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Postjudgment Discovery

§ 26.1 Purpose and Scope of Postjudgment Discovery

Pretrial discovery proceedings can be used after judgment to aid in the enforcement of the judgment. Generally, the rules governing pretrial discovery also apply to postjudgment discovery. Tex. R. Civ. P. 621a. The prejudgment discovery limitations of rule 190 (concerning the discovery period, the number of interrogatories, and deposition time) do not apply to discovery conducted under rule 621a. Tex. R. Civ. P. 190.6. Any inquiry permissible under pretrial discovery should be permissible to aid in enforcing a judgment. The information sought must be reasonably calculated to lead to the discovery of material evidence, and material evidence in turn includes information that would aid in enforcement of the judgment. *Blankinship v. Brown*, 399 S.W.3d 303, 312 (Tex. App.—Dallas 2013, pet. denied). For instance, it should be permissible to make any inquiry designed to aid the attorney in ascertaining whether the judgment debtor—

1. currently has property subject to satisfaction of the judgment;
2. has transferred or conveyed property fraudulently; or
3. will obtain property that would be subject to the liability under the judgment.

The right of a successful party to obtain postjudgment discovery inures to his successor or assignee. Tex. R. Civ. P. 621a.

In pursuing discovery of the debtor's assets, as well as if seeking actual levy, the creditor's attorney should keep in mind what property is exempt and what is not. These matters are discussed in part III. in chapter 27 of this manual.

Procedurally, discovery operates in the same manner after judgment as before. *See Emmons v. Creditor's Financial Services*, 492 S.W.2d 363, 365 (Tex. Civ. App.—Waco 1973, no writ).

If the judgment has been suspended by supersedeas bond or court order, postjudgment discovery is not permitted. Tex. R. Civ. P. 621a. See section 27.25 in this manual regarding postjudgment orders suspending execution of the judgment.

§ 26.2 Depositions

§ 26.2:1 Depositions Generally

It is often preferable to take the judgment debtor's oral deposition instead of using written interrogatories, because questioning him in person allows the creditor immediately to ask additional questions based on the debtor's responses. A subpoena or a notice duces tecum combines a documents request with the scheduled deposition. If substantial documents are expected, it may be more practical to first proceed with a request for production so the documents can be reviewed before the time the deposition is scheduled. The discussion in part II. in chapter 18 of this manual regarding pretrial depositions applies as well to postjudgment depositions. Postjudgment deposition notices and subpoenas with duces tecum language are at forms 26-1 through 26-3 in this chapter. Note that the subpoena must state the text of rule 176.8(a), which warns the witness that failure to obey the sub-

poena may be a contempt of court. Tex. R. Civ. P. 176.1(g). Rule 176.8(b) provides that a person served with a subpoena cannot be attached for failure to comply without proof by affidavit of the party requesting the subpoena or the party's attorney of record that all fees due the person by law were paid or tendered. Tex. R. Civ. P. 176.8(b). Civil Practice and Remedies Code section 22.001 provides for $10 per day for each day the witness "attends court," and section 22.004 provides for $1 for production of documents. *See* Tex. Civ. Prac. & Rem. Code §§ 22.001, 22.004. The $10 per day witness fee requirement applies to subpoenas for depositions. Tex. Att'y Gen. Op. No. DM-342 (1995). These fees need to be paid when the subpoena is served so the typical procedure is to attach $11 in cash to the subpoena. *See* Tex. Civ. Prac. & Rem. Code § 22.001(b).The pattern interrogatories at forms 26-5 through 26-8 can serve as an outline for the scope of a deposition. See form 26-21 for a checklist of deposition topics.

A witness may be compelled to attend a deposition by being served with a subpoena under Tex. R. Civ. P. 176. If the witness is a party or is retained by, employed by, or otherwise subject to the control of a party, however, service of the notice of oral deposition on the party's attorney has the same effect as a subpoena served on the witness. Tex. R. Civ. P. 199.3. If the judgment debtor is a corporation or other entity, it is the better practice to name a particular person to appear on behalf of the corporation. If it is unclear whether the desired witness is an agent or employee subject to control of the party, serving the individual with a subpoena may be preferable. *See In re Reaud*, 286 S.W.3d 574, 583 (Tex. App.—Beaumont 2009, orig. proceeding) (per curiam) (director of corporation not subject to corporation's control). See form 26-3. If a nonparty witness is to be subpoenaed, the subpoena must be filed with the court and a copy served on the other parties to the suit. Tex. R. Civ. P. 191.4(b)(1), 191.5. A pro se defendant should be served with a subpoena instead of merely a notice, although some practitioners take the position that the pro se defendant is acting as his own attorney and that a notice has the effect of a subpoena under Tex. R. Civ. P. 199.3.

§ 26.2:2 Nonstenographic Depositions

Nonstenographic depositions are allowed if the party intending to take the deposition gives at least five days' notice to the witness and all other parties specifying the type of nonstenographic recording that will be used and whether the deposition will also be recorded stenographically. Tex. R. Civ. P. 199.1(c). Typically this notice is included in the subpoena or deposition notice. The party requesting the nonstenographic recording is responsible for obtaining a person authorized to administer the oath and for assuring that the recording will be intelligible, accurate, and trustworthy. Tex. R. Civ. P. 199.1(c).

A nonstenographic deposition may be recorded by a certified shorthand reporter, a party, the party's attorney, or a full-time employee of the party or his attorney. Tex. Gov't Code §§ 52.021(f), 52.033. *See also Burr v. Shannon*, 593 S.W.2d 677, 678 (Tex. 1980) (orig. proceeding) (discussing predecessor statutes with similar language) and Tex. Att'y Gen. Op. No. GA-928 (2012) (discussing the statutory exception to section 52.021(f)'s requirement that all depositions conducted in this state must be recorded by a certified shorthand reporter; the exception is found at section 52.033, which states that the requirement does not apply to (1) a party to the litigation involved, (2) the attorney of the party, or (3) a full-time employee of a party or a party's attorney). The oath may be administered by a notary public. Tex. Gov't Code § 602.002(4).

A nonstenographic deposition is especially useful for postjudgment discovery. It eliminates the expense of a court reporter; its scope and length are limited only by the general scope of discov-

ery; and it affords, under color of civil procedure rule, a judicially enforceable means of meeting the debtor face-to-face to discuss the debt and the debtor's ability to satisfy it. See section 18.26 in this manual for additional information regarding nonstenographic depositions.

§ 26.3 Requests for Production

§ 26.3:1 Scope of Requests

The scope of postjudgment requests for production is the same as that for prejudgment requests. *See* Tex. R. Civ. P. 621a. See section 18.72 in this manual. Examples of the types of documents the creditor's attorney might seek are described in the notices and subpoenas duces tecum at forms 26-1 through 26-3 in this chapter.

§ 26.3:2 Service of Requests and Responses

Service of a postjudgment request for production is made in the same manner as a prejudgment request. *See* Tex. R. Civ. P. 621a. See section 18.74 in this manual. If the debtor is represented by an attorney at this stage, or if it is uncertain whether the debtor is still so represented, it is the better practice to serve both the debtor and the attorney. *See Arndt v. Farris*, 633 S.W.2d 497, 500 (Tex. 1982). Copies must also be served on all parties of record. Tex. R. Civ. P. 191.5.

§ 26.4 Interrogatories

§ 26.4:1 Interrogatories Generally

The number of postjudgment interrogatories is not limited by the rules. *See* Tex. R. Civ. P. 190.6. This has led to a practice of sending long form interrogatories. Nonselective use of interrogatories could be unduly burdensome to the debtor and may be subject to objection if it appears that many of the questions are not relevant. The creditor's attorney should be selective in preparing written interrogatories, especially those directed to individual debtors, and should ask only those questions that are relevant to the particular debtor. Accordingly, depositions are usually preferable to interrogatories as a tool for examining the debtor directly. See also part IV. in chapter 18 of this manual regarding pretrial interrogatories.

§ 26.4:2 Service of Interrogatories

Written interrogatories are served in the same manner as other papers in the suit. Tex. R. Civ. P. 21a, 621a. If it is uncertain whether the party is still represented by an attorney, it is the better practice to serve both the party and attorney. *See Arndt v. Farris*, 633 S.W.2d 497, 500 (Tex. 1982). Copies must also be served on all parties of record. Tex. R. Civ. P. 191.5.

§ 26.4:3 Service of Interrogatories on Corporate or Other Entity Debtor

If the debtor is a corporation or other entity, it is good practice to address the interrogatories to the agent or employee subject to control of the entity defendant that will have the most knowledge of the defendant's assets. For a large corporation, the attorney should consider serving the corporation's controller. For a closely held corporation, the president is a common choice for service. If it becomes necessary to enforce a court order to answer the interrogatories by contempt proceedings, it can be problematic enforcing the order by contempt on an entity debtor unless the corporate agent is shown to have knowledge of the order and participates in or encourages the violation of the order. *Ex parte Chambers*, 898 S.W.2d 257, 264 (Tex. 1995) (orig. proceeding) (contemner was sole officer, director, and shareholder). See section 26.7 below. Preferably, the individual should reside or do business in the county of suit, because

some courts are reluctant to order the attachment of persons outside the county; see section 26.7:2.

§ 26.5 Obtaining Discovery from Debtor's Financial Institution

The debtor's bank, savings and loan association, or other financial institution may be compelled to produce financial records of the debtor. Tex. Fin. Code § 59.006. See the discussion at section 18.16 in this manual.

§ 26.6 Sanctions for Failure to Respond to Discovery

Pretrial discovery sanctions are available for postjudgment discovery. Tex. R. Civ. P. 215, 621a. Most of these sanctions, such as striking pleadings, refusing to allow a defense, or entering a default judgment, are clearly not relevant to postjudgment discovery. The procedure most likely to cause the judgment debtor to respond to written interrogatories, oral questions on deposition, or a subpoena duces tecum is to obtain an order compelling discovery followed by contempt proceedings. *See* Tex. R. Civ. P. 215.2(a). If the judgment is on appeal and not superseded, the sanction may be dismissal of the appeal. *See Byrnes v. Ketterman*, 440 S.W.3d 688, 690 (Tex. App.—El Paso 2013, no pet.).

§ 26.7 Enforcement of Discovery Orders by Contempt

§ 26.7:1 Statutory Basis of Contempt

The court's authority to enforce its lawful orders includes punishment of the contemner by fine, imprisonment, or both. Tex. Gov't Code §§ 21.001, 21.002. The court may incarcerate a contemner to coerce compliance with court orders relating to postjudgment discovery proceedings. Tex. Gov't Code § 21.002(e).

