortgage servicer**, 14.2:2  
foreclosure by, 14.1, 14.6:2  
notice of default, 14.2:2, 14.5  
notice of sale, 14.2:2  
right to service mortgage, 14.2:2

**Mortgagor, definition of**, 14.2:2

**Motor vehicle.** *See* Vehicle, motor

**Multi-unit housing complexes**  
emergency access, 2.98  
utility submetering, 2.278

**Municipal utility district (MUD)**  
notices regarding, 2.66, 2.277  
statutes governing, 2.175

**Muniment of title, probate of will as**, 2.293

## N

**Names.** *See also* Parties  
generally, 3.9

assumed, in financing statement, 2.22  
of debtor and secured party, 9.3:2, 9.14:2, 9.15:2

**National Pollutant Discharge Elimination System**, 2.241

**Naturally Occurring Radioactive Materials (NORM)**, 2.176

**Navigable streams**, 2.177, 16.4

**Nonlawyer assistant, client confidentiality and**,  
1.7:2

**Nonprofit organizations**, 2.33, 2.274

**Nonrecourse provision**, 6.4:6  
home equity loan, 11.7

**North American Free Trade Agreement (NAFTA)**, 2.180

**Notary public**

acknowledgment, 2.4, 3.11:1, 3.11:2, 3.12:1, 3.12:8,  
3.12:10  
foreign, 3.11:1, 3.12:1  
official seal of, 3.12:10  
out of state, 2.181, 3.11:1  
qualifications and requirements, 2.182  
seal on electronic documents, 2.182  
signature of, for disabled person, 3.8:2  
unauthorized practice of law, 2.182

**Note**

generally, 6.1  
acceleration of, 2.3  
assumption of, 5.2:3  
collateral transfer of (*see* Collateral transfer of note  
and lien)  
conflicts clause, 6.2:6, 6.4:8  
consistency in documents, 6.2:6, 6.4:8  
cosigner, 6.5:2  
deed of trust (*see also* Deed of trust)  
description, 8.2:2  
extension and renewal clauses, 8.2:8  
parties, designation of, 8.2:1  
deed of trust described in, 6.3:6  
default, 6.4:5, 8.10:10  
endorsement of, to perfect security interest, 9.9  
extension or reinstatement agreement, 8.2:2, 10.3  
after acceleration of note, 14.5:5  
cautions, 10.3:1  
preparing, 10.3:2  
first- and second-lien, when necessary, 5.3:3  
first-lien, assumption of, 5.3:4, 5.3:5  
guaranty clause, 6.4:4  
home equity loan, 11.53. (*See also* Home equity  
lending)  
identified in security agreement, 9.9  
interest rates, 6.2:3, 6.3:3, 8.10:9  
late charge clause, 6.4:3  
lost, 11.22  
maturity of, 6.1:1  
mechanic's lien (*see under* Mechanic's lien)

[Decimal numbers refer to sections in practice notes.]

[Chapters 1-7, vol. 1; chs. 8-15, vol. 2; chs. 16-22, vol. 3; chs. 23-26, vol. 4]

negotiability, 6.2:4  
 nonrecourse provision, 6.4:6  
 partial recourse provision, 6.4:6  
 preparing, 6.3  
     address for payment, 6.3:2  
     description of property, 6.3:6  
     description of security, 6.3:6  
     payment clauses, 6.3:4  
     prepayment clauses, 6.3:5  
     terms for payment, 6.3:3  
 promissory, defined, 9.3:3  
 reamortization clause, 6.4:7  
 sale of collateral if borrower defaults under, 6.3:6  
 second-lien, 5.3:3–5.3:5  
     clause, 6.4:1  
 secured by real property, 6.1:2, 6.3:6  
 secured by security agreement, 6.3:6, 6.5:1  
 with security clause, as consideration, 5.3:2  
 security interest in, creating, 9.9  
 standard provisions, 6.1:1  
 subordinate lien, payments on, 8.5:2  
 unsecured, 6.1:3, 6.2:5, 6.4:5  
 waiver of borrower's rights on default, 6.1:1  
 when deed of trust necessary, 5.3:3, 6.5:1  
 when security agreement and financing statement  
     necessary, 6.5:1  
 wraparound (*see* Wraparound mortgage)

#### Notice

of acceleration of maturity, 6.1:1  
 of cancellation, 2.50, 2.54, 2.55, 20.4:2  
 of change of locks, 25.12:6  
 confidentiality (*see* Confidentiality notice)  
 conspicuous text in contracts, 2.50  
 of constitutional lien, filing, 21.1:1  
 consumer credit contract, 2.113  
 contract for deed, 2.50, 2.55  
 to cosigner of note, 6.5:2  
 of default (*see also* Foreclosure)  
     contract for deed, 2.55  
     in foreclosure of superior lien, 8.4, 20.2:3  
     note, 6.4:5  
     promissory note, 6.1:1  
 disclosure (*see* Disclosure; Truth in lending)  
 of extension of credit, 11.52  
 filing of federal liens, requirements for, 2.97  
 of final agreement, 8.1:2, 10.12  
 foreclosure (*see* Foreclosure)  
 home improvement contract, 2.50, 2.125, 12.2:2,  
     12.4  
 of intention to accelerate promissory note, 6.1:1  
 of liabilities to cosigners of note, 20.7  
 of lien in commercial leases, filing, 25.9:1

for loans in excess of \$50,000, 2.50, 2.157, 10.12  
 lockout, 25.12:5  
 mechanic's lien, statutory, 21.5:1–21.5:5  
     contractual retainage claims, 18.3:4, 21.5:5, 21.6  
     nonresidential project, 21.7:1  
     to persons other than spouse in credit transactions,  
         20.6, 20.7  
     requirements based on definitions of project's  
         participants, 21.3, 21.3:1–21.3:3  
     residential projects, 21.7:2  
     right of cancellation, 20.4:2  
     specially fabricated materials, 21.5:5  
 of right of rescission (*see* Right of rescission, notice  
     of)  
 of security interest, 9.9, 9.13:1, 9.13:2  
     to purchaser of farm product, 9.7:2  
     to third party, 9.5:4  
 of tax rate of utility district, 2.277  
 of transfer of lien to borrower, 10.1:1

**Nuisance**, 2.183, 2.291

## O

**Obligation.** *See* Consideration

**Occupational Safety and Health Administration**,  
25.12:9

**Oil and gas operations**, 2.296

#### Open-space land

foreign ownership, 2.107  
 tax exemption, 2.5, 2.157, 2.184

**Origination fees**, 12.11:3

**Outdoor lighting**, 2.185

**Outdoor signs**, 2.186

#### Owerty

effect on homestead, 2.128, 11.10, 18.3:1  
 effect on partition deed, 5.13:5

## P

**Parking restrictions**, 2.259

**Parks and recreational projects**, 2.188

**Partial recourse provision**, 6.4:6

**Parties.** *See also* Names

[Decimal numbers refer to sections in practice notes.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]

- construction project participants, 21.3, 21.3:1–21.3:3  
     request for information, 21.5:6  
 defined, 9.3:2  
 identification of, 4.4:1, 16.17:1, 16.45:1, 16.66:1  
 names of, 3.9  
     in deed of trust, 8.2:1  
 partnership (*see* Partnership)
- Partition**, 2.189  
 deed, 12.6  
     owelty, effect on, 5.13:5
- Partnership**  
 acknowledgment for, 3.10:3, 3.11:4, 3.12:6  
 limited liability, 2.33, 2.154  
     foreign, 2.154  
 statutes affecting, 2.33, 2.190  
 transactions involving, 2.190, 9.11
- Patents and trademarks, perfecting security interest in**, 9.7
- Payment intangibles**, 9.2:1, 9.2:3
- Perfection**, 9.4:6, 9.5, 9.6:3, 9.6:4, 9.18:3  
 in water rights transactions, 16.81:4
- Personal property foreclosure. *See* Foreclosure, personal property**
- Pest control**, 2.192
- Pipelines**  
 disclosure, 2.66  
 easement, 2.73
- Pool-yard enclosures**, 2.195
- Possession, perfection by**, 9.4:5, 9.5:4
- Power of attorney**, 2.72, 3.10:1  
 executing loan documents, 11.20:6, 11.21  
 recording, 3.14
- Proof by suit**, 3.13:4
- Proof by unsworn declaration**, 3.13:5
- Property**  
 “as is” conveyance of, 5.12:3  
 coastal (*see* Coastal property)  
 community  
     characterization of, 5.1:2  
     character of, not altered in partition, 5.6  
     interest special warranty deed, 5.13:7  
     right of survivorship in, 2.45, 5.13:6  
 description based on unrecorded subdivision plat,  
     2.243  
 disclosures of conditions, 2.66  
 exchange of, implied vendor’s lien, 5.3:1  
 fee simple determinable condition of, 5.12:4  
 forfeiture laws, 2.108  
     by buyer, 11.9, 16.22, 16.50, 16.51  
     seller’s records for, 4.6:2, 16.19:2, 16.47:2,  
         16.68:2  
 inspection (*see* Inspection, property)  
 insurance, 17.3:1  
 investment, for security interest, 9.3:3  
     financing statement, filing of, 9.5:3, 9.5:5  
 lease (*see* Lease)  
 legal description, 3.7, 4.4:2, 16.17:8, 16.45:8  
     affidavit claiming mechanic’s or materialman’s  
         lien, 21.5:1  
     with collateral identification in security  
         agreement, 8.11:2  
     in deed, 5.1  
     in financing statement, 9.9  
     metes and bounds, 3.7:2, 3.7:4  
     in note, 6.2:6  
     personal property excluded, 5.12:2  
     platted property, 3.7:3  
     strips and gores, 5.12:5  
 owners association, 2.200, 23.2  
 personal, bill of sale (*see* Bill of sale)  
 personal restrictions on assignability, 9.11  
 possession, when acquired, 4.13, 16.26, 16.54, 16.75  
 private rights, 2.198  
 real (*see* Deed of trust)  
 repairs, 2.50, 2.142  
 restrictive covenant (*see under* Covenant)  
 review of title commitment, 4.8:1, 16.21:1, 16.49:1,  
     16.70  
 separate  
     warranty deed, 5.2:5  
     what constitutes, 5.1:2  
 spreading, grantor entitled to implied vendor’s lien,  
     5.3:1  
 tax consultants, 2.201  
 tax loans, 2.202
- Property owners associations**  
 generally, 23.2  
 assessments, collection of, 23.2:2  
 bylaws, 23.3:12  
 covenants and rules, enforcement of, 23.2:2  
 declarations, 23.1:2  
 governance of, 23.2:1  
 military personnel, notices to, 2.165  
 resale certificates, 23.2:3  
 restrictive covenants, 23.1:1, 23.1:3, 23.3  
 rules, 23.3:13