§ 26.7:2 Preliminary Considerations

Before proceeding with postjudgment discovery, the creditor's attorney should assess the likelihood that the defendant will not respond and that contempt proceedings will be needed to coerce compliance. If the eventual need to use the contempt sanction appears likely, two factors should be considered:

1. If the defendant is a corporation or other entity, the discovery request should be addressed to a named individual on behalf of the corporation so that, on failure of the individual to respond, the contempt sanction can be imposed on him (see section 26.4:3 above). Similarly, the attorney should consider noticing an individual for a deposition in aid of judgment instead of merely noticing the corporation. See form 26-1 in this chapter. See also the discussion at section 26.2:1 above regarding when a subpoena should be used.

2. If the defendant who may have to be incarcerated will not be within the county of suit and is likely not to appear at the show-cause hearing, counsel should determine whether the court would order attachment and whether counsel will be able to obtain the necessary cooperation of law enforcement personnel to attach and transport the defendant.

Because of the trouble and expense involved in transferring an individual from one county to another, some courts will not order attachment of a person who is not within the county in which the court sits. If a defendant who is located in another county is held in contempt, attachment will require the coordinated efforts of sheriffs and constables in both counties. It is advisable to ascertain the costs involved and the logistics for attaching the defendant before pro-

ceeding with a motion for contempt involving an out-of-county defendant.

§ 26.7:3 Motion and Order to Compel as Preliminary to Contempt Action

If the defendant does not comply with discovery requests within the prescribed time, the judgment creditor should obtain a court order compelling compliance. Tex. R. Civ. P. 215. See forms 26-9, 26-10, 26-19, and 26-20 in this chapter for a motion and order. If the order is disobeyed, the creditor should then file a motion for contempt; see form 26-12. Due process is violated if the motion for contempt and the show-cause order do not specifically notify the relator of the precise complaint for which he may be held in contempt. *In re Roberts*, 584 S.W.2d 925, 926 (Tex. Civ. App.—Dallas 1979, no writ). Therefore, the attorney should always obtain personal service of the show cause notice, show cause order, and motion for contempt on the person he intends to ask the court to hold in contempt. Notice or knowledge of the order one is charged with violating is a jurisdictional prerequisite to the validity of a contempt order. *Ex parte Conway*, 419 S.W.2d 827, 828 (Tex. 1967).

§ 26.7:4 Show-Cause Hearing and Show-Cause Order

In response to a motion to hold the defendant in contempt, the court will order the defendant to appear and show cause why he should not be held in contempt for failing to comply with the discovery order. *See Ex parte Gordon*, 584 S.W.2d 686, 688–89 (Tex. 1979). Typically the motion is filed or presented to the court with a proposed order. The court clerk will issue a show-cause notice (in some counties, also titled a *show-cause order*). The show-cause order and notice along with a copy of the motion should be served on the defendant personally, not on his attorney and not by mail. It is a denial of due process to commit to jail for contempt a person who is not shown to have had personal notice or knowledge of the show-cause hearing at which he was held in contempt. *Ex parte Herring*, 438 S.W.2d 801, 803 (Tex. 1969). The documents served on the defendant must state when, how, and by what means the accused may be found to be guilty of contempt. *Ex parte Edgerly*, 441 S.W.2d 514, 516 (Tex. 1969). In a case involving conduct outside the presence of the court, oral notification of an accusation of contempt is insufficient. *Ex parte Vetterick*, 744 S.W.2d 598, 599 (Tex. 1988) (per curiam). See form 26-12 in this chapter for a motion for contempt and show-cause order. Note that if contempt is sought for failing to comply with a subpoena, an affidavit must accompany the motion stating that all fees due the witness by law were paid or tendered. Tex. R. Civ. P. 176.8(b). See the option in form 26-12 in this chapter. If the court clerk does not prepare the show-cause notice, form 26-13 may be used.

A defendant should not be held in contempt in his absence. If the defendant fails to appear at the show cause hearing, an order for writ of attachment should be signed and a writ of attachment issued to bring the defendant before the court. See form 26-17 for an order for writ of attachment and form 26-18 for a writ of attachment. See also the discussion of due process at 26.7:8 below.

§ 26.7:5 Contempt Judgment

It is well settled that to satisfy due-process requirements, both a written judgment of contempt and a written commitment order are necessary to imprison a person for civil constructive contempt of court. *Ex parte Hernandez*, 827 S.W.2d 858, 858 (Tex. 1992); *Ex parte Barnett*, 600 S.W.2d 252, 256 (Tex. 1980). A contempt judgment that confines the contemner until he complies with a previous court order should clearly state in what respect that order has been violated. *Ex parte Proctor*, 398 S.W.2d 917, 918

(Tex. 1966). It must be definite as to punishment, defining what is required of the contemner in order to purge himself of the contempt. *Ex parte Kottwitz*, 8 S.W.2d 508, 509–10 (Tex. 1928). Collection of attorney's fees by contempt is not allowed and constitutes imprisonment for debt. The contempt judgment can provide for recovery of attorney's fees but should not provide for payment as a condition of release. *Ex parte Dolenz*, 893 S.W.2d 677 (Tex. Civ. App.—Dallas 1995, orig. proceeding). See form 26-15 in this chapter for a contempt judgment.

It is rare that the court will place a defendant in jail, unless the defendant is openly disrespectful to the court or states that he has no intention of complying with the court's order. Should the court choose to grant additional time to allow the defendant to comply with the discovery order, the best practice is to ask the court to recess the show cause hearing to allow the defendant to comply with the discovery order.

§ 26.7:6 Commitment Order

A person may not be imprisoned for contempt without a written order of commitment. *Ex parte Martinez*, 331 S.W.2d 209, 210 (Tex. 1960). The commitment order must clearly specify actions that the contemner must perform to gain release. *Ex parte Hart*, 520 S.W.2d 952, 954 (Tex. Civ. App.—Dallas 1975, no writ). To the extent that the punishment directed in a commitment order varies from the punishment directed by the contempt judgment, the commitment order is unauthorized and will not be enforced. *See Ex parte Port*, 674 S.W.2d 772, 777 (Tex. Crim. App. 1984) (when commitments directed punishment of incarceration, fine, and costs, whereas contempt judgments authorized only fine and costs, alleged contemners entitled to relief from portion of commitments directing incarceration), *overruled on other grounds by Ex parte Edone*, 740 S.W.2d 446 (Tex. Crim. App. 1987). Most courts will require a provision in the contempt judgment permitting the defendant to be released from jail on payment of a bond, conditioned that on or before a certain date he will comply with the requirements of the contempt judgment and that if he does not the bond will be forfeited and the defendant jailed under the contempt judgment. See form 26-16 in this chapter for a writ of attachment and commitment order to be issued by the clerk and transmitted to law enforcement. The defendant is typically held in jail until the judgment of contempt, writ of attachment, and commitment order can be issued and served. Drafts of the documents should be prepared before the contempt hearing. Fourteen and even three days have been held to be too long to be confined without a written commitment order. *In re Stout*, 367 S.W.3d 523, 524 (Dallas—2012, orig. proceeding) (fourteen-day delay too long, citing court's ruling in *In re White*) *In re White*, No. 05-06-00318-CV, 2006 WL 1000228, at *1 (Tex. App.—Dallas 2006, orig. proceeding) (three days too long).

§ 26.7:7 Confinement, Fine, and Habeas Corpus Release

If the defendant is held in contempt, he can be ordered incarcerated until he complies with the court's orders. *Ex parte Proctor*, 398 S.W.2d 917, 918 (Tex. 1966); *Ex parte Kottwitz*, 8 S.W.2d 508, 509 (Tex. 1928). In addition to ordering indefinite commitment to coerce compliance, the district or county court can punish the defendant in contempt by a fine of not more than $500 ($100 in justice court), confinement in the county jail for not more than six months (three days in justice court), or both. Tex. Gov't Code §§ 21.001, 21.002(b), (c), (e). A nonparty who fails to comply with discovery may be incarcerated for contempt. *See Hennessy v. Marshall*, 682 S.W.2d 340, 343 n.1 (Tex. App.—Dallas 1984, no writ). Although commitment to coerce compliance may be for an indefinite time, the contemner must have a means to purge himself and secure his release. *Ex parte De Wees*, 210 S.W.2d 145, 146–47 (Tex. 1948); *In*

re Anderson, 604 S.W.2d 338, 339 (Tex. Civ. App.—Tyler 1980, no writ).

§ 26.7:8 Due-Process Requirements

Contempt may be civil or criminal, direct or constructive. *See Ex parte Werblud*, 536 S.W.2d 542, 545–46 (Tex. 1976). Contempt proceedings are quasi-criminal in nature, and alleged contemners are entitled to certain procedural safeguards, including reasonable notice, assistance of counsel, jury trial for serious contempt, and the requirement that if violation of a court order is alleged, the order must have been in writing, clear, and unambiguous. *Ex parte Johnson*, 654 S.W.2d 415, 420 & n.2 (Tex. 1983). If the alleged contempt carries a possible punitive deprivation of personal liberty, regardless of whether the proceeding is labeled "civil," "criminal," or "quasi-criminal," due-process requirements apply. *Ex parte Johnson*, 654 S.W.2d at 420. A person charged with constructive criminal contempt must therefore be advised that he has the right to an attorney and the right to have an attorney appointed if he cannot afford one. *Ex parte Goodman*, 742 S.W.2d 536, 541 (Tex. App.—Fort Worth 1987, no writ). A contempt order is not necessarily void, however, because it does not contain a statement that the contemner "knowingly and intelligently" waived his right to counsel. *Ex parte Linder*, 783 S.W.2d 754, 759–61 (Tex. App.—Dallas 1990, no writ) (overruling *Ex parte Martinez*, 775 S.W.2d 455 (Tex. App.—Dallas 1989, no writ)). Persons charged with constructive criminal contempt are constitutionally guaranteed the right to be present at trial and to confront witnesses. If the alleged contemner fails to personally appear at the show-cause hearing after personal service, it is the burden of the party moving for contempt to demonstrate affirmatively that the alleged contemner's absence at the contempt hearing was due to a voluntary, knowing, and intelligent waiver of his right to be present and participate at trial. Appearance by the attorney is not sufficient. If an individual is cited for criminal contempt and fails to appear at the appointed time and place, the proper procedure is to bring him into court under a capias or writ of attachment. *Johnson*, 654 S.W.2d at 421–22. In *Ex parte Alloju*, the court held that even though the defendant was assessed only coercive incarceration, the guidelines in *Johnson* should apply because the defendant could have been punished with punitive confinement. The court held that the trial court should not have proceeded on the contempt charges in his absence without a waiver of his rights. *Ex parte Alloju*, 907 S.W.2d 486, 487 (Tex. 1995) (orig. proceeding) (per curiam). Rarely will a waiver be available. Instead, a writ of attachment should issue and the defendant brought before the court. See form 26-17 in this chapter for an order for writ of attachment and form 26-18 for a writ of attachment.