[Decimal numbers refer to *sections* in practice notes.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]

**Public improvement districts**, 2.66

**Purchase-money interest**, 6.5:2, 9.5:6, 9.10:3, 9.13:1  
effect of lien on homestead, 2.128, 5.13:5, 11.10, 18.3:1, 20.1:2

## Q

**Quitclaim deed**, 5.6

## R

**Railroad Commission, Texas**, 2.176

**Real Estate Commission, Texas**, 2.30, 2.206

**Real estate investments**  
subject to Securities Acts, 2.226  
trusts, 2.205

**Real estate license**, 2.30, 2.54  
regulation regarding real estate transaction, 2.206, 4.13, 16.26, 16.54, 16.75

**Real Estate Settlement Procedures Act (RESPA)**, 2.54, 2.69, 2.207, 12.11

**Reamortization clause**, 6.4:7

**Rebuilding obligations**, 25.1:4

**Recording.** *See also* Filing  
abstracts of judgment, 2.2  
acknowledgment required, 3.10:1, 3.14  
collateral transfer of note and lien, 9.18:4  
deed of trust, 8.11:1  
information for release of lien, 10.2:2, 10.2:3  
instrument, 3.14, 3.15  
    alternative methods, 3.13, 3.13:1–3.13:5  
    home equity loan, fees, 11.6:7  
    requirement for, 2.4, 2.117, 2.208, 3.6  
    responsibility for, after closing, 4.16:5, 16.29:5, 16.57:5, 16.78:5  
modification and extension agreement, 10.3:2  
notice of lien in commercial leases, 25.9:1  
release of lien and partial release of lien, 10.2  
survivorship agreement, 5.13:6  
of tax lien, 8.2:9  
unrecorded deed, binding on parties, 5.1:1

**Recording reference**, 3.7:5, 8.7

**Recordkeeping**  
of acknowledgment, 3.12:11  
by attorneys, 1.5:3, 1.5:6  
of income-producing property, 8.10:3

**Record of unit, condominium**, 24.6:4

**Record retention**, 2.209

**Redlining**, 11.3:7

**Reformation**, 5.8

**Regulation X, Housing and Urban Development**, 2.69, 12.11, 20.1:4. *See also* Real Estate Settlement Procedures Act (RESPA)  
disclosures under, 12.11:3  
prohibitions under, 12.11:6, 12.11:7

**Regulation Z**, 2.54, 2.69, 2.265, 12.1–12.7. *See also* Truth in lending  
commentaries, website, 12.2:3  
on consumer's acknowledgment of disclosure statements, 12.7  
on drafting documents, 12.2:3, 12.4  
model foreclosure statement, 12.4  
right of rescission under, 11.19:2, 12.2:2, 12.2:3, 20.1:4

**Reinstatement agreement**, 14.5:5

**Relatives, loans by**, 11.3:6

**Release of lien**  
by affidavit, 2.213  
in bankruptcy, 2.214  
cautions, 10.2:1  
effect of, 10.2  
filing, 10.2  
home equity loan, 11.22  
by judge, 2.214  
mechanic's and materialman's, 21.5:7  
partial, 10.2:1  
    clauses concerning property, 8.10:2  
    for groundwater transactions, 16.12, 16.42  
    preparing, 10.2:3  
    prepayment clause, 10.2:4  
preparing, 10.2:2  
recording information, 10.2:2, 10.2:3  
by recording return on execution, 2.214  
related to closing, 4.16:1, 16.29:1, 16.57:1, 16.78:1

**Remedies**  
for consumers, 2.54. (*See also* Truth in lending)  
for default of contract, 4.14, 16.27, 16.55, 16.76  
landlord's, 2.142

[Decimal numbers refer to sections in practice notes.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]

**Rent, prorations**, 4.16:2. *See also* Landlord-tenant relationship; Lease

**Rental application deposit**, 2.142

**Rental locators, residential**, 2.217

**Rental-purchase agreement**, 2.191  
disclosures, 2.50

**Repairs to property**, 2.50, 2.142, 25.5:3

**Republic of Texas liens**. *See* Fraud

**Resale certificate, condominium**, 24.6:3

**Reservations and exceptions**  
mineral rights, 5.14:1, 5.14:2  
clauses, 5.14:6  
vendor's lien, 5.3:1  
warranty deed, 5.1, 5.2:6, 5.2:7

**Residential construction**. *See* Construction, residential contract

**RESPA**. *See* Real Estate Settlement Procedures Act (RESPA)

**Restoration obligations**. *See* Rebuilding obligations

**Restrictive covenants**, 23.1:1

**Retail installment contract**, 2.50. *See also* Home improvement contract

**Reverse mortgage**, 2.124, 2.219, 11.31–11.47  
advances under, 11.34, 11.39, 11.41, 11.43  
affecting homestead rights, 2.128, 18.3:1, 20.1:2  
age requirements for, 11.32  
closing, 11.38  
consumer notice, 11.38  
counseling required, 11.38  
federal Home Equity Conversion Mortgage (HECM), 11.47  
foreclosure of, 11.35, 11.37  
interest, 11.42  
maturity event, 11.35  
nonrecourse, 11.33  
permitted uses of, 11.36  
prohibited uses, 11.40  
title insurance considerations, 11.45  
truth-in-lending disclosures, 11.46

**Right of redemption**  
of government, 14.2:5  
personal property, 14.3:9  
tax foreclosure, 2.5, 2.211

**Right of rescission, notice of**, 2.220

accrual of finance charges, 12.7  
cooling-off period, 12.2:2, 12.3  
copies, 12.7  
date of transaction, 12.4  
home equity loan, 11.18, 11.56  
home improvement loan, 12.2:2, 12.4  
in mechanic's lien transaction, 20.1:4  
persons entitled to, 12.2:2  
preparing, 12.4  
use of forms, 12.2, 12.2:2, 12.2:3  
for vendor's lien holder, 5.3:1  
waiver of, 12.7

**Right of survivorship**, 2.45, 5.13:6

**Riparian rights**, 16.5:2

**Risk allocation methods**, 17.1, 25.1:4

**Risk of loss**, 2.275

**Roads**, 2.242

**Roadway boundary**, 2.222

**Royalty**. *See* Minerals

**Rule against perpetuities**, 2.223

**Rule of capture**, 16.2:2

## S

**SAFE Act**. *See* Secure and Fair Enforcement of Mortgage Licensing Act of 2009

**Safety devices**, 2.50, 2.142

**Satellite dishes**, 23.1:3

**Schedules A, B, and C, title insurance review**, 4.8:1, 16.21:1, 16.49:1, 16.70

**Secure and Fair Enforcement of Mortgage Licensing Act of 2009**, 2.69, 6.2:7, 8.4, 11.3:5, 20.2:3

**Securities Acts**, 2.226

**Security agreement**. *See also* Financing statement; Fixtures  
after-acquired collateral or property, 9.4:3, 9.10:1  
attorney's fee provision, 9.10:4  
authentication of, 9.4:3  
classification and description of collateral in, 9.3:3, 9.9, 9.14:3  
collateral, location of, 9.9

[Decimal numbers refer to *sections* in practice notes.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]

contractual landlord's lien, 2.141  
 in deed of trust, 6.1:4  
   if borrower defaults, 6.3:6  
 deed of trust as, 8.11, 8.11:1  
 deed of trust used with, 8.1  
 defined, 9.3:1  
 description of collateral, 6.3:6  
 endorsement of note, 9.9  
 farm products, 9.7:2  
 function, 9.4:1  
 information request (form UCC11), 9.15:4  
 instructions for preparing, 9.9  
 modifications and clauses, 8.11:2  
 in note, when necessary, 6.5:1  
 note identified in, 9.9  
 personal property, 6.1:4  
 use of addenda, 9.15:1, 9.15:3  
 water rights transactions, use in, 16.81:3

**Security deposit**, 2.142  
 credited to buyer, 4.16:2  
 leases, 2.227

**Security device**, 2.50, 2.142

**Security instrument**, 14.2:2

**Security interest**, 2.228  
 after-acquired property, 9.4:3, 9.4:4, 9.10:1, 9.14:3  
 assignment of, 9.12  
 automatic perfection, 9.5:6, 9.5:7  
 changes concerning, filing of, 9.15:2  
 choice of law, 9.6  
 collateral, categories of, 9.3:3  
 creating and perfecting, 8.11:1, 9.4, 9.5, 9.6:3, 9.6:4  
   certain types of collateral, cautions, 9.7  
 deed of trust with, foreclosure of, 14.10  
 defined, 9.3:1  
 definitions of collateral, 9.3:1  
 documents required, 9.15  
 in farm products, 9.6:3, 9.6:4, 9.7:2, 25.7  
 of FDIC, foreclosure limitation, 2.105  
 financing statement as constructive notice of, 9.13:2  
 form UCC1, use of, in perfecting, 9.13:1  
 future advances, 9.10:2, 9.14:3  
 granted by government, 9.2:3  
 items incidental to homestead collateral, 11.9:1  
 lottery winnings, 9.5:6  
 in note, created by collateral transfer, 14.11  
 notice of, 9.13:2  
 purchase-money (*see* Purchase-money interest)  
 supporting obligation, 9.3:3, 9.5:6  
 temporary automatic perfection, 9.5:6, 9.5:7  
 in water rights, 16.81

when extended to future advances, 9.4:4, 9.10:2

**Self-service storage facility**, 2.229  
 warehouseman's lien, 2.286

**Seller's permit**  
 groundwater, 16.17:5, 16.45:5  
 surface water, 16.66:4

**Servicemembers.** *See* Military personnel

**Sewer service**, 2.231

**Sex offenders**, 2.232

**Sexual violence, termination of lease in event of**,  
 25.5:2

**Ships and aircraft, perfecting security interest in**,  
 9.7, 9.13:2

**Shopping centers**, 2.233, 25.3

**Signatures**  
 generally, 3.8  
 in financing statement, 9.5:3, 9.14:4  
 home equity loans, 11.20:6  
 marital property conveyance, 5.1:2  
 mechanic's lien contract, 20.7  
   in security agreement, 9.4:5  
 original for paper documents, 3.8:4

**Smoke alarms**, 2.142, 2.234  
 landlord's duty to install, 25.5:2

**Soil testing**, 2.140

**Special districts**, 2.236

**Statute of frauds.** *See also* Fraud  
 leases, 25.1:2  
 not applicable to certain personal loans, 8.10:9  
 notice, 2.50, 2.157, 2.238  
   of final agreement, 8.1:2  
 partitions not subject to, 5.6  
 regarding loan documents, 6.1:2, 8.1:2

**Statute of limitations.** *See* Limitations

**Statutes of repose**, 2.240

**Storage tanks**, 2.268  
 disclosure of, 2.66, 2.268  
 statutes affecting, 2.122, 2.268

**Stormwater permits**, 2.241

**Streets**, 2.242

**Subcontractors**  
 as derivative claimants, 21.4:2

[Decimal numbers refer to *sections* in practice notes.]

[Chapters 1-7, vol. 1; chs. 8-15, vol. 2; chs. 16-22, vol. 3; chs. 23-26, vol. 4]

lien affidavit filing deadline, 21.8:3  
 list of, 18.7:2  
 first-tier, 21.3:2  
 second-tier, 21.3:3, 21.5:2, 21.5:3

**Subdivision plats, 2.243**

in counties near Mexican border, 2.43, 2.243  
 in economically distressed counties, 2.43, 2.243  
 standards for outdoor lighting, 2.23

**Subletting and assignment, 2.142, 2.244****Subordination, nondisturbance, and attornment agreement, 10.16****Subrogation, waiver of, 17.7:2****Subrogation rights of surety, 2.119**

**Substitute trustee.** *See also* Trustee  
 appointment of, 14.6:1, 14.6:4  
 conditions for sale by, 14.2:2  
 definition of, 14.2:2

**Suit for deficiency**

personal property foreclosure, 14.3:5  
 real property foreclosure, 14.2:3

**Supporting obligation, 9.3:3, 9.5:6****Sureties, 2.119****Surface water, 16.1, 16.4.** *See also* Groundwater adjudication, 16.6

appropriation, 16.5:1  
 availability of unappropriated, 16.7:1  
 beneficial use, 16.7:2  
 cancellation of rights, 16.5:1  
 civil-law water rights, 16.5:3  
 conservation requirements, 16.7:5  
 damage to property by, 16.5:1  
 developed, 16.4  
 diffused, 16.4  
 drought contingency requirements, 16.7:5  
 due diligence, 16.8:3  
 eminent domain, 16.5:1  
 exemption from regulation for domestic and livestock use, 16.4  
 existing rights, nonimpairment of, 16.7:3  
 marketing, 16.8:1  
 obtaining rights, 16.7  
 permits, 16.8:2, 16.8:4, 16.66:4  
 public welfare and obtaining rights, 16.7:4  
 riparian rights, 16.5:2  
 sale of, 16.7, 16.8, 16.61  
 severability, 16.8:1  
 TCEQ permits, 16.8:2

types of, 16.5

**Surface water rights contract for sale, 16.62–16.69**

assignment, 16.77  
 closing, 16.75, 16.78  
   ad valorem taxes, 16.78:2  
   expenses, 16.78:1  
   fees, 16.78:2  
   funding, 16.78:3  
   payoff, 16.78:1  
   recording, 16.78:5  
 default, 16.76  
   inspection period, 16.70  
   postclosing, 16.79:3  
   representations and warranties, 16.72  
 surface use considerations in groundwater conveyance, 16.14  
 title, 16.70  
   abstract of, 16.70  
   commitment, 16.70  
   termination, 16.74  
   UCC search, 16.70

**Survey**

of property, 4.8, 16.21, 16.45:3, 16.49, 16.70  
   before construction begins, 18.3:5  
 review of, 4.8:2, 16.21:3, 16.49:3

**Surveyors**

liens against real estate, 2.247  
 manual for land surveying, 4.8:2, 16.21:3, 16.49:3  
 requirements for, 2.247  
 statutes of repose, 2.240

**Surviving spouse of mortgagor, 2.249****Survivorship, right of, 2.44, 5.13:6****Swimming pools, 2.195****T****Tax**

abatements in reinvestment zones, 2.251  
 ad valorem (*see* Ad valorem tax)  
 condominiums, 2.47  
 consultants, 2.201  
 credits for owners of low-income housing, 2.8  
 escrow funds, transfer of, 5.12:7  
 federal estate, 2.86  
 forced sale of co-owner's interest for payment of, 2.102  
 foreclosure, 2.104

[Decimal numbers refer to *sections* in practice notes.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]



federal lien records, 14.2:5  
 redemption rights, 2.5, 2.211  
 searches, 14.4:4  
 hotel occupancy, 2.129  
 lien, federal, 2.97, 14.2:5  
   effect on homestead, 11.10, 18.3:1, 20.1:2  
 loans, 2.202  
 open-space exemption, 2.5, 2.184  
 property  
   affecting homestead rights, 18.3:1, 20.1:2  
   review of title commitment, 4.8:1, 16.21:1,  
   16.49:1, 16.70  
 prorations, 4.16:2, 16.29:2, 16.57:2, 16.78:2  
 reserve account for payment of premiums, 8.5:1  
 reserve clause in deed of trust, 8.1:1  
 rollback, 2.50  
 tenant's right to protest appraised property value,  
   25.11:5  
 withholding from purchase price to pay, 2.179  
**Telecommunications**, 2.252  
**Tenant.** *See also* Landlord-tenant relationship; Lease  
 abandonment of premises by, 2.1  
 landlord's ad valorem tax assessment contested by,  
   2.5  
 right of, to contest property appraisal, 25.11:5  
 utility expenses, 2.278  
**Terrorism regulation**, 2.253  
**Texas Commission on Environmental Quality**,  
   2.231, 16.1, 16.2:3, 16.4, 16.5:1, 16.6, 16.7,  
   16.7:1-16.7:6, 16.8:1-16.8:4  
**Texas Water Development Board**, 16.1, 16.2:3,  
   16.7:6  
**Third-party lender**, 6.1  
 buyer's duties for, 4.4:5  
 consumer protection laws concerning, 20.1:4  
 estoppel agreement signed by, 20.6  
 execution of note to, 5.3:2-5.3:5  
 financing by, in mechanic's lien transaction, 20.2:1-  
   20.2:3  
 implied vendor's lien for, 5.3:1  
 landlord's lien waiver, 25.12:4  
 mechanic's lien contract, use of deed of trust with,  
   8.2:7  
 truth-in-lending disclosure form to borrower, 8.4,  
   20.2:3  
 usury laws concerning, 20.1:3  
**Timber production**, 2.5  
 financing statement

description, 9.4:4, 9.9, 9.14:3  
 filing, 8.11:1, 9.5:3, 9.6, 9.14:5  
 right in warranty deed, 5.15:1

**Timeshares**, 2.257

deed, 5.15:5  
 disclosure requirements, 2.66

**Title**

commitment and survey, 4.8, 16.21, 16.45:3, 16.49,  
   16.70  
 encumbrances to, 12.1  
 insurance, 2.258, 4.8, 16.21, 16.45:3, 16.49, 16.70  
   Basic Manual for writing, 4.8:1, 5.15:6, 10.2:1,  
   14.4:4, 16.21:1, 16.49:1, 16.70  
 endorsement of policy, 10.2:1  
 foreclosure, 14.4:4  
 insured closing service letter, 4.16:4, 16.29:4,  
   16.57:4, 16.78:4  
 limitations for special warranty deed, 5.4  
 limitations of, in modification and extension  
   agreement, 10.3:1  
 manufactured housing, 5.15:6  
   review of, 4.17:4, 16.30:3, 16.58:3, 16.79:3  
 manufactured housing, filing, 5.15:6  
 review of commitment, 4.8:1, 16.21:1, 16.49:1, 16.70  
 search, 4.8, 5.8, 16.21, 16.45:3, 16.49, 16.70  
 superior, evidence to establish, 2.255  
 warranty, 5.1

**Title company**

as closing agent, 11.21, 11.51, 16.17:2, 16.29,  
   16.45:2, 16.57, 16.66:2, 16.78  
 deposit of earnest money with, 16.20, 16.48, 16.69  
 endorsement of policy for partial release of lien,  
   10.2:1  
 release of lien by affidavit, 2.214  
 responsibilities in closing, 16.29, 16.57, 16.78

**Townhouse and planned unit development**

lease, 25.5  
 warranty deed, 5.15:4

**Toxic substances.** *See* Hazardous waste

**Trademark and trade-name rights**, 2.260

**Trade name.** *See* Assumed names

**Transfer of lien**

confidentiality notice, 10.1:5  
 consideration described in, 10.1:2  
 effect of, 10.1  
 endorsement of note, 10.1:4  
 negation of recourse and representations and  
   warranties, 10.1:3

[Decimal numbers refer to sections in practice notes.]