Form 26-1

This form is suitable for giving the judgment debtor notice for an oral deposition in aid of judgment. The notice should be addressed to the defendant through his attorney if he is represented by one. If the defendant is not represented and contempt is anticipated, the defendant should instead be served with a subpoena. See form 26-3. If it is unclear whether the judgment debtor is still represented, the attorney should be contacted to verify representation.

This form assumes that the deposition will be recorded by audiotape, that a court reporter will not participate, and that there will be no attendees other than those named in Tex. R. Civ. P. 199.5(a)(3). See section 26.2:2 in this chapter regarding nonstenographic depositions. If a court reporter is used, he will have to be notified of the deposition. This form includes a duces tecum request to produce documents and other tangible items. The list of items requested is intended only as a guide. The practitioner should select those that are appropriate to the particular case as well as any requests not included here that may be appropriate.

See form 26-2 for a long-form version of this notice.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Notice of Intention to Take Oral Deposition in Aid of Judgment [with Duces Tecum]

[Short Form]

To: [**name of defendant**], Defendant, by and through [his/her] attorney of record, [**name and address of attorney**].

Please take notice that [**name of plaintiff**], Plaintiff, intends to take the oral deposition of [**name of judgment debtor**] [**include if judgment debtor is not an individual:** by deposing its agent or employee, [**name of agent or employee**],] at [**address, city, state**], commencing on [**date and time**]. The deposition will be tape-recorded. The deposition will not also be recorded stenographically.

[**Name of judgment debtor**] is instructed to produce at the time and place of the taking of this deposition, for use in conjunction with the taking of the deposition, the following:

Select the following for an individual defendant.

1. All canceled checks, bank statements, check-stub records, and other banking records pertaining to your financial affairs and those of your spouse or for any account on which you have had signatory authority within the last two years.

2. Copies of all books, records, and financial statements kept or issued by you for the last two years.

3. Copies of your income tax returns, with all attachments, and those of your spouse for the last two years.

4. All papers and records pertaining to debts owed to you by others and any other papers of any sort pertaining to your business or financial affairs for the period of two years immediately preceding the date of this deposition, including but not limited to any and all certificates of title to vehicles, share certificates, deeds or contracts concerning real estate, or other indications of ownership of real or personal property.

Select the following for a corporate defendant.

1. All canceled checks, bank statements, check-stub records, and other banking records pertaining to the financial affairs of [**name of judgment debtor**] or for any account pertaining to [**name of judgment debtor**] within the last two years.

2. Copies of all books, records, and financial statements kept or issued by [**name of judgment debtor**] for the last two years.

3. Copies of the income tax returns of [**name of judgment debtor**], with all attachments, for the last two years.

4. All papers and records pertaining to debts owed to [**name of judgment debtor**] by others and any other papers of any sort pertaining to the business or financial affairs of [**name of judgment debtor**] for the period of two years immediately preceding the date of this deposi-

tion, including but not limited to any and all certificates of title to vehicles, share certificates, deeds or contracts concerning real estate, or other indications of ownership of real or personal property.

Continue with the following.

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Include a certificate of service (form 19-1).

Form 26-2

This form is suitable for giving the judgment debtor notice for an oral deposition in aid of judgment. The notice should be addressed to the defendant through his attorney if he is represented by one. If the defendant is not represented and contempt is anticipated, the defendant should instead be served with a subpoena. See form 26-3. If it is unclear whether the judgment debtor is still represented, the attorney should be contacted to verify representation.

This form assumes that the deposition will be recorded by audiotape, that a court reporter will not participate, and that there will be no attendees other than those named in Tex. R. Civ. P. 199.5(a)(3). See section 26.2:2 in this chapter regarding nonstenographic depositions. If a court reporter is used, he will have to be notified of the deposition. This form includes a duces tecum request to produce documents and other tangible items. The list of items requested is intended only as a guide. The practitioner should select those that are appropriate to the particular case as well as any requests not included here that may be appropriate.

See form 26-1 for a short-form version of this notice.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Notice of Intention to Take Oral Deposition in Aid of Judgment [with Duces Tecum]

[Long Form]

To: [**name of defendant**], Defendant, by and through [his/her] attorney of record, [**name and address of attorney**].

Please take notice that [**name of plaintiff**], Plaintiff, intends to take the oral deposition of [**name of judgment debtor**] [**include if judgment debtor is not an individual:** by deposing its agent or employee, [**name of agent or employee**],] at [**address, city, state**], commencing on [**date and time**]. The deposition will be tape-recorded. The deposition will not also be recorded stenographically.

Continue with the following.

[**Name of judgment debtor**] is instructed to produce at the time and place of the taking of this deposition, for use in conjunction with the taking of the deposition, the following:

1. All income tax and any other tax returns filed by [**name of judgment debtor**] for the last five years.

2. All documents referred to in any way, directly or indirectly, in any and all income tax returns filed by [**name of judgment debtor**] for the last five years.

3. All documents that constitute or refer in any way, directly or indirectly, to any and all books, records, or other memoranda of business or financial conduct, activities, status, or income of [**name of judgment debtor**] for the last five years.

4. All documents that constitute or refer in any way, directly or indirectly, to any and all deeds, records, or other documents that relate to assets in the name of [**name of judgment debtor**].

5. All documents that refer in any way, directly or indirectly, to any items of personal property in which [**name of judgment debtor**] owns or claims an interest.

6. All documents, items, and things that refer in any way, directly or indirectly, to any and all accounts (business or personal bank, checking, savings, credit union, or retirement) in which [**name of judgment debtor**] has an interest.

7. All documents that refer in any way, directly or indirectly, to the names and addresses of persons or entities to whom [**name of judgment debtor**] has given a financial statement in the last five years.

8. All documents that constitute or refer in any way, directly or indirectly, to financial statements prepared by [**name of judgment debtor**] in the last five years.

9. All documents that contain or refer in any way, directly or indirectly, to the names and addresses of persons who have served as bookkeepers or financial advisers for [**name of judgment debtor**] in the last five years.

10. All documents that refer in any way, directly or indirectly, to each person or entity to whom [**name of judgment debtor**] has paid, given, or conveyed any real or personal property of a value more than $200 in the last five years, not in the regular course of business.

11. All documents that refer in any way, directly or indirectly, to any personal or real property that [**name of judgment debtor**] has sold, given, paid, or otherwise conveyed in the last five years.

12. All documents that refer in any way, directly or indirectly, to any and all motorized vehicles (including automobiles, trucks, watercraft, aircraft, recreational vehicles, and motorcycles) in which [**name of judgment debtor**] claims an interest.

13. All documents that refer in any way, directly or indirectly, to any and all persons or entities who have appraised any real or personal property for [**name of judgment debtor**] in the last two years.

14. All documents that constitute or refer in any way, directly or indirectly, to any appraisal of any real or personal property prepared for [**name of judgment debtor**] in the last two years or that otherwise reflect the value of any real or personal property in which [**name of judgment debtor**] has an interest.

15. All documents that evidence or refer in any way, directly or indirectly, to the amount of money owed to [**name of judgment debtor**] by any person or entity.

16. All documents that refer in any way, directly or indirectly, to any legal cause of action, either real or anticipated, by or against [**name of judgment debtor**].

17. All documents that refer in any way, directly or indirectly, to the anticipated amount of recovery in any legal cause of action, either real or anticipated, by [**name of judgment debtor**].

18. All documents that refer in any way, directly or indirectly, to each person who has served as the banker or entity that has served as the bank for [**name of judgment debtor**] in the last two years.

19. All documents that refer in any way, directly or indirectly, to any cash on hand for [**name of judgment debtor**] as of the date of the deposition.

20. All documents that refer in any way, directly or indirectly, to any and all cash in any account owned or claimed by [**name of judgment debtor**] held or deposited with any bank or other financial institution.

21. All documents that refer in any way, directly or indirectly, to any accounts payable owed by [**name of judgment debtor**].

22. All documents that constitute or refer in any way, directly or indirectly, to any accounts receivable owed to [**name of judgment debtor**].

23. All documents that constitute or refer in any way, directly or indirectly, to any notes receivable held by [**name of judgment debtor**] or in which [**name of judgment debtor**] claims an interest.

24. All documents that refer in any way, directly or indirectly, to any shares of stock owned by [**name of judgment debtor**] or in which [**name of judgment debtor**] claims an interest.

25. All documents that refer in any way, directly or indirectly, to any bonds owned by [**name of judgment debtor**] or in which [**name of judgment debtor**] claims an interest.

26. All documents that refer in any way, directly or indirectly, to any real estate that [**name of judgment debtor**] owns or in which [**name of judgment debtor**] claims an interest.

27. All documents that refer in any way, directly or indirectly, to any interest [**name of judgment debtor**] may have in any businesses, partnerships, corporations, or joint ventures.

28. All documents that refer in any way, directly or indirectly, to any equipment that [**name of judgment debtor**] owns or in which [**name of judgment debtor**] claims an interest.

29. All documents that refer in any way, directly or indirectly, to any mortgage on which [**name of judgment debtor**] is liable.

30. All documents that refer in any way, directly or indirectly, to any other unpaid taxes for which [**name of judgment debtor**] is liable except for those already listed with regard to real estate.

31. All documents that refer in any way, directly or indirectly, to any assets held in trust, in an estate, or in any other name or capacity in which [**name of judgment debtor**] claims or has an interest.

32. All documents that refer in any way, directly or indirectly, to assets, except real estate, that secure any debt for which [**name of judgment debtor**] is liable.

33. All documents that refer in any way, directly or indirectly, to [**name of judgment debtor**]'s obligations to pay the leases, notes, or other debts of any other person or entity.

34. All documents that refer in any way, directly or indirectly, to any unsatisfied judgment against [**name of judgment debtor**] or for which [**name of judgment debtor**] is liable.