[Chapters 1-7, vol. 1; chs. 8-15, vol. 2; chs. 16-22, vol. 3; chs. 23-26, vol. 4]

notice of, to borrower, 10.1:1  
 preparing, 10.1:2  
 for security interest in real property, 9.18  
 tax, to lender, 8.2:9

**Transfer on death deed**, 2.61, 2.261, 5.11  
 existing rights of survivorship, 5.11:5  
 preparing, 5.11:11  
 purchasers, protection of, 5.11:10  
 purpose and effect of, 5.11:1  
 recordation of, 5.11:4  
 requirements, 5.11:2  
 revocation of, 5.11:6  
     divorce, 5.11:9  
     subsequent conveyance, 5.11:10  
     subsequent instrument, 5.11:8  
     subsequent transfer on death deed, 5.11:7  
 transferor, 5.11:3

**Transportation Commission, Texas**, 2.242

**Trespass to try title**, 2.263

action for, 2.142

#### **Trustee**

acknowledgment for, 3.10:3, 3.11:4, 3.12:6  
 conditions for sale by, 14.2:2  
 deed, 14.6:4  
     confidentiality notice, 14.6:4  
 definition, 14.2:2  
 duties for foreclosure, 8.1:2, 14.2:2  
 individual named as, 8.2:1  
 notice of sale, 14.6:2  
 substitute  
     appointment of, 14.6:1, 14.6:4  
     conditions for sale by, 14.2:2  
     definition of, 14.2:2

**Trusts**, 2.264

blind, 2.29

#### **Truth in lending**

consumer credit, what constitutes, 12.2  
 disclosure in transactions, 2.54, 2.69, 12.1, 12.2  
     annual percentage rate, 12.2  
     copies of forms, 12.7  
     financed amount itemization, 12.3, 12.4  
     forms, use of, 12.2  
     home equity loans, 11.18:2, 11.27  
     insurance provisions, 12.4  
     late-payment, 12.4  
     material, 12.1:3  
     multiple creditors, 12.4  
     requirements for statements, 12.2:1, 12.2:3, 12.3,  
     12.4, 12.7

residential mortgage, 12.4  
 for third-party lender, 8.4, 20.2:3  
 timeliness, 12.1:3  
 useful commentary, 12.2:3  
 variable rate, 12.1:3

document preparation, fees for, 12.7  
 escrow accounts, mandatory, 12.1:4  
 mechanic's lien (*see* Mechanic's lien)  
 overview, 12.1  
 prepayment penalties, restrictions on, 12.1:4  
 prohibited coercion of appraisers, 12.1:4  
 prohibited lending, 12.1:4  
 prohibited servicing practices, 12.1:4  
 regulations, credit extension subject to, 6.2:2  
 right of rescission, notice of (*see* Right of rescission,  
 notice of)

## U

**Unclaimed property**, 2.1, 2.85

**Underflow**, 16.2:1

**Underwriter**, 4.4:4

**Unsworn declaration, proof by**, 3.13:5

**Usury**, 2.276, 6.2:8

foreign state financial institutions exempt from Texas  
 law, 11.3:1

implications in wraparound note, 8.4

statutes and regulations, 20.1:3

#### **Utilities**

expenses for tenants, 2.278

interruptions, 2.142, 25.5:2

for residential construction, 18.3:5

submetering, 2.278

**Utility district.** *See* Municipal utility district (MUD)

## V

**Variable interest rates**, 2.279, 6.3:3. *See also*

Interest

disclosure statements, 12.4

home equity loans, 11.13:1, 11.53

#### **Vehicle, motor**

parking, 2.187

sale of, 5.7:1

security interest in, 9.7

[Decimal numbers refer to *sections* in practice notes.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]

towing, 2.259

**Venue**, 2.281

**Veterans Affairs, Department of**, 5.12:8

VA-guaranteed loans, 11.3:3

**Visual arts, copyright protection for**, 2.56, 2.283

**Voluntary cleanup program**, 2.284

**Voting rights, condominium**, 24.3:7

## W

**Wage liens**, 2.278

**Waiver**, 17.2

borrower's right to notices and demands, 6.1:1

of citation, 11.15

construction contract, 2.52, 17.2:4

drafting, 17.2:2

landlord's lien, 25.12:4

of notice after default, 14.7:1, 14.9:1

of notice of default and intent to accelerate, 14.5:3

of subrogation, 17.7:2, 25.1:4

of tenant's right to protest appraised property value,  
25.11:5

types, 17.2:2

**Warehouseman's lien**, 2.286

**Warranty**

appliance, 5.7:1

contractor's, for residential construction, 18.3:3

deed without, 5.1:1

exclusion of, 5.7:2

implied, for sale of goods, 5.7:3

implied by "grant" or "convey," 2.132

strips and gores excepted, 5.12:5

of title, generally, 5.1

**Warranty deed**

buyer as grantee in, 8.6

clauses, 5.1, 5.1:1

    easement, 5.15:2

community interest special, 5.13:7

condominium, 5.15:3

consideration

    cash, 5.2:2

    cash and assumption of note, 5.2:3

    cash and subject to note, 5.2:4

    as separate property, 5.2:5

conveyance of mineral rights, 5.14, 5.14:1

    lease between grantor and grantee, 5.14:4

    life tenant's right, 5.14:5

    royalty clause, 5.14:2, 5.14:6

    surface use, 5.14:3

preparing form, 5.2:1

provisions, use with deed of trust to secure  
    assumption, 8.7:2

reservations and exceptions, 5.2:6, 5.2:7

right to harvest timber, 5.15:1

separate property, 5.2:5

special, 5.4

townhouse and planned unit development, 5.15:4

**Warranty deed with vendor's lien**

implied vendor's lien, circumstances of, 5.3:1

when used, 5.3

**Waste, hazardous.** *See* Hazardous waste

**Waste, industrial**, 25.6

**Water.** *See also* Groundwater; Surface water  
artesian, 16.2:1

pollution, statutes affecting, 2.82

rights, adjudication of, 16.6

sale of, to public, 2.289

stormwater permits, 2.241

watercourse boundary, concurrent jurisdiction, 2.288

well drillers, regulation of, 2.290

**Water or utility district.** *See* Municipal utility  
district (MUD)

**Websites**

*Homestead Update*, 11.9:8, 11.9:9

OCCC Commentary, 11.1

    equity loan disclosure notice, 11.18:1, 11.52

Regulation Z commentaries, 12.2:3

Texas Center for Legal Ethics and Professionalism,  
1.2

Texas Commission on Environmental Quality, 16.8:4

Texas Water Development Board, 16.2:3, 16.7:6

**Wetlands**, 2.292

**Will**

probate of, as muniment of title, 2.293

property sales authorized by, 5.13:4

**Windstorm inspection**, 2.294

**Windstorm Insurance Association, Texas**, 2.294

**Workers' compensation laws**, 18.3:3

**Wraparound mortgage**

characteristics and risks, 6.4:2, 8.3, 8.4

clauses, 8.3, 8.5, 8.5:1–8.5:3

collection and payment agreement, 8.5:2, 10.6

[Decimal numbers refer to *sections* in practice notes.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]

considerations in drafting, 8.5  
deed of trust to secure assumption not appropriate in,  
    8.6  
defined, 5.12:6, 8.3  
effect of, 8.3  
modification of clauses, 8.5:3  
use of, 8.4  
usury implications, 8.4

**Z**

**Zoning**

community and group homes, 2.44  
municipalities' authority, 2.296  
restrictive covenants, 2.218

[Decimal numbers refer to *sections* in practice notes.]

[Chapters 1–7, vol. 1; chs. 8–15, vol. 2; chs. 16–22, vol. 3; chs. 23–26, vol. 4]

## LIST OF EFFECTIVE PAGES

This list shows the current version of each sheet that should be in the *Texas Real Estate Forms Manual*, third edition, after incorporating into it the 2018 supplement. After this supplement has been inserted, use this list to check the completeness of the manual. Only the right-hand pages are listed; next to each page number is the date of the current version of that sheet, which should be the same as the date printed in the lower right corner of the page, underneath the page number, in the manual. Pages that have not been replaced by supplementation do not bear dates. The first six pages in volume 1 (half-title page through State Bar of Texas officers) and the first four pages in volumes 2 through 4 (half-title through copyright page) do not bear dates. Please note that pages xi through xviii are the List of Effective Pages and will be inserted in the manual after you have checked all other pages against this list.

It is often necessary to reprint pages with unchanged content because of the reflow of text following added, amended, or deleted text, and occasionally pages are reprinted to simplify the task of removing and replacing pages.

<b>Volume 1</b>	1-4-1 .....	—	2-5 .....	(4/18)	3-5 .....	—
Half-title	1-5-1 .....	—	2-7 .....	(4/18)	3-7 .....	—
Title	1-5-3 .....	—	2-9 .....	(4/18)	3-9 .....	—
v .....	1-6-1 .....	—	2-11 .....	(4/18)	3-11 .....	—
vii .....	1-6-3 .....	—	2-13 .....	(4/18)	3-13 .....	(4/18)
ix .....	1-7-1 .....	—	2-15 .....	(4/18)	3-15 .....	(4/18)
	1-7-3 .....	—	2-17 .....	(4/18)	3-17 .....	(4/18)
	1-8-1 .....	—	2-19 .....	(4/18)	3-19 .....	—
<b>Summary of Contents</b>	1-8-3 .....	—	2-21 .....	(4/18)	3-1-1 .....	—
Contents-1 .....	1-8-5 .....	—	2-23 .....	(4/18)	3-2-1 .....	—
Contents-3 .....	1-8-7 .....	—	2-25 .....	(4/18)	3-3-1 .....	—
	1-8-9 .....	—	2-27 .....	(4/18)	3-4-1 .....	—
	1-8-11 .....	—	2-29 .....	(4/18)	3-5-1 .....	—
<b>How to Download This Manual</b>	1-9-1 .....	—	2-31 .....	(4/18)	3-6-1 .....	—
Doc-1 .....	1-9-3 .....	—	2-33 .....	(4/18)	3-7-1 .....	—
Doc-3 .....	1-9-5 .....	—	2-35 .....	(4/18)	3-8-1 .....	—
Doc-5 .....	1-9-7 .....	—	2-37 .....	(4/18)	3-9-1 .....	—
Doc-7 .....	1-9-9 .....	—	2-39 .....	(4/18)	3-10-1 .....	—
	1-9-11 .....	—	2-41 .....	(4/18)	3-11-1 .....	—
	1-10-1 .....	—	2-43 .....	(4/18)	3-12-1 .....	—
<b>Introduction</b>	1-10-3 .....	—	2-45 .....	(4/18)	3-13-1 .....	—
Intro-1 .....	1-10-5 .....	—	2-47 .....	(4/18)	3-14-1 .....	—
Intro-3 .....	1-10-7 .....	—	2-49 .....	(4/18)	3-15-1 .....	—
	1-10-9 .....	—	2-51 .....	(4/18)	3-16-1 .....	—
	1-11-1 .....	—	2-53 .....	(4/18)	3-17-1 .....	—
<b>Chapter 1</b>	1-12-1 .....	—	2-55 .....	(4/18)	3-18-1 .....	—
1-i .....	1-13-1 .....	—	2-57 .....	(4/18)	3-19-1 .....	—
1-1 .....	1-14-1 .....	—	2-59 .....	(4/18)	3-20-1 .....	—
1-3 .....			2-61 .....	(4/18)	3-21-1 .....	—
1-5 .....			2-63 .....	(4/18)	3-22-1 .....	—
1-7 .....			2-65 .....	—	3-23-1 .....	—
1-9 .....	<b>Chapter 2</b>	2-i .....			3-24-1 .....	—
1-11 .....		2-iii .....			3-25-1 .....	—
1-1-1 .....		2-v .....			3-26-1 .....	—
1-2-1 .....		2-vii .....			3-27-1 .....	—
1-3-1 .....		2-ix .....			3-28-1 .....	—
1-3-3 .....		2-1 .....			3-29-1 .....	—
		2-3 .....				
			<b>Chapter 3</b>			
			3-i .....	—		
			3-iii .....	—		
			3-1 .....	—		
			3-3 .....	—		

\* Please note that pages xi through xviii are the List of Effective Pages.

LIST OF EFFECTIVE PAGES

3-30-1 ..... —  
 3-31-1 ..... (4/18)  
 3-32-1 ..... —  
 3-33-1 ..... —  
 3-34-1 ..... —  
 3-35-1 ..... —  
 3-36-1 ..... —

**Chapter 4**

4-i ..... (4/18)  
 4-iii ..... (4/18)  
 4-1 ..... (4/18)  
 4-3 ..... (4/18)  
 4-5 ..... (4/18)  
 4-7 ..... (4/18)  
 4-9 ..... (4/18)  
 4-11 ..... (4/18)  
 4-13 ..... —  
 4-1-1 ..... —  
 4-1-3 ..... —  
 4-1-5 ..... —  
 4-1-7 ..... —  
 4-1-9 ..... —  
 4-1-11 ..... —  
 4-1-13 ..... —  
 4-1-15 ..... —  
 4-1-17 ..... —  
 4-1-19 ..... —  
 4-1-21 ..... —  
 4-1-23 ..... —  
 4-1-25 ..... —  
 4-1-27 ..... —  
 4-1-29 ..... —  
 4-1-31 ..... —  
 4-1-33 ..... —  
 4-1-35 ..... —  
 4-1-37 ..... —  
 4-1-39 ..... —  
 4-1-41 ..... —  
 4-1-43 ..... —  
 4-1-45 ..... —  
 4-1-47 ..... —  
 4-1-49 ..... —  
 4-1-51 ..... —  
 4-1-53 ..... —  
 4-1-55 ..... —  
 4-1-57 ..... —  
 4-2-1 ..... —  
 4-2-3 ..... —  
 4-3-1 ..... —  
 4-3-3 ..... —  
 4-3-5 ..... —  
 4-3-7 ..... —  
 4-3-9 ..... —  
 4-4-1 ..... —  
 4-5-1 ..... —  
 4-6-1 ..... —  
 4-7-1 ..... —  
 4-7-3 ..... —  
 4-8-1 ..... —  
 4-9-1 ..... —

4-9-3 ..... —  
 4-10-1 ..... —  
 4-11-1 ..... —  
 4-12-1 ..... —  
 4-13-1 ..... —  
 4-13-3 ..... —  
 4-14-1 ..... —  
 4-15-1 ..... —  
 4-16-1 ..... —  
 4-17-1 ..... —  
 4-17-3 ..... —  
 4-18-1 ..... —  
 4-19-1 ..... —  
 4-20-1 ..... —  
 4-21-1 ..... —  
 4-22-1 ..... —  
 4-22-3 ..... —  
 4-22-5 ..... (4/18)  
 4-23-1 ..... —  
 4-23-3 ..... —  
 4-23-5 ..... —  
 4-23-7 ..... —  
 4-24-1 ..... —  
 4-25-1 ..... —  
 4-26-1 ..... —  
 4-26-3 ..... —  
 4-27-1 ..... —  
 4-27-3 ..... —

**Chapter 5**

5-i ..... (4/18)  
 5-iii ..... (4/18)  
 5-v ..... (4/18)  
 5-vii ..... (4/18)  
 5-1 ..... —  
 5-3 ..... —  
 5-5 ..... —  
 5-7 ..... —  
 5-9 ..... —  
 5-11 ..... (4/18)  
 5-13 ..... (4/18)  
 5-15 ..... (4/18)  
 5-17 ..... (4/18)  
 5-19 ..... (4/18)  
 5-21 ..... (4/18)  
 5-23 ..... (4/18)  
 5-25 ..... —  
 5-1-1 ..... —  
 5-2-1 ..... —  
 5-3-1 ..... —  
 5-4-1 ..... —  
 5-5-1 ..... —  
 5-6-1 ..... —  
 5-6-3 ..... —  
 5-6-5 ..... —  
 5-7-1 ..... —  
 5-7-3 ..... —  
 5-7-5 ..... —  
 5-7-7 ..... —  
 5-8-1 ..... —  
 5-8-3 ..... —

5-8-5 ..... —  
 5-8-7 ..... —  
 5-8-9 ..... —  
 5-8-11 ..... —  
 5-8-13 ..... —  
 5-8-15 ..... —  
 5-8-17 ..... —  
 5-9-1 ..... —  
 5-9-3 ..... —  
 5-9-5 ..... —  
 5-9-7 ..... —  
 5-9-9 ..... —  
 5-9-11 ..... —  
 5-9-13 ..... —  
 5-10-1 ..... —  
 5-11-1 ..... —  
 5-11-3 ..... —  
 5-12-1 ..... —  
 5-13-1 ..... —  
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 5-14-1 ..... —  
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 5-15-3 ..... —  
 5-16-1 ..... —  
 5-17-1 ..... —  
 5-18-1 ..... —  
 5-19-1 ..... —  
 5-20-1 ..... —  
 5-20-3 ..... —  
 5-21-1 ..... —  
 5-22-1 ..... —  
 5-23-1 ..... —  
 5-23-3 ..... —  
 5-24-1 ..... —  
 5-25-1 ..... (4/18)  
 5-25-3 ..... (4/18)  
 5-25-5 ..... (4/18)  
 5-26-1 ..... —  
 5-27-1 ..... —

**Chapter 6**

6-i ..... —  
 6-iii ..... —  
 6-1 ..... —  
 6-3 ..... —  
 6-5 ..... —  
 6-7 ..... —  
 6-9 ..... —  
 6-1-1 ..... —  
 6-1-3 ..... —  
 6-1-5 ..... —  
 6-2-1 ..... —  
 6-2-3 ..... —  
 6-2-5 ..... —  
 6-2-7 ..... —  
 6-2-9 ..... —  
 6-3-1 ..... —  
 6-3-3 ..... —  
 6-4-1 ..... —  
 6-5-1 ..... —  
 6-6-1 ..... —

6-6-3 ..... —  
 6-6-5 ..... —  
 6-6-7 ..... —  
 6-6-9 ..... —  
 6-7-1 ..... —

**Chapter 7**

7-i ..... (4/18)

**Volume 2**

Half-title ..... —  
 Title ..... —  
 v ..... —

**Chapter 8**

8-i ..... —  
 8-iii ..... —  
 8-1 ..... —  
 8-3 ..... —  
 8-5 ..... —  
 8-7 ..... —  
 8-9 ..... —  
 8-11 ..... —  
 8-13 ..... —  
 8-15 ..... —  
 8-17 ..... —  
 8-1-1 ..... —  
 8-1-3 ..... —  
 8-1-5 ..... —  
 8-1-7 ..... —  
 8-1-9 ..... —  
 8-1-11 ..... —  
 8-1-13 ..... —  
 8-2-1 ..... —  
 8-2-3 ..... —  
 8-2-5 ..... —  
 8-2-7 ..... —  
 8-3-1 ..... —  
 8-4-1 ..... —  
 8-4-3 ..... —  
 8-5-1 ..... —  
 8-6-1 ..... —  
 8-7-1 ..... —  
 8-7-3 ..... —  
 8-8-1 ..... —  
 8-9-1 ..... —  
 8-9-3 ..... —  
 8-9-5 ..... —  
 8-9-7 ..... —  
 8-9-9 ..... —  
 8-9-11 ..... —  
 8-9-13 ..... —  
 8-9-15 ..... —  
 8-9-17 ..... —  
 8-9-19 ..... —  
 8-9-21 ..... —  
 8-9-23 ..... —  
 8-10-1 ..... —  
 8-10-3 ..... —  
 8-10-5 ..... —