35. All documents that refer in any way, directly or indirectly, to any filing in bankruptcy by [**name of judgment debtor**] or any assignment by [**name of judgment debtor**] for the benefit of creditors.

36. All documents that refer in any way, directly or indirectly, to any dividends payable to [**name of judgment debtor**] or in which [**name of judgment debtor**] claims an interest.

37. All documents that refer in any way, directly or indirectly, to any interest payable to [**name of judgment debtor**] or in which [**name of judgment debtor**] claims an interest.

38. All documents that refer in any way, directly or indirectly, to any royalties payable to [**name of judgment debtor**] or in which [**name of judgment debtor**] claims an interest.

39. All documents that refer in any way, directly or indirectly, to any personal or business expense (management, rent, household, etc.) of [**name of judgment debtor**].

40. All documents that refer in any way, directly or indirectly, to any insurance policies and/or annuity contracts in which [**name of judgment debtor**] has an interest or that insure property in which [**name of judgment debtor**] has an interest or any insurance payments made by [**name of judgment debtor**] in the last four years and any insurance payments due or to become due to [**name of judgment debtor**].

41. All documents that refer in any way, directly or indirectly, to any other assets not already divulged by [**name of judgment debtor**] under this document request.

42. All documents that refer in any way, directly or indirectly, to any other liabilities not already divulged under this document request.

43. All documents that refer in any way, directly or indirectly, to any outstanding contracts for which [**name of judgment debtor**] is entitled to receive a commission and/or on which [**name of judgment debtor**] claims a right to receive a commission, whether a partial commission or complete commission.

44. All documents that evidence safe-deposit boxes, lock boxes, and storage facilities of any kind to which [**name of judgment debtor**] has access.

45. All check stubs, canceled checks, and account statements for the last two years for accounts in which [**name of judgment debtor**] claims an interest.

46. All documents that evidence any trusts and the assets contained therein for trusts of which [**name of judgment debtor**] is a grantor, beneficiary, or trustee.

Include the following as applicable for an individual defendant.

47. All documents that constitute or refer in any way, directly or indirectly, to any records of salaries, commissions, bonuses, income from employment, allowances, expenses, or any other amounts of money paid to or by [**name of judgment debtor**] within the last five years.

48. All documents that contain or refer in any way, directly or indirectly, to the name and address of any person who has custody of records of salaries, commissions, bonuses, allowances, expenses, or any other amounts of money paid to or by [**name of judgment debtor**] within the last five years.

49. All documents that refer in any way, directly or indirectly, to any property that [**name of judgment debtor**] claims as homestead property.

50. All documents that refer in any way, directly or indirectly, to any and all businesses in which [**name of judgment debtor**] is a partner, officer, or principal owner.

51. All documents that refer in any way, directly or indirectly, to any assets that were owned or claimed by [**name of judgment debtor**]'s spouse before marriage, acquired by [**name of judgment debtor**]'s spouse during marriage by gift or inheritance, or recovered for personal injuries sustained by [**name of judgment debtor**]'s spouse during marriage or received in any settlement or judgment pertaining to divorce.

52. Any will executed but not revoked in writing by [**name of judgment debtor**].

53. All documents that refer to any divorce of [**name of judgment debtor**] within the last five years.

54. [**Name of judgment debtor**]'s stock certificates that evidence his ownership in [**name of corporation**] and all corporate records of that corporation.

55. All documents that evidence [**name of judgment debtor**]'s ownership interest in the limited partnership known as [**name of limited partnership**].

Or

Include the following as applicable for a corporate defendant.

47. [**Name of judgment debtor**]'s original bylaws and articles of incorporation as well as any amended versions that have been filed.

48. All minutes of the board of directors meetings of [**name of judgment debtor**] from the date of incorporation to the present.

49. All minutes of shareholders meetings of [**name of judgment debtor**] from the date of incorporation to the present.

50. All documents reflecting the number of outstanding and treasury shares of stock in [**name of judgment debtor**].

51. All documents reflecting the ownership of outstanding shares of stock in [**name of judgment debtor**].

52. All documents reflecting the purchase by all shareholders of their shares of stock in [**name of judgment debtor**] since the date of incorporation to the present.

53. All documents filed with the Internal Revenue Service including but not limited to IRS Form 941, pertaining to quarterly earnings, tax withholdings, FICA withheld, and [**name of judgment debtor**]'s portion of FICA withheld.

54. All documents filed with the Texas Workforce Commission for unemployment tax paid to the state of Texas.

55. All W-2s and W-3s filed with the Social Security Administration.

56. All documents filed with the state of Texas pertaining to sales tax collected.

57. All documents that relate to, concern, or discuss the formation of [**name of judgment debtor**] and the function, purpose, or reason for incorporation of [**name of judgment debtor**].

Continue with the following.

[**Name**]
Attorney for Plaintiff
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Include a certificate of service (form 19-1).

Form 26-3

This form is used if the person sought to be deposed is not a party to the suit and is not, or may not be, an agent or employee subject to control of an entity judgment debtor. It should also be used when the defendant is not represented by counsel.

This form assumes that the deposition will be recorded by audiotape, that a court reporter will not participate, and that there will be no attendees other than those named in Tex. R. Civ. P. 199.5(a)(3). See section 26.2:2 in this chapter regarding nonstenographic depositions. If a court reporter is used, he will have to be notified of the deposition. This form includes a duces tecum request to produce documents and other tangible items. The list of items requested is intended only as a guide. The practitioner should select those that are appropriate to the particular case as well as any requests not included here that may be appropriate.

A notice of deposition must first be filed with the court and a copy served on all other parties to the litigation. Tex. R. Civ. P. 191.4(b)(1), 191.5.

Subpoena Duces Tecum

[Nonparty Witness, Postjudgment Deposition]

THE STATE OF TEXAS)

Style of suit: [**style**]

Cause No.: [**number**]

Court: [**designation and location of court**]

Party Issuing Subpoena: [**name of plaintiff**]

Party's Attorney of Record: [**name of attorney**]

To: [**name of witness or person producing items**]

You are commanded to attend and give testimony at a deposition in the above-styled case on [**date and time**] at [**address, city, state**]. You must remain there until discharged by the court or the party summoning you. The deposition will be tape-recorded. The deposition will not also be recorded stenographically.

You are further commanded to produce and permit inspection and copying of the following documents or tangible things in your possession, custody, or control:

1. All canceled checks, bank statements, check-stub records, and other banking records pertaining to the financial affairs of [**name of judgment debtor**] or for any account pertaining to [**name of judgment debtor**] within the last two years.

2. Copies of all books, records, and financial statements kept or issued by [**name of judgment debtor**] for the last two years.

3. Copies of the income tax returns of [**name of judgment debtor**], with all attachments, for the last two years.

4. All papers and records pertaining to debts owed to [**name of judgment debtor**] by others and any other papers of any sort pertaining to the business or financial affairs of [**name of judgment debtor**] for the two years immediately preceding the date of this subpoena, including but not limited to any and all certificates of title to vehicles, share certificates, deeds or contracts concerning real estate, or other indications of ownership of real or personal property.

5. Any and all documents evidencing the identity and location of [**persons or things whose identity is sought**].

6. Any and all documents evidencing the assets of [**name of judgment debtor**].

FAILURE BY ANY PERSON WITHOUT ADEQUATE EXCUSE TO OBEY A SUBPOENA SERVED UPON THAT PERSON MAY BE DEEMED A CONTEMPT OF THE COURT FROM WHICH THE SUBPOENA IS ISSUED OR A DISTRICT COURT IN THE COUNTY IN WHICH THE SUBPOENA IS SERVED, AND MAY BE PUNISHED BY FINE OR CONFINEMENT, OR BOTH.

This subpoena constitutes notice to [**name of judgment debtor**] of Plaintiff's intent to take the deposition of [**name of witness**] as provided herein.

Date: [**date**]

_____

[**Name of attorney**]

Return

I certify that I personally served [**name of witness or person producing items**] with a copy of this subpoena on _____ at _____. I also tendered to the witness the witness fees required by law at the time the subpoena was delivered.

_____

[**Name of process server**]

Form 26-4

A copy of the interrogatories should be attached to this form. For pattern interrogatories, see forms 26-5 (individual debtor—short form), 26-6 (corporate debtor—short form), 26-7 (individual debtor—long form), and 26-8 (corporate debtor—long form) in this chapter. If the defendant is a corporation or other entity, the interrogatories should be addressed to a named individual, employee, or agent under the control of the entity, so that if a contempt order is issued the individual may be more easily held in contempt. See section 26.4:3.

The interrogatories should be addressed to the debtor through his attorney if he is represented by one. If the defendant is not represented, the notice should be sent directly to him, addressed "To: [**name of defendant**], Defendant." If it is unclear whether the judgment debtor is still represented, the interrogatories should be served on both the debtor and his attorney to ensure proper service (see section 26.4:2).

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Plaintiff's Interrogatories in Aid of Judgment

Select one of the following. Select the first paragraph if the judgment debtor is an individual. Select the second paragraph if the judgment debtor is a corporation, governmental agency, partnership, or association.

To: [**name of judgment debtor**], Defendant, by and through [his/her] attorney of record, [**name and address of attorney**].

Or

To: [**name and capacity of individual to whom interrogatories are addressed**], as representative of [**name of judgment debtor**], Defendant, by and through its attorney of record, [**name and address of attorney**].

Continue with the following.

Pursuant to rules 197.2 and 621a of the Texas Rules of Civil Procedure, you are to answer the attached interrogatories separately, fully, in writing, and under oath. You should deliver a true copy of your answers to me within thirty days after the date of service of these interrogatories.

See form 18-14 for definitions that may be included.

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach the interrogatories. Serve a copy of the interrogatories on the defendant and all other parties. Include a certificate of service (form 19-1).

Form 26-5

Pattern Interrogatories in Aid of Judgment—Individual Debtor

[Short Form]

1. State the following information.

   a. Full legal name; please also include any other names you have ever used:

   b. Date of birth:

   c. Social Security number:

   d. Driver's license number and issuing state:

   e. Business address and telephone number:

      City, state, zip:

   f. Residence address and telephone number:

      City, state, zip:

2. Do you have an ownership interest or a leasehold interest in any real estate?

If so, then state, with respect to each parcel, the street address, a full legal description (use any attachments if necessary), a description of each structure or improvement, the name and address of any other person who has an ownership interest in the property, the ownership of the property as stated in documents of title, the recording reference and present location of each document of title, the present value of your equity interest in each property, and whether you have designated the parcel as your homestead.