8-10-7 ..... —  
 8-10-9 ..... —  
 8-10-11 ..... —  
 8-11-1 ..... —  
 8-11-3 ..... —  
 8-11-5 ..... —  
 8-12-1 ..... —  
 8-12-3 ..... —  
 8-12-5 ..... —  
 8-12-7 ..... —  
 8-12-9 ..... —

**Chapter 9**

9-i ..... —  
 9-iii ..... —  
 9-1 ..... —  
 9-3 ..... —  
 9-5 ..... —  
 9-7 ..... —  
 9-9 ..... —  
 9-11 ..... —  
 9-13 ..... —  
 9-15 ..... —  
 9-17 ..... —  
 9-19 ..... —  
 9-21 ..... —  
 9-23 ..... —  
 9-25 ..... —  
 9-27 ..... —  
 9-29 ..... —  
 9-31 ..... —  
 9-1-1 ..... —  
 9-1-3 ..... —  
 9-1-5 ..... —  
 9-1-7 ..... —  
 9-1-9 ..... —  
 9-1-11 ..... —  
 9-1-13 ..... —  
 9-2-1 ..... —  
 9-2-3 ..... —  
 9-2-5 ..... —  
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 9-2-11 ..... —  
 9-2-13 ..... —  
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 9-3-7 ..... —  
 9-3-9 ..... —  
 9-3-11 ..... —  
 9-4-1 ..... —  
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 9-4-7 ..... —  
 9-4-9 ..... —  
 9-4-11 ..... —  
 9-5-1 ..... —  
 9-5-3 ..... —  
 9-6-1 ..... —  
 9-6-3 ..... —

9-7-1 ..... —  
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 9-8-9 ..... —  
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 9-10-3 ..... —  
 9-11-1 ..... —  
 9-12-1 ..... —  
 9-13-1 ..... —  
 9-14-1 ..... —  
 9-15-1 ..... —  
 9-16-1 ..... —  
 9-17-1 ..... —  
 9-18-1 ..... —

**Chapter 10**

10-i ..... —  
 10-iii ..... —  
 10-1 ..... —  
 10-3 ..... —  
 10-5 ..... —  
 10-7 ..... —  
 10-9 ..... —  
 10-1-1 ..... —  
 10-2-1 ..... —  
 10-3-1 ..... —  
 10-4-1 ..... —  
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 10-16-1 ..... —  
 10-17-1 ..... —  
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 10-17-11 ..... —  
 10-17-13 ..... —  
 10-17-15 ..... —  
 10-17-17 ..... —  
 10-17-19 ..... —  
 10-17-21 ..... —

10-17-23 ..... —  
 10-18-1 ..... —  
 10-18-3 ..... —  
 10-19-1 ..... —  
 10-20-1 ..... —  
 10-20-3 ..... —  
 10-21-1 ..... —  
 10-22-1 ..... —  
 10-22-3 ..... —  
 10-23-1 ..... —  
 10-24-1 ..... —

**Chapter 11**

11-i ..... (4/18)  
 11-iii ..... (4/18)  
 11-v ..... (4/18)  
 11-1 ..... (4/18)  
 11-3 ..... (4/18)  
 11-5 ..... (4/18)  
 11-7 ..... (4/18)  
 11-9 ..... (4/18)  
 11-11 ..... (4/18)  
 11-13 ..... (4/18)  
 11-15 ..... (4/18)  
 11-17 ..... (4/18)  
 11-19 ..... (4/18)  
 11-21 ..... (4/18)  
 11-23 ..... (4/18)  
 11-25 ..... (4/18)  
 11-27 ..... (4/18)  
 11-29 ..... (4/18)  
 11-31 ..... (4/18)  
 11-33 ..... (4/18)  
 11-35 ..... (4/18)  
 11-37 ..... (4/18)  
 11-39 ..... (4/18)  
 11-41 ..... (4/18)  
 11-1-1 ..... (4/18)  
 11-1-3 ..... (4/18)  
 11-1-5 ..... (4/18)  
 11-2-1 ..... —  
 11-2-3 ..... —  
 11-2-5 ..... —  
 11-2-7 ..... —  
 11-3-1 ..... —  
 11-3-3 ..... —  
 11-3-5 ..... —  
 11-3-7 ..... —  
 11-3-9 ..... —  
 11-4-1 ..... (4/18)  
 11-4-3 ..... (4/18)  
 11-4-5 ..... (4/18)  
 11-5-1 ..... (4/18)  
 11-5-3 ..... (4/18)  
 11-5-5 ..... (4/18)  
 11-5-7 ..... (4/18)  
 11-6-1 ..... —  
 11-7-1 ..... —  
 11-8-1 ..... (4/18)  
 11-9-1 ..... (4/18)  
 11-9-3 ..... (4/18)

**Chapter 12**

12-i ..... —  
 12-1 ..... —  
 12-3 ..... —  
 12-5 ..... —  
 12-7 ..... —  
 12-9 ..... —  
 12-11 ..... —  
 12-13 ..... —  
 12-15 ..... —  
 12-17 ..... —  
 12-19 ..... —  
 12-1-1 ..... —  
 12-1-3 ..... —  
 12-2-1 ..... —  
 12-2-3 ..... —

**Chapter 13**

13-1 ..... —

**Chapter 14**

14-i ..... (4/18)  
 14-iii ..... (4/18)  
 14-1 ..... (4/18)  
 14-3 ..... (4/18)  
 14-5 ..... (4/18)  
 14-7 ..... (4/18)  
 14-9 ..... (4/18)  
 14-11 ..... (4/18)  
 14-13 ..... (4/18)  
 14-15 ..... (4/18)  
 14-17 ..... (4/18)  
 14-19 ..... (4/18)  
 14-21 ..... —  
 14-1-1 ..... —  
 14-2-1 ..... —  
 14-3-1 ..... —  
 14-4-1 ..... —  
 14-5-1 ..... —  
 14-6-1 ..... —  
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 14-7-1 ..... —  
 14-8-1 ..... —  
 14-9-1 ..... —  
 14-10-1 ..... —  
 14-11-1 ..... —  
 14-12-1 ..... —  
 14-12-3 ..... —  
 14-13-1 ..... —  
 14-13-3 ..... —  
 14-14-1 ..... —  
 14-14-3 ..... —  
 14-15-1 ..... (4/18)  
 14-15-3 ..... (4/18)  
 14-16-1 ..... (4/18)  
 14-16-3 ..... (4/18)  
 14-17-1 ..... (4/18)  
 14-17-3 ..... (4/18)  
 14-18-1 ..... (4/18)  
 14-19-1 ..... (4/18)

LIST OF EFFECTIVE PAGES

14-20-1 ..... (4/18)  
 14-20-3 ..... (4/18)  
 14-21-1 ..... (4/18)  
 14-22-1 ..... (4/18)  
 14-23-1 ..... (4/18)  
 14-24-1 ..... (4/18)  
 14-25-1 ..... (4/18)  
 14-26-1 ..... (4/18)  
 14-27-1 ..... (4/18)  
 14-28-1 ..... (4/18)  
 14-29-1 ..... (4/18)  
 14-30-1 ..... (4/18)  
 14-31-1 ..... (4/18)  
 14-32-1 ..... (4/18)  
 14-33-1 ..... (4/18)  
 14-33-3 ..... (4/18)  
 14-34-1 ..... (4/18)  
 14-34-3 ..... (4/18)  
 14-35-1 ..... (4/18)  
 14-35-3 ..... (4/18)  
 14-36-1 ..... (4/18)  
 14-37-1 ..... (4/18)  
 14-38-1 ..... (4/18)  
 14-39-1 ..... (4/18)  
 14-40-1 ..... (4/18)  
 14-40-3 ..... (4/18)  
 14-41-1 ..... (4/18)

**Chapter 15**

15-i ..... (4/18)

**Volume 3**

Half-title

Title

v ..... ———

**Chapter 16**

16-i ..... ———  
 16-iii ..... ———  
 16-v ..... ———  
 16-vii ..... ———  
 16-1 ..... ———  
 16-3 ..... ———  
 16-5 ..... ———  
 16-7 ..... ———  
 16-9 ..... ———  
 16-11 ..... ———  
 16-13 ..... ———  
 16-15 ..... ———  
 16-17 ..... ———  
 16-19 ..... ———  
 16-21 ..... ———  
 16-23 ..... ———  
 16-25 ..... ———  
 16-27 ..... ———  
 16-29 ..... ———  
 16-31 ..... ———  
 16-33 ..... ———  
 16-35 ..... ———  
 16-37 ..... ———

16-39 ..... ———  
 16-41 ..... ———  
 16-43 ..... ———  
 16-45 ..... ———  
 16-47 ..... ———  
 16-49 ..... ———  
 16-51 ..... ———  
 16-53 ..... ———  
 16-55 ..... ———  
 16-57 ..... ———  
 16-59 ..... ———  
 16-61 ..... ———  
 16-63 ..... ———  
 16-65 ..... ———  
 16-67 ..... ———  
 16-69 ..... ———  
 16-71 ..... ———  
 16-73 ..... ———  
 16-1-1 ..... ———  
 16-1-3 ..... ———  
 16-1-5 ..... ———  
 16-1-7 ..... ———  
 16-1-9 ..... ———  
 16-1-11 ..... ———  
 16-1-13 ..... ———  
 16-1-15 ..... ———  
 16-1-17 ..... ———  
 16-1-19 ..... ———  
 16-1-21 ..... ———  
 16-1-23 ..... ———  
 16-1-25 ..... ———  
 16-1-27 ..... ———  
 16-1-29 ..... ———  
 16-1-31 ..... ———  
 16-1-33 ..... ———  
 16-1-35 ..... ———  
 16-1-37 ..... ———  
 16-1-39 ..... ———  
 16-1-41 ..... ———  
 16-1-43 ..... ———  
 16-1-45 ..... ———  
 16-1-47 ..... ———  
 16-1-49 ..... ———  
 16-1-51 ..... ———  
 16-1-53 ..... ———  
 16-1-55 ..... ———  
 16-1-57 ..... ———  
 16-1-59 ..... ———  
 16-1-61 ..... ———  
 16-2-1 ..... ———  
 16-2-3 ..... ———  
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 16-3-3 ..... ———  
 16-3-5 ..... ———  
 16-3-7 ..... ———  
 16-3-9 ..... ———  
 16-3-11 ..... ———  
 16-3-13 ..... ———  
 16-3-15 ..... ———  
 16-4-1 ..... ———  
 16-4-3 ..... ———  
 16-5-1 ..... ———

16-5-3 ..... ———  
 16-6-1 ..... ———  
 16-6-3 ..... ———  
 16-6-5 ..... ———  
 16-6-7 ..... ———  
 16-7-1 ..... ———  
 16-8-1 ..... ———  
 16-9-1 ..... ———  
 16-9-3 ..... ———  
 16-9-5 ..... ———  
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 16-9-23 ..... ———  
 16-9-25 ..... ———  
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 16-9-31 ..... ———  
 16-9-33 ..... ———  
 16-9-35 ..... ———  
 16-9-37 ..... ———  
 16-9-39 ..... ———  
 16-9-41 ..... ———  
 16-9-43 ..... ———  
 16-9-45 ..... ———  
 16-10-1 ..... ———  
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 16-12-1 ..... ———  
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 16-15-1 ..... ———  
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 16-16-1 ..... ———  
 16-17-1 ..... ———  
 16-18-1 ..... ———  
 16-18-3 ..... ———  
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 16-18-17 ..... ———  
 16-18-19 ..... ———  
 16-18-21 ..... ———  
 16-18-23 ..... ———  
 16-18-25 ..... ———  
 16-18-27 ..... ———  
 16-18-29 ..... ———  
 16-18-31 ..... ———  
 16-18-33 ..... ———  
 16-18-35 ..... ———  
 16-18-37 ..... ———

16-18-39 ..... ———  
 16-18-41 ..... ———  
 16-18-43 ..... ———  
 16-18-45 ..... ———  
 16-18-47 ..... ———  
 16-18-49 ..... ———  
 16-19-1 ..... ———  
 16-19-3 ..... ———  
 16-20-1 ..... ———  
 16-20-3 ..... ———  
 16-21-1 ..... ———  
 16-21-3 ..... ———  
 16-21-5 ..... ———  
 16-21-7 ..... ———  
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 16-21-11 ..... ———  
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 16-21-15 ..... ———  
 16-22-1 ..... ———  
 16-22-3 ..... ———  
 16-22-5 ..... ———  
 16-22-7 ..... ———  
 16-22-9 ..... ———  
 16-22-11 ..... ———  
 16-22-13 ..... ———  
 16-22-15 ..... ———  
 16-23-1 ..... ———  
 16-24-1 ..... ———  
 16-25-1 ..... ———

**Chapter 17**

17-i ..... ———  
 17-1 ..... ———  
 17-3 ..... ———  
 17-5 ..... ———  
 17-7 ..... ———  
 17-9 ..... ———  
 17-11 ..... ———  
 17-13 ..... ———  
 17-15 ..... ———  
 17-17 ..... ———  
 17-19 ..... ———  
 17-21 ..... ———  
 17-23 ..... ———  
 17-25 ..... ———  
 17-27 ..... ———  
 17-1-1 ..... ———  
 17-2-1 ..... ———  
 17-3-1 ..... ———

**Chapter 18**

18-i ..... (4/18)  
 18-1 ..... (4/18)  
 18-3 ..... (4/18)  
 18-5 ..... (4/18)  
 18-7 ..... (4/18)  
 18-9 ..... (4/18)  
 18-1-1 ..... ———  
 18-1-3 ..... ———  
 18-1-5 ..... ———  
 18-2-1 ..... ———



18-3-1 ..... —  
 18-4-1 ..... —  
 18-4-3 ..... —  
 18-4-5 ..... (4/18)  
 18-4-7 ..... (4/18)  
 18-4-9 ..... (4/18)  
 18-4-11 ..... (4/18)  
 18-4-13 ..... (4/18)  
 18-4-15 ..... (4/18)  
 18-4-17 ..... (4/18)  
 18-4-19 ..... —  
 18-5-1 ..... —  
 18-6-1 ..... —  
 18-7-1 ..... —  
 18-8-1 ..... —  
 18-9-1 ..... —  
 18-10-1 ..... —  
 18-11-1 ..... —  
 18-12-1 ..... —  
 18-12-3 ..... —

**Chapter 19**

19-i ..... (4/18)  
 19-1 ..... (4/18)  
 19-3 ..... (4/18)  
 19-1-1 ..... (4/18)  
 19-1-3 ..... (4/18)  
 19-1-5 ..... —  
 19-1-7 ..... —  
 19-1-9 ..... —  
 19-1-11 ..... —  
 19-1-13 ..... —  
 19-1-15 ..... —  
 19-1-17 ..... —  
 19-1-19 ..... —  
 19-1-21 ..... —  
 19-1-23 ..... —  
 19-1-25 ..... —  
 19-1-27 ..... —  
 19-1-29 ..... —  
 19-1-31 ..... (4/18)  
 19-1-33 ..... —  
 19-1-35 ..... —  
 19-1-37 ..... —  
 19-1-39 ..... —  
 19-1-41 ..... —  
 19-1-43 ..... —  
 19-1-45 ..... —  
 19-1-47 ..... —  
 19-1-49 ..... —  
 19-1-51 ..... —  
 19-1-53 ..... —  
 19-1-55 ..... —  
 19-1-57 ..... —  
 19-1-59 ..... —  
 19-1-61 ..... —  
 19-1-63 ..... —  
 19-1-65 ..... —  
 19-1-67 ..... —  
 19-1-69 ..... —  
 19-1-71 ..... —

19-1-73 ..... —

**Chapter 20**

20-i ..... —  
 20-1 ..... —  
 20-3 ..... —  
 20-5 ..... —  
 20-7 ..... —  
 20-9 ..... —  
 20-11 ..... —  
 20-13 ..... —  
 20-15 ..... —  
 20-17 ..... —  
 20-19 ..... —  
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 20-3-1 ..... —  
 20-3-3 ..... —  
 20-4-1 ..... —  
 20-5-1 ..... —  
 20-5-3 ..... —  
 20-5-5 ..... —  
 20-6-1 ..... —  
 20-7-1 ..... —  
 20-8-1 ..... —

**Chapter 21**

21-i ..... —  
 21-1 ..... —  
 21-3 ..... —  
 21-5 ..... —  
 21-7 ..... —  
 21-9 ..... —  
 21-11 ..... —  
 21-13 ..... —  
 21-1-1 ..... —  
 21-2-1 ..... —  
 21-3-1 ..... —  
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 21-4-3 ..... —  
 21-5-1 ..... —  
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 21-7-1 ..... —  
 21-8-1 ..... —  
 21-9-1 ..... —  
 21-10-1 ..... —  
 21-11-1 ..... —  
 21-12-1 ..... —  
 21-13-1 ..... —  
 21-14-1 ..... —  
 21-15-1 ..... —

**Chapter 22**

22-i ..... (4/18)

**Volume 4**

Half-title ..... —  
 Title ..... —  
 v ..... —

**Chapter 23**

23-i ..... —  
 23-1 ..... —  
 23-3 ..... —  
 23-5 ..... —  
 23-7 ..... —  
 23-9 ..... —  
 23-1-1 ..... —  
 23-1-3 ..... —  
 23-1-5 ..... —  
 23-1-7 ..... —  
 23-1-9 ..... —  
 23-1-11 ..... —  
 23-1-13 ..... —  
 23-1-15 ..... —  
 23-1-17 ..... —  
 23-2-1 ..... —  
 23-2-3 ..... —  
 23-2-5 ..... —  
 23-2-7 ..... —  
 23-2-9 ..... —  
 23-3-1 ..... —  
 23-4-1 ..... —  
 23-4-3 ..... —  
 23-4-5 ..... —  
 23-4-7 ..... —  
 23-4-9 ..... —  
 23-4-11 ..... —  
 23-5-1 ..... —  
 23-5-3 ..... —  
 23-6-1 ..... —  
 23-7-1 ..... —  
 23-8-1 ..... —  
 23-9-1 ..... —  
 23-10-1 ..... —  
 23-10-3 ..... —  
 23-11-1 ..... —  
 23-11-3 ..... —  
 23-11-5 ..... —  
 23-12-1 ..... —  
 23-12-3 ..... —  
 23-12-5 ..... —  
 23-12-7 ..... —  
 23-12-9 ..... —  
 23-13-1 ..... —  
 23-14-1 ..... —  
 23-14-3 ..... —  
 23-15-1 ..... —  
 23-16-1 ..... —  
 23-17-1 ..... —  
 23-17-3 ..... —  
 23-18-1 ..... —