3. Is any of the real property owned by you encumbered by any type of lien or real estate mortgage?

If so, then state, with respect to each parcel, a description of the property encumbered, the nature or type of encumbrance, the date of encumbrance, the name and address of the holder of the encumbrance, the amount of consideration received for the encumbrance, and the date and place of recordation of the encumbrance.

4. If you own your own home, please state the date of purchase, the purchase price, and the amount of the monthly payment. If you rent, state the amount of your monthly rent payment.

a. Date of purchase:

b. Purchase price:

c. Monthly house/rent payment:

5. How many vehicles do you own (including cars, trucks, motorcycles, boats, aircraft, or trailers)?

With reference to each, please state the year, make, model, license number, motor number, serial number, present or usual location, and estimated value.

6. Are you currently married? If so, please state your spouse's full name.

7. Please state the following information about each checking or savings account that you maintain:

a. Name and address of institution:

b. Account number:

c. Authorized signatures:

d. Present balance:

8. Have you deposited funds or had anyone deposit your funds in any savings, trust, or checking account, whether such account is personal, for business, or held jointly with someone else?

If so, please state the following information about each account:

a. Name and address of institution:

b. Account number:

c. Name on account:

d. Authorized signatures:

e. Present balance:

9. Do you own any stocks, bonds, or other securities of any class in any government, governmental agency, company, firm, or corporation?

If so, please state the name and address of each organization in which the interest is owned, the description and serial or certificate number of each security, and the date and method of acquisition of the security. Please state the name and address of each person, firm, or corporation from which the security was acquired or with whom any joint ownership or community interest is shared, the present location of the security, and the name and address of each person having custody of the security. Please state the name and address of any person, firm, or corporation to whom securities are pledged or mortgaged or subject to an option to repurchase.

10. Do you have any claims for money against others by reason of notes, personal loans, claims for damage, or the like?

If so, please give a complete description of each claim, the name and address of the person indebted to you, and the amount claimed due.

11. Do you own any collections of any kind (such as coin or stamp collections)?

If so, please give a complete description of each collection, its contents, the estimated present market value, and its exact present location.

12. Do you have access to any safe-deposit box or other depository for securities, cash, or other valuables?

If so, please state for each depository the name and address of the bank or institution in which it is located and of each person having access to the depository, a complete description of items in the depository as of five days ago, and the date you last entered the depository.

13. Have you conveyed or disposed of any property, by sale, gift, or otherwise, in the past two years?

If so, please give a description of each item conveyed or disposed of, the date of conveyance or disposition, the name and address of the person receiving it, the manner of conveyance or disposition, and the consideration received.

14. Do you have any ownership interest in any business?

If so, please state the full name and address of each business, the address where the business is conducted, the type of business conducted, your office or position, and the form of business organization. Also state the date you acquired the interest, the exact present value of the interest, and the percentage of the total your interest represents. Please list the full name and address of each officer, director, or partner.

15. Do you have any accounts receivable, including any assigned or disposed of in the last year?

If so, please give the name and address of each person owing you and the amount due from each, the extent to which future accounts receivable were covered, and the amount of consideration received.

16. Have you entered into any transaction with your spouse or any other relative involving a transfer, conveyance, assignment, or other disposition of any of your real or personal property in the past four years, or have you transferred any of your real or personal property to any other person in consideration of future support in the past four years?

If so, please list a description of each transaction, the date of the transaction, the consideration received, and the name and address of any family member or relative involved.

17. Do you have any debts?

If so, for each creditor state the name and address of the creditor, the amount owed, the date the debt was incurred, how the debt was incurred, and the security given.

18. Have you made any payments to any creditors, including any not listed above, within the past four months?

If so, please state the name and address of each creditor, the amount of each payment, and the date of each payment.

19. Do you have any interest in any pension plan, retirement fund, or profit-sharing plan?

If so, please state the name and address of the administrator of the plan, the present value of your interest in the plan, the nature of the plan, a description of the plan, and a description of terms under which you may receive money or property pursuant to the plan.

20. Using the information on your income tax returns for the past two years, please state the source and amount of each item of income listed, the address of the IRS office where

the return was filed and the date of filing, the total income received for each year, amounts of any income received but not shown on any tax return, sources of other income shown on each tax return, and the date of receipt of income not shown on the tax returns.

21. Please state all reasons why you have not paid this debt.

22. If our client is willing to accept less than the full amount of the claim against you, how much money would you be able and willing to pay to our client within the next thirty days to settle this matter?

23. If arrangements for a lump-sum settlement cannot be made, please state when you could start making monthly or other periodic payments and how much you are able and willing to pay per month toward satisfying this debt.

24. Why are you unable or unwilling to pay more than the amount you listed in the answers to questions 22. and 23.?

The following information is requested in order to help us work out a settlement with you. You are not required to answer the following question.

Please list the amounts of each of your regular monthly bills.

Expense	Amount
Rent/house payment	$_____
Utilities	$_____
Telephone	$_____
Food	$_____
Car payment	$_____
Gas and oil	$_____

Other (please specify, for example, charge cards, child support, alimony):

_____ $_____

_____ $_____

_____ $_____

_____ $_____

_____ $_____

TOTAL: $_____

_____

[Name of debtor]

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

Form 26-6

Pattern Interrogatories in Aid of Judgment—Corporate Debtor

[Short Form]

1. State the following information about yourself.

   a. Full legal name:

   b. Business address:

   c. Residence address:

2. State the following information about the corporation.

   a. Exact corporate name:

   b. Each trade name or assumed name used by the corporation:

3. With respect to each person who has been a director of the corporation during the past four years, please state that person's—

   a. Name:

   b. Residence address:

4. With respect to each person who has been an officer of the corporation during the past four years, please state that person's—

   a. Name:

   b. Office held:

   c. Residence address:

5. Please state the following information about each of the holders of any stocks, bonds, or securities issued by the corporation.

a. Name of holder:

b. Residence address:

6. State the nature of each business engaged in by the corporation during the past four years.

7. Please state the address (street, city, state, and zip code) of all real property owned by the corporation or in which the corporation owns an interest.

8. Please state the make of any vehicles (automobiles, motorcycles, boats, aircraft, trailers, or other engine-powered methods of transportation) owned by the corporation.

9. Please state the following information about each checking or savings account maintained by the corporation.

a. Name and address of institution:

b. Account number:

c. Name on account:

d. Authorized signatures:

e. Present balance:

10. Please state the value of any stocks, bonds, or other securities of any class issued by any government, governmental agency, company, firm, or corporation owned by the corporation.

11. Please state the following information for each claim for money against others by reason of notes, claims for damages, casualty losses from fire, wind, theft, or otherwise, and accounts receivable or the like.

a. Description of claim:

b. Name and address of debtor:

c. Amount claimed due:

12. Briefly describe and state the net value of all assets currently owned by the corporation that have not been previously identified in answer to these interrogatories.

13. Please state the gross income of the corporation for the year ending this past December 31 (you may round off to the nearest thousand dollars).

The following information is requested in order to help us work out a settlement with you. You are not required to answer the following questions.

14. Please state all reasons why the corporation has not paid this debt.

15. If our client is willing to accept less than the full amount of the claim against the corporation, would the corporation be able to obtain a lump sum of money to pay to our client?

16. How much money would the corporation be able and willing to pay to our client within the next thirty days to settle this case?

17. If arrangements for a lump-sum settlement cannot be made, please state when the corporation could start making monthly payments.

18. If the corporation cannot start monthly payments within the next thirty days, please state why not.

19. Please state how much the corporation is able and willing to pay per month toward satisfaction of this debt.

20. Why is the corporation unable or unwilling to pay more than the amount listed in answer to the previous questions?

21. Please state your daytime and nighttime telephone numbers.

_____

[**Name of debtor**]

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

Form 26-7

These interrogatories are to be used only as a guide and cannot be considered appropriate for all litigation. They may also be used as a guide for questioning the debtor at oral deposition. This pattern set of questions is intended to locate the most common kinds of assets. The information already known about the judgment debtor will probably suggest additional questions, which must be specially drafted and included. Care should therefore be exercised in planning and drafting postjudgment interrogatories.

Information developed by these questions may suggest other questions to be asked in subsequent interrogatories or by other kinds of discovery. These questions are phrased to include the spouse to make them suitable for the most likely situation, a personal debt incurred during marriage in which the joint community property is at risk. See discussion at section 27.33 in this manual. The questions should be revised for separate debts or debts of unmarried persons. For interrogatories to a corporate debtor, see form 26-6 (short form) and form 26-8 (long form).

Questions marked with an asterisk (*) are so fundamental that they will be suitable for almost every set; the remaining questions should be considered in light of what is already known about the debtor and should be included as appropriate.

Pattern Interrogatories in Aid of Judgment—Individual Debtor

[Long Form]

* 1. Please state your full legal name and any other name you have used at any time, including each nickname, alias, and (if applicable) married name and name before your marriage.

2. Have you or your spouse filed an assumed name certificate or partnership certificate? If so, for each certificate please state—

a. the full assumed or partnership name used;

b. the full name(s) of the person(s) (you, your spouse, or both) using it; and

c. the city, county, and state in which the assumed or partnership name was primarily used.

3. Have you or your spouse used an assumed name or partnership name without filing a certificate? If so, for each name please state—

a. the full assumed or partnership name used;

b. the full name(s) of the person(s) (you, your spouse, or both) using it; and

c. the city, county, and state in which the assumed or partnership name was primarily used.

* 4. Please state your date and place of birth.

* 5. Please state your Social Security number.

* 6. Please state the license number and issuing state of each driver's license in any of your names.

* 7. Please state each of your current residential addresses (street address, city, county, state, zip code) and telephone numbers (including area code).

* 8. Please state each of your current business addresses (street address, city, county, state, zip code) and telephone numbers (including area code). Also please state any post office box address used.

* 9. Are you now married? If you are, please state—

a. your spouse's full name; and

b. your spouse's complete present address.

* 10. Have you been married to someone to whom you are not now married? If you have, for each prior marriage please state—

a. whether the former spouse is still living;

b. the full present name of the former spouse if still living;

c. the date of the marriage;

d. the date the marriage ended and how it was terminated; and

e. the complete present residential address of the former spouse if still living.

* 11. Is a suit to dissolve your marriage pending? If so, please state the cause number and the name, number, and location of the court in which it is pending and, if you will do so without a court order, attach a copy of any temporary order.

12. Have you and your spouse ever partitioned your community property by written agreement? If so, please state—

a. the date the agreement was signed;

b. the contents of the agreement, copying it verbatim or, if you will do so without a court order, attaching a copy of the agreement to your answers; and

c. whether the agreement has been filed in the records of any county and, if it has, the name of each county in which it has been filed.

13. Regarding your father, please state—

a. his full name;

b. whether he is now living;

c. if he is alive, his complete present address;

d. if he is alive, his present occupation and employer's name; and

e. if he is not living, the date of his death and his complete residential address when he died.

14. Regarding your mother, please state—

    a. her full name;

    b. whether she is now living;

    c. if she is alive, her complete present address;

    d. if she is alive, her present occupation and employer's name; and

    e. if she is not living, the date of her death and her complete residential address when she died.

15. Regarding your spouse's parents, for each parent please state—

    a. the parent's full name;

    b. whether he or she is now living;

    c. the complete present address of the parent if living;

    d. the present occupation and employer's name of the parent if living; and

    e. the date of death and complete residential address at death if the parent is deceased.

16. Do you have one or more children now living? If you do, for each child please state—

    a. the present full name of the child;

    b. whether he or she is now married;

    c. the date of birth of the child; and

d. the complete present residential address of the child.

17. Is there presently living at your residence anyone who is not your child or spouse? If there is, for each person please state—

a. his or her full name;

b. the person's relationship to you; and

c. the full name and complete address of the employer of the person.

* 18. Please state the complete address (street address, city, county, state, zip code) of each place where you have lived in the past five years and the dates you lived there.

* 19. Do you own one or more of your residences? If you do, for each residence you own please state—

a. the complete address (street address, city, county, state, zip code) and full legal description of the residence;

b. the full names and complete addresses of any other person who is a co-owner of the property;

c. whether the residence is mortgaged;

d. the full name, complete address, and telephone number of each mortgage holder;

e. the present balance of each mortgage;

f. the complete address to which each mortgage payment is sent;

g. the full name, complete address (street address, city, county, state, zip code), and amount of each escrow account maintained in connection with each mortgage; and

h. the complete address (street address, city, county, state, zip code) of the property that you claim as a homestead.

* 20. Do you rent one or more of the places you use as residences? If you do, for each residence you rent please state—

a. the complete address of the residence;

b. the full name and complete address of your landlord;

c. the amount of each rental payment, the day of the month when it is due, and the date when it is made;

d. the complete address to which rental payments are made; and

e. the amount of each deposit paid to the landlord.

21. Do you have one or more boarders, tenants, or subtenants? If you do, for each one please state—

a. the person's full name;

b. the amount of rent paid by him or her;

c. the date on which the person began renting from you;

d. the rental agreement you have with him or her; and

e. the amount of any deposit made by the person to you.

* 22. What is your usual occupation?

* 23. Are you presently self-employed, either full time or part time? If you are, please state—

a. the nature of your occupation, in detail;

b. how long you have been self-employed in this business;

c. the full name under which your business is operated;

d. the complete address and telephone number of your place of business;

e. your annual income for each of the last five years or for any portion of that time that you have been self-employed;

f. your average monthly income for the last six months; and

g. whether any money is presently owed you and, if it is, from whom and in what amount it is owed.

* 24. Are you presently employed, either full time or part time, by someone other than yourself? If you are, for each employer please state—

a. the full name, complete address, and telephone number of the employer;

b. your wages or salary and how often you are paid—for example, daily, weekly, monthly;

c. if you work for commissions, the average monthly amount of your commissions;

d. the day of the week on which you are paid or the date or dates on which you are paid every month or the other regular day or dates on which you are paid; and

e. whether any compensation is presently owed you and, if so, from what source and in what amount it is owed.

25. Does your spouse work now? If so, for each job your spouse has, including self-employment, please state—

a. whether any income is from self-employment;

b. the full name, complete address, and telephone number of each employer;

c. the annual compensation that your spouse has received for each of the last five years or for any portion of that time during which your spouse has been employed by another or self-employed;

d. your spouse's average monthly income for the last six months; and

e. whether any compensation is presently owed your spouse and, if so, from what source and in what amount it is owed.

26. Are you the sole support of your family? If you are not, for each other person who contributes support please state—

a. the full name and complete address of the contributor;

b. your relationship to the contributor;

c. the amount of each contribution and when it is normally made; and

d. the full name and complete address of each person or entity from whom the contributor acquires the assets to make the contribution.

27. Do you receive income or benefits from any source other than your employment or family contributions listed above? If you do, for each source please state—

a. the full name and complete address of the source;

b. the amount of the income or benefits;

c. precisely when each payment is received throughout the year; and

d. the full name, complete address, and telephone number of each person, financial institution, or other entity with which you deposit the payments.

28. For each of your expenses that recurs on a monthly or other regular basis and exceeds $100, please state—

a. the frequency with which payments are made;

b. the amount of each payment and either that this amount is the same for each payment or that this amount is an average for the past year;

c. the full name and complete address of the recipient of the payments; and

d. the full name and complete address of each person or entity from whom you acquire the assets to make payments.

29. For each of your spouse's expenses that recurs on a monthly or other regular basis and exceeds $100, please state—

a. the frequency with which payments are made;

b. the amount of each payment and either that this amount is the same for each payment or that this amount is an average for the past year;

c. the full name and complete address of the recipient of the payments; and

d. the full name and complete address of each person or entity from whom your spouse acquires the assets to make payments.

30. For each of your family's expenses that recurs on a monthly or other regular basis and exceeds $100, please state—

a. the frequency with which payments are made;

b. the amount of each payment and either that this amount is the same for each payment or that this amount is an average for the past year;

c. the full name and complete address of the recipient of the payments;

d. the full name and complete address of each person or entity from whom the assets to make payments are acquired; and

e. the full name of the person who pays the expense and, if not you, your relationship to that person.

* 31. Have you or your spouse made any payment exceeding $500 to any person or entity during the last four months? If so, for each payment please state—

a. the date and amount of the payment;

b. the full name and complete address of the recipient;

c. the total amount owed the recipient before the payment was made;

d. the date on which the payment was due;

e. the balance due the recipient after the payment was made; and

f. the name(s) of the person(s) (you, your spouse, or both) who made the payment.

* 32. Have you or your spouse received any real estate or personal property by inheritance? Do you or your spouse expect to receive any inheritance? If the answer to either question is yes, for each property or inheritance please state, to the greatest extent possible—

a. a complete description of the property or inheritance;

b. the present estimated market value of the property or inheritance;

c. the complete present location of the property or inheritance;

d. the full name of the estate or person from whom the property or inheritance was or will be inherited;

e. the full name and complete address of the executor or administrator of the estate;

f. the name, number, and location of the court administering the estate;

g. the name(s) of the person(s) (you, your spouse, or both) who inherited or will inherit the property or inheritance; and

h. whether there has been a final distribution of the estate and, if so, when it was made.

33. Within the last year, have you or your spouse received as a gift any money or property worth more than $100? If so, for each gift please state—

a. the full name, complete address, and telephone number of the person or entity that made the gift;

b. the date it was received;

c. the name(s) of the person(s) (you, your spouse, or both) who received it;

d. a complete description of the gift;

e. the present estimated market value of the gift;

f. the gift's present location; and

g. a detailed description of what was done with the gift if the recipient(s) (you, your spouse, or both) does not still have it.

* 34. Do you or your spouse have an ownership interest in, option to purchase, contract to sell, leasehold in, or other interest in any real estate not identified in answer to question 19.? If so, for each property please state—

a. the legal and common descriptions and the location of the property;

b. the size of the property;

c. a description of every improvement on the property;

d. the name of the person (you, your spouse, or both) having the interest;

e. the full name and complete address of every other person or entity having any kind of interest in the property;

f. the present value of your or your spouse's equity in the property;

g. Whether the property is encumbered; if it is, also please state—

(1) the nature of the encumbrance;

(2) the full name and complete address of the holder of the encumbrance; and

(3) the amount of the encumbrance;

h. the cost of the property, excluding improvements;

i. when and how the property was bought or acquired;

j. whether any part of the property is within the corporate limits of a town and, if so, the name of the town; and

k. whether any money or property has been placed in escrow; if it has, also please state—

(1) the full name and complete address of the person or entity now having possession of the escrow amount or property; and

(2) the amount of money or value of the property in escrow.

* 35. Is there any checking account, savings account, trust fund, pension plan, profit-sharing plan, mutual fund, or other account or fund of money in which you, your spouse, or any family member now residing with you either owns an interest or has a right of withdrawal or deposit? If there is, for each account please state—

a. the full name and relationship to you of each person owning an interest in the account or having access to it;

b. the name (or title) and number of the account;

c. the full name and complete address of the person or entity holding the fund;

d. the present balance in the account; and

e. the full names and complete addresses of all authorized signatories to the account.

* 36. Do you or does your spouse or any family member now residing with you have access to any depository, including but not limited to safes, vaults, and safe-deposit boxes? If so, for each depository please state—

a. the full name and complete address of each person or entity to whom the depository is rented or leased;

b. the full name and complete address of the bank or other institution where the depository is located;

c. the full name and complete address of each person having access to the depository;

d. a complete description of the property contained in the depository on the date you are answering these questions;

e. the date of each inventory of the depository; and

f. the complete contents of each inventory, copying the inventories verbatim or, if you will do so without a court order, attaching copies of them to your answers.

37. Has anything been removed from any above-mentioned depository during the last twelve months? If it has, for each thing removed please state—

a. a complete description of the property removed;

b. the date it was removed;

c. why it was removed;

d. the full name and complete address of each person who removed it;

e. the full name of the present custodian of the property and either the complete address of the property's present location or a detailed description of its disposition, whichever applies; and

f. whether the property is worth more than $500. If it is, also please state the date of acquisition and the cost of acquisition of the property.

38. Is there any real estate or personal property that any person or entity holds title to or possesses in the name or for the benefit of you, your spouse, or any member of your family now residing with you? If there is, for each property please state—

a. the full name of the person in whose name the property is held and, if it is not in your name, your relationship with the person in whose name it is held;

b. the full name of the person for whose benefit the property is held and, if it is not for your benefit, your relationship with the person for whose benefit it is held;

c. a detailed description of the property;

d. the value of the property;

e. the full name, complete address, and telephone number of the person or entity holding the property;

f. the relationship between the person or entity holding the property and the person for whose benefit it is held; and

g. a detailed description of the arrangements under which the property is being held, including a description of the interest you, your spouse, or your family member has in the property.