23-19-1 ..... —

23-20-1 ..... —

**Chapter 24**

24-i ..... —  
 24-1 ..... —  
 24-3 ..... —  
 24-5 ..... —  
 24-7 ..... —  
 24-9 ..... —  
 24-1-1 ..... —  
 24-1-3 ..... —  
 24-1-5 ..... —  
 24-1-7 ..... —  
 24-1-9 ..... —  
 24-1-11 ..... —  
 24-1-13 ..... —  
 24-1-15 ..... —  
 24-1-17 ..... —  
 24-2-1 ..... —  
 24-2-3 ..... —  
 24-3-1 ..... —  
 24-4-1 ..... —  
 24-4-3 ..... —  
 24-4-5 ..... —  
 24-4-7 ..... —  
 24-4-9 ..... —  
 24-4-11 ..... —  
 24-5-1 ..... —  
 24-6-1 ..... —  
 24-6-3 ..... —  
 24-7-1 ..... —  
 24-8-1 ..... —  
 24-9-1 ..... —  
 24-10-1 ..... —  
 24-11-1 ..... —  
 24-11-3 ..... —  
 24-12-1 ..... —  
 24-12-3 ..... —  
 24-13-1 ..... —  
 24-13-3 ..... —  
 24-13-5 ..... —  
 24-13-7 ..... —  
 24-13-9 ..... —  
 24-13-11 ..... —

**Chapter 25**

25-i ..... —  
 25-iii ..... —  
 25-1 ..... —  
 25-3 ..... —  
 25-5 ..... —  
 25-7 ..... —  
 25-9 ..... —  
 25-11 ..... (4/18)  
 25-13 ..... —  
 25-15 ..... —  
 25-1-1 ..... —  
 25-1-3 ..... —  
 25-1-5 ..... —  
 25-1-7 ..... —

25-1-9 . . . . .	25-18-1 . . . . .	26-18-1 . . . . .
25-1-11 . . . . .	25-19-1 . . . . .	26-19-1 . . . . .
25-2-1 . . . . .	25-19-3 . . . . .	26-20-1 . . . . .
25-2-3 . . . . .	25-19-5 . . . . .	26-21-1 . . . . .
25-2-5 . . . . .	25-20-1 . . . . .	26-22-1 . . . . .
25-2-7 . . . . .	25-21-1 . . . . .	26-22-3 . . . . .
25-2-9 . . . . .	25-22-1 . . . . .	26-22-5 . . . . .
25-2-11 . . . . .	25-23-1 . . . . .	26-22-7 . . . . .
25-2-13 . . . . .	25-24-1 . . . . .	26-23-1 . . . . .
25-3-1 . . . . .	25-25-1 . . . . .	26-23-3 . . . . .
25-3-3 . . . . .	25-25-3 . . . . .	26-23-5 . . . . .
25-3-5 . . . . .	25-26-1 . . . . .	26-23-7 . . . . .
25-3-7 . . . . .	25-26-3 . . . . .	26-24-1 . . . . .
25-3-9 . . . . .	25-27-1 . . . . .	26-24-3 . . . . .
25-3-11 . . . . .	25-28-1 . . . . .	26-24-5 . . . . .
25-3-13 . . . . .	25-29-1 . . . . .	26-25-1 . . . . .
25-4-1 . . . . .	25-29-3 . . . . .	26-25-3 . . . . . (4/18)
25-5-1 . . . . .	25-29-5 . . . . .	26-25-5 . . . . .
25-5-3 . . . . .	25-29-7 . . . . .	26-25-7 . . . . .
25-5-5 . . . . .	25-29-9 . . . . .	26-26-1 . . . . .
25-5-7 . . . . .	25-30-1 . . . . .	26-26-3 . . . . .
25-5-9 . . . . .	25-31-1 . . . . .	26-27-1 . . . . .
25-5-11 . . . . .	25-32-1 . . . . .	26-27-3 . . . . .
25-5-13 . . . . .	25-33-1 . . . . .	26-28-1 . . . . .
25-5-15 . . . . .	25-34-1 . . . . .	26-29-1 . . . . .
25-6-1 . . . . .	25-34-3 . . . . .	26-29-3 . . . . .
25-6-3 . . . . .	25-35-1 . . . . .	26-29-5 . . . . .
25-6-5 . . . . .	25-35-3 . . . . .	26-29-7 . . . . .
25-6-7 . . . . .		26-29-9 . . . . .
25-6-9 . . . . .		26-29-11 . . . . .
25-6-11 . . . . .		26-30-1 . . . . .
25-6-13 . . . . .		26-30-3 . . . . .
25-7-1 . . . . .		26-30-5 . . . . .
25-7-3 . . . . .		26-30-7 . . . . .
25-7-5 . . . . .		26-30-9 . . . . .
25-7-7 . . . . .		26-30-11 . . . . .
25-7-9 . . . . .		26-31-1 . . . . .
25-7-11 . . . . .		26-31-3 . . . . .
25-7-13 . . . . .		26-31-5 . . . . .
25-8-1 . . . . .		26-31-7 . . . . .
25-8-3 . . . . .		26-31-9 . . . . .
25-8-5 . . . . .		26-31-11 . . . . .
25-8-7 . . . . .		26-32-1 . . . . .
25-8-9 . . . . .		26-33-1 . . . . .
25-8-11 . . . . .		26-33-3 . . . . .
25-8-13 . . . . .		26-34-1 . . . . .
25-9-1 . . . . .		26-35-1 . . . . .
25-9-3 . . . . .		26-36-1 . . . . .
25-9-5 . . . . .		26-36-3 . . . . .
25-9-7 . . . . .		26-36-5 . . . . .
25-9-9 . . . . .		26-37-1 . . . . . (4/18)
25-9-11 . . . . .		26-37-3 . . . . . (4/18)
25-10-1 . . . . .		26-37-5 . . . . . (4/18)
25-10-3 . . . . .		26-37-7 . . . . . (4/18)
25-11-1 . . . . .		26-37-9 . . . . . (4/18)
25-12-1 . . . . .		26-38-1 . . . . . (4/18)
25-13-1 . . . . .		26-38-3 . . . . . (4/18)
25-13-3 . . . . .		
25-14-1 . . . . .		
25-15-1 . . . . .		
25-16-1 . . . . .		
25-17-1 . . . . .		
	<b>Chapter 26</b>	
	26-i . . . . . (4/18)	
	26-1-1 . . . . .	
	26-1-3 . . . . .	
	26-2-1 . . . . .	
	26-3-1 . . . . .	
	26-3-3 . . . . .	
	26-4-1 . . . . .	
	26-4-3 . . . . .	
	26-5-1 . . . . .	
	26-6-1 . . . . .	
	26-6-3 . . . . .	
	26-7-1 . . . . .	
	26-8-1 . . . . .	
	26-9-1 . . . . .	
	26-9-3 . . . . .	
	26-10-1 . . . . .	
	26-11-1 . . . . .	
	26-12-1 . . . . .	
	26-12-3 . . . . .	
	26-13-1 . . . . .	
	26-13-3 . . . . .	
	26-14-1 . . . . .	
	26-14-3 . . . . .	
	26-15-1 . . . . .	
	26-15-3 . . . . .	
	26-16-1 . . . . .	
	26-16-3 . . . . .	
	26-16-5 . . . . .	
	26-17-1 . . . . .	
	26-17-3 . . . . .	
	26-17-5 . . . . .	

**Statutes and Rules Cited**

Stat-1 . . . . .	(4/18)
Stat-3 . . . . .	(4/18)
Stat-5 . . . . .	(4/18)
Stat-7 . . . . .	(4/18)
Stat-9 . . . . .	(4/18)
Stat-11 . . . . .	(4/18)
Stat-13 . . . . .	(4/18)
Stat-15 . . . . .	(4/18)
Stat-17 . . . . .	(4/18)
Stat-19 . . . . .	(4/18)
Stat-21 . . . . .	(4/18)
Stat-23 . . . . .	(4/18)
Stat-25 . . . . .	(4/18)
Stat-27 . . . . .	(4/18)
Stat-29 . . . . .	(4/18)
Stat-31 . . . . .	(4/18)
Stat-33 . . . . .	(4/18)
Stat-35 . . . . .	(4/18)
Stat-37 . . . . .	(4/18)

**Cases Cited**

Cases-1 . . . . .	(4/18)
Cases-3 . . . . .	(4/18)
Cases-5 . . . . .	(4/18)

**Subject Index to Forms**

Forms-1 . . . . .	(4/18)
Forms-3 . . . . .	(4/18)
Forms-5 . . . . .	(4/18)
Forms-7 . . . . .	(4/18)
Forms-9 . . . . .	(4/18)
Forms-11 . . . . .	(4/18)

**List of Forms by Title**

List-1 . . . . .	(4/18)
List-3 . . . . .	(4/18)
List-5 . . . . .	(4/18)
List-7 . . . . .	(4/18)
List-9 . . . . .	(4/18)
List-11 . . . . .	(4/18)
List-13 . . . . .	(4/18)
List-15 . . . . .	(4/18)

**Subject Index**

Subj-1 . . . . .	(4/18)
Subj-3 . . . . .	(4/18)
Subj-5 . . . . .	(4/18)
Subj-7 . . . . .	(4/18)
Subj-9 . . . . .	(4/18)
Subj-11 . . . . .	(4/18)
Subj-13 . . . . .	(4/18)
Subj-15 . . . . .	(4/18)
Subj-17 . . . . .	(4/18)
Subj-19 . . . . .	(4/18)
Subj-21 . . . . .	(4/18)
Subj-23 . . . . .	(4/18)

**Appendix**

App-1 . . . . .	(4/18)
App-3 . . . . .	(4/18)

Subj-25 . . . . (4/18)  
Subj-27 . . . . (4/18)  
Subj-29 . . . . (4/18)

*[Reserved]*