* 39. Have you or your spouse furnished a financial statement to any person or entity in the last five years? If you have, for each financial statement please state—

a. the full name and complete address of each person or entity to whom it was furnished;

b. the date it was furnished;

c. the contents of the statement, copying it verbatim or, if you will do so without a court order, attaching a copy of the statement to your answers; and

d. the name(s) of the person(s) (you, your spouse, or both) who furnished the statement.

* 40. If you will do so without a court order, please attach to your answers a copy of each federal income tax return for the last five years for you, your spouse, or both of you. Please state—

a. the source and amount of each item of income listed;

b. the total income received for each year, whether reported or not;

c. the date each return was filed and the address of the Internal Revenue Service office where it was filed;

d. the amount and source of each amount of income received but not shown on any of the returns that you are attaching to your answers; and

e. the full name and complete address of each person who worked on or helped prepare each return.

* 41. Do you or your spouse have any life insurance? If so, for each policy please state—

a. the full name, complete address, and telephone number of the issuing company;

b. the policy number;

c. the date of issuance, amount, and type of the policy;

d. the cash value of it or that it has no cash value;

e. the full name and complete address of each beneficiary of the policy; and

f. whether the policy is encumbered in any way and, if it is, in what way and for what amount.

42. At any time in the last five years, have you or your spouse paid or had paid a premium on any life insurance policy payable to your estate or your spouse's estate? If so, for each policy please state—

a. the full name, complete address, and telephone number of the issuing company;

b. the number of the policy;

c. the face value of it on the death of the insured;

d. each date on which a payment was made; and

e. the amount of each payment.

43. Has any beneficiary designation of an insurance policy on you or your spouse been changed in the last five years? If so, for each change please state—

a. the date the change took place;

b. the name of the new beneficiary;

c. the name of the old beneficiary; and

d. why the change was made.

44. If you will do so without a court order, please attach to your answers a copy of each insurance policy, contract, or document to which the preceding answers pertain.

* 45. Do you or your spouse now own, claim any interest in, or have title to any vehicle (including but not limited to automobiles, trucks, boats, aircraft, trailers, and motorcycles)? If so, for each vehicle please state—

a. a complete description of the vehicle, including, as applicable, its year, make, model, vehicle identification number, serial number, and other permanent identification numbers;

b. the general condition of the vehicle;

c. the complete address of its current location;

d. the full name and complete address of each person or entity having control over the vehicle;

e. the present estimated market value of the vehicle; and

f. the name(s) of the person(s) (you, your spouse, or both) having title to or an interest in the vehicle and the nature of the interest.

* 46. Do you or your spouse now own, claim any interest in, or have title to any firearm? If so, for each firearm please state—

a. a complete description of the firearm, including as applicable its year, make, model, serial number, and other permanent identification numbers;

b. the general condition of the firearm;

c. the complete address of its current location;

d. the full name and complete address of each person or entity having control over the firearm;

e. its present estimated market value; and

f. the name(s) of the person(s) (you, your spouse, or both) having title to or an interest in the firearm and the nature of the interest.

* 47. Do you or your spouse now own, claim any interest in, or have title to any art object? If so, for each object please state—

a. a complete description of the object;

b. the complete address of its current location;

c. the full name and complete address of each person or entity having control over the object;

d. the present estimated market value of the object; and

e. the name(s) of the person(s) (you, your spouse, or both) having title to or an interest in the object and the nature of the interest.

* 48. Do you or your spouse now own, claim any interest in, or have title to any collection, including but not limited to stamp collections and coin collections, that has not been described in a previous answer? If so, for each collection please state—

a. a complete description of the collection, including as applicable the year, make, model, serial number, and other permanent identification numbers of each thing in the collection;

b. the complete address of its current location;

c. the full name and complete address of each person or entity having possession or control of the collection;

d. the present estimated market value of the collection, or of each thing in it if appropriate; and

e. the name(s) of the person(s) (you, your spouse, or both) having title to or an interest in the collection and the nature of the interest.

* 49. Do you or your spouse now own, claim any interest in, or have title to any manufactured home, mobile home, trailer house, recreational vehicle, camper trailer, trailer, or other item of a similar nature that has not been described in a previous answer? If so, for each item please state—

a. a complete description of the item, including as applicable the year, make, model, vehicle identification number, serial number, and other permanent identification numbers;

b. the general condition of the item;

c. the complete address of its current location;

d. the full name and complete address of each person or entity having possession or control of the item;

e. the present estimated market value of the item;

f. the full name and complete address of the person or entity having possession of the certificate of title or other document evidencing title to the item;

g. the amount of any lien against the item and the full name and complete address of the holder or owner of the lien; and

h. the name(s) of the person(s) (you, your spouse, or both) having title to or an interest in the item and the nature of the interest.

* 50. Do you or your spouse now own, claim any interest in, or have title to any animal of a value of $100 or more? If so, for each animal please state—

a. a complete description of the animal, including registration information as applicable;

b. the complete address of its present location;

c. the present estimated market value of the animal;

d. the full name and complete address of the person or entity having possession of the animal;

e. the date and cost of acquisition of the animal;

f. the amount of any lien against the animal and the full name and complete address of the holder or owner of the lien; and

g. the name(s) of the person(s) (you, your spouse, or both) having title to or an interest in the animal and the nature of the interest.

* 51. Do you or your spouse now own, claim any interest in, or have title to any farm machinery of any kind that has not been described in a previous answer? If so, for each item please state—

a. a complete description of the item, including as applicable its year, make, model, motor number, serial number, and other permanent identification numbers;

b. the complete address of its present location;

c. the full name and complete address of the person or entity having possession of the certificate of title or other document evidencing title to the item;

d. whether the item is subject to a lien and, if so, the amount of the indebtedness and the full name and complete address of the holder or owner of the lien;

e. the present estimated market value of the item;

f. the date and cost of acquisition of the item; and

g. the name(s) of the person(s) (you, your spouse, or both) having title to or an interest in the item and the nature of the interest.

52. Do you or your spouse now own, claim any interest in, or have title to any kind of aircraft that has not been described in a previous answer? If so, for each aircraft please state—

a. a complete description of the aircraft, including the FAA identification number, motor number, and other permanent identification numbers;

b. the complete address of its present location;

c. the full name and complete address of the person or entity having possession of the certificate of title and, if different, the present location of the certificate;

d. whether the aircraft is subject to a lien and, if it is, the amount of the indebtedness and the full name and address of the holder or owner of the lien;

e. the present estimated market value of the aircraft;

f. the date and cost of its acquisition;

g. the full name and complete address of the person or entity having possession of the aircraft; and

h. the name(s) of the person(s) (you, your spouse, or both) having title to or an interest in the aircraft and the nature of the interest.

* 53. Do you or your spouse now own, claim any interest in, or have title to any of the following kinds of property?

a. stocks, bonds, or other securities;

b. mortgages or liens on real or personal property;

c. promissory notes, drafts, bills of exchange, or other commercial paper;

d. judgments;

e. savings bonds or other government-issued bonds;

f. any interests in oil, gas, or mineral leases;

g. certificates of deposit, letters of credit, money orders, cashier's checks, traveler's checks, bank deposits, or escrow funds;

h. Keogh plans, individual retirement accounts, profit-sharing plans, deferred compensation plans, pension plans, prepaid funeral plans, retirement benefits, or other retirement plans;

i. leases, life estates, remainder interests, or other interests in real property; and

j. patents, copyrights, trademarks, service marks, franchises, or other such licenses.

If you do and if the information sought in this question has not been provided in another answer, for each item of property please state—

a. a complete description of the item, including account number, registration number, other permanent identification numbers, and other specified identification;

b. the full name and complete address of the person in whose name the item is held;

c. the present value of the item;

d. the amount of the indebtedness outstanding against the item; and

e. the name(s) of the person(s) (you, your spouse, or both) having title to or an interest in the item and the nature of the interest.

* 54. Do you or your spouse now own, claim any interest in, or have title to any personal property including but not limited to household effects, furniture, tools, appliances, clothing, and jewelry that is worth more than $500 and that has not been described in a previous answer? If so, for each item please state—

a. a complete description of the item, including as applicable the year, make, model, serial number, and other permanent identification numbers;

b. the complete address of its present location;

c. the full name and complete address of the person or entity having possession or control of the item;

d. the present estimated market value of the item; and

e. the name(s) of the person(s) (you, your spouse, or both) having title to or an interest in the item and the nature of the interest.

* 55. Do you or your spouse now own, claim any interest in, or have title to any personal property now pledged as security for a debt? If so, for each item please state—

a. a complete description of the item, including as applicable the year, make, model, serial number, and other permanent identification numbers;

b. the amount of the debt the property was pledged to secure and the current amount of the debt;

c. the full name and complete address of the person or entity to whom the property is pledged;

d. the date the debt is to be paid;

e. the date the debt was incurred; and

f. the name(s) of the person(s) (you, your spouse, or both) having title to or an interest in the property and the nature of the interest.

56. Have you, your spouse, or an agent for either of you moved any property that you or your spouse owns or claims any interest in from the county of residence of the owner (you or your spouse) at any time within the last twelve months? If so, for each item that was not located in the county of the owner's residence on the date you received these questions, please state—

a. a complete description of the property, including as applicable the year, make, model, serial number, and other permanent identification numbers;

b. the complete address of its present location;

c. the reason for removing the item from the county of the owner's residence; and

d. the name(s) of the person(s) (you, your spouse, or both) having title to or an interest in the item and the nature of the interest.

* 57. Do you or any member of your family now residing with you have an ownership interest in any business, partnership, joint venture, or other noncorporate legal entity? If so, for each interest please state—

a. the full name, complete address, and telephone number of the business or entity;

b. a detailed description of the type of business or other endeavor in which it is engaged;

c. the full name of the person (you or a family member) having the interest and, if applicable, your relationship to that person;

d. the date, manner, and cost of acquisition of the interest;

e. a detailed description of the interest;

f. a description of the legal nature of the entity;

g. the full name and complete address of each officer, director, or partner in the business;

h. the full name and complete address of each bank in which the business maintains any type of checking or deposit account or from which the business has borrowed money;

i. the present estimated market value of the interest and its percentage of the total value of the business; and

j. the amount of any interest you or a family member has transferred within the last year and the full name and complete address of the person or entity receiving the interest.

58. Have you or any member of your family now residing with you been at any time an employee, officer, director, or stockholder or owner of any other kind of interest, including debentures, purchase options, or beneficial interests, of a corporation? If so, for each relationship or interest please state—

a. a description of the relationship or interest;

b. the full name of the person (you or a family member) having the relationship or interest;

c. the full name, complete address, and telephone number of the corporation;

d. the nature, amount, method, and date of payment of compensation received from the corporation by you or a family member at any time; and

e. the nature and extent of your or your family member's duties or responsibilities in the relationship.

* 59. Are you or your spouse a beneficiary of any trust? If so, for each trust please state—

a. the full name of the trust;

b. the full name, complete address, and telephone number of the trustee;

c. the full name, complete address, and telephone number of each beneficiary of the trust;

d. a detailed description of the terms of the trust as they relate to you or your spouse as beneficiary;

e. a detailed description of how the trust is funded;

f. the total amount presently held in trust;

g. the portion of the current balance held in trust for you or your spouse;

h. the date on which rights in the trust will vest in you or your spouse;

i. a description of the assets owned by the trust and their present estimated market value;

j. the account number and location of each checking, savings, or other depository account of the trust;

k. the date and period when trust disbursements are regularly made; and

l. the contents of every one of the trust's tax returns for the last five years, copying the returns verbatim or, if you will do so without a court order, attaching copies of the returns to your answers.

* 60. Do you or your spouse maintain any business or personal account with any bank, savings and loan association, credit union, or postal savings department? If so, for each account please state—

a. the full name and complete address of the institution holding the account;

b. the full name and number under which the account is maintained;

c. the balance of the account five calendar days before the day you received these interrogatories; and

d. the balance of the account on the day you answered these interrogatories.

61. Do you or your spouse own an interest in a patent or copyright? If you do, for each interest please state—

a. a full description of the thing patented or copyrighted;

b. a description of the interest owned;

c. the registration number of the patent or copyright; and

d. the amount of income received from the patent or copyright during the last twelve months.

62. Do you or your spouse hold any property as trustee of any type of trust? If so, for each trust please state—

a. a detailed description of all the property held in trust;

b. the full name and complete address of each beneficiary of the trust;

c. whether the trustee (you or your spouse) has a general power of appointment over any property in the trust;

d. the date the trust was created; and

e. the full name of the trust.

63. During the last five years, have you or your spouse created or contributed to any trust? If so, for each trust please state—

a. the date the trust was created;

b. a description of the property contributed;

c. the full name and complete address of each trustee; and

d. the full name and complete address of each beneficiary.

* 64. Does any person or entity owe you or your spouse money, including but not limited to promissory notes and accounts receivable? If so, for each debt please state—

a. the full name and complete address of the debtor; and

b. the amount and due date of the debt and to whom owed.

65. Has any account receivable of yours or your spouse's been assigned or disposed of, other than by collection in full, in the last twelve months? If so, for each account please state—

a. the full name of the account;

b. the kind of disposition;

c. the date of the disposition;

d. the full name and complete address of the person or entity taking the account;

e. the amount of reserve due you or your spouse;

f. the extent to which future accounts receivable were covered;

g. the amount of payment received in exchange; and

h. the name(s) of the person(s) (you, your spouse, or both) who owned the account.

* 66. At any time in the last five years, have you or your spouse disposed of any personal property of a value of $100 or more by sale, gift, or other action? If so, for each disposition please state—

a. a full description of the property disposed of;

b. the date of the disposition;

c. the full name and complete address of each person or entity to whom disposition was made;

d. the payment or other consideration received in exchange;

e. the manner of disposition (gift, sale, etc.);

f. the date you or your spouse acquired the property;

g. the name of the person(s) (you, your spouse, or both) who owned the property;

h. the estimated market value of the property when you or your spouse acquired it; and

i. the contents of any gift tax return filed in connection with the disposition, copying the return verbatim or, if you will do so without a court order, attaching a copy of the return to your answers.

67. Have you or your spouse ever made any conveyance, transfer, gift, or other disposition of property with any reservation of rights, benefits, or options for the reacquisition of the property at some future date? If so, for each disposition please state—

a. a full description of the property involved;

b. the date of the disposition;

c. the full name and complete address of the transferee;

d. the nature of the reservation, benefit, or option;

e. the cost of the property when you or your spouse acquired it;

f. the market value of the property at the time of disposition or the payment or other consideration received in exchange; and

g. the name(s) of the person(s) (you, your spouse, or both) making the transfer.

* 68. At any time in the last five years, have you or your spouse disposed of any real estate by sale, gift, or other action? If so, for each disposition please state—

a. a full description of the property disposed of;

b. the date of the disposition;

c. the full name and complete address of each person or entity involved in the transaction;

d. the payment or other consideration received in exchange;

e. the manner of disposition (gift, sale, etc.);

f. the contents of any gift tax return filed in connection with the disposition, copying the return verbatim or, if you will do so without a court order, attaching a copy of the return to your answers; and

g. the name(s) of the person(s) (you, your spouse, or both) making the disposition.

69. At any time in the last five years, have you or your spouse transferred any real estate or personal property to any other person or entity in exchange for a promise of future support? If so, for each transfer please state—

a. a full description of the property transferred;

b. the date the transfer occurred;

c. the full name and complete address of each person or entity to whom the transfer was made;

d. a detailed description of the transaction; and

e. the name(s) of the person(s) (you, your spouse, or both) making the transfer.

70. At any time in the last five years, have you or your spouse suffered any casualty loss from fire, wind, theft, or any other cause? If so, for each loss please state—

a. a complete description of the property lost or damaged;

b. the date of the loss;

c. the cause, nature, and amount of the loss;

d. whether the loss was covered by insurance and, if it was, the name of the insurance carrier, the policy limits, and whether any claim was filed;

e. if a claim was filed, the amount of the claim, the full name and address of the agent who processed it, and how much of the claim was paid; and

f. in whose name(s) (you, your spouse, or both) the lost or damaged property was held.

71. At any time in the last five years, have you or your spouse made any agreement by which some entity or other person was granted an option to buy any assets of yours or your spouse's? If so, for each agreement please state—

a. the date of the agreement;

b. the full name and complete address of each party to the agreement;

c. the payment or other consideration you or your spouse received in exchange for the agreement;

d. a complete description of the property covered by the agreement and the name(s) of the person(s) (you, your spouse, or both) in whose name the property was held; and

e. the terms of the agreement, copying it verbatim or, if you will do so without a court order, attaching a copy of the agreement to your answers.

72. Have you or your spouse ever been a plaintiff or defendant in a lawsuit? If so, for each suit please state—

a. the party designation (plaintiff, defendant, etc.) of you or your spouse;

b. the names of the parties under which the suit was filed and indexed and the number of the suit;

c. the name, number, and location of the court;

d. the date the suit was filed;

e. the damages and other relief sought by each party;

f. the amount of any settlement offer in the case;

g. the present status of the suit; and

h. the amount of any judgment entered against you or your spouse, the date it was entered, and the name(s) of the person(s) (you, your spouse, or both) against whom it was entered.

* 73. Is there any judgment against you or your spouse that is unpaid? If there is, for each unpaid judgment please state—

a. the date of the judgment;

b. the amount of the judgment and how much remains unpaid;

c. the name of the plaintiff having the judgment against either or both of you;

d. the name of the present holder of the judgment if different from the plaintiff;

e. the name, number, and location of the court in which the judgment was obtained;

f. the cause number of the judgment;

g. the name of each county and the volume and page numbers of each record book where it is recorded; and

h. the name(s) of the person(s) (you, your spouse, or both) against whom it was entered.

74. Have you or your spouse ever filed a petition in a bankruptcy proceeding, entered into an assignment for the benefit of creditors, or been a party to a composition agreement? If so, for each such occurrence please state—

a. the nature of the proceeding or agreement;

b. the date the proceeding began or the agreement was made;

c. the name, number, and location of any court that was involved;

d. the disposition or present status of the proceeding or agreement; and

e. the name(s) of the person(s) (you, your spouse, or both) involved.

75. Has any person or entity ever filed an insolvency proceeding against you or your spouse (including a state receivership action or federal bankruptcy proceeding)? If so, for each proceeding please state—

a. the full name and complete address of the person or entity that filed it;

b. the date it was filed;

c. the name, number, and location of the court in which it was filed;

d. the grounds alleged;

e. the disposition of the proceeding or its present status; and

f. the name(s) of the person(s) (you, your spouse, or both) against whom it was filed.

* 76. Do you or your spouse now keep, or have you kept at any time in the last five years, any records (including but not limited to checkbooks, books, ledgers, memoranda, other written documents, tape recordings, and computer records) of receipts, disbursements, and other business or personal transactions, including those of any business you or your spouse now operates or has operated? If so, for each set of records pertaining to any part of the last five years please state—

a. the name(s) of the person(s) (you, your spouse, or both) or business whose records are or were kept;

b. the form in which they are or were kept;

c. when they were first maintained;

d. the accounting basis (cash or accrual) used;

e. whether a bookkeeper or accountant is now being used and, if so, his or her full name and complete address;

f. the full name and complete address of each person or entity that prepared them;

g. the full name and complete address of each person now having custody of them;

h. the complete address of each location of any such records;

i. whether the records accurately reflect the income reported in federal income tax returns for you, your spouse, and any business either of you now operates or has operated, for each year during which the records were kept; and

j. the contents of these records, copying them verbatim or, if you will do so without a court order, attaching copies of them to your answers. If the records amount to more than one hundred pages for all sets, you may comply by stating that you will permit inspection or make them available without a court order.

77. Has any record relating to your or your spouse's income, disbursements, or business been stolen or disposed of in the last five years? If so, for each disposition please state—

a. the nature of the disposition, such as theft or intentional destruction;

b. the date of the disposition;

c. the reason for the disposition;

d. the full name and complete address of the person making the disposition; and

e. if theft occurred, whether it was reported to the police.

78. Are you or your spouse presently entitled to receive any money from a governmental office, such as a utility deposit or income tax refund? If so, for each payment please state—

a. the full name and complete address of the office owing the money;

b. the reason you are owed the money;

c. the amount owed;

d. the date it will be paid; and

e. the name(s) of the person(s) (you, your spouse, or both) to whom it is owed.

* 79. At any time in the last five years, has anyone taken an inventory of your or your spouse's property, either personal or business? If so, for each inventory please state—

a. the date of the inventory;

b. the name and complete address of each person who made the inventory or supervised it;

c. the name and complete address of each person or entity having a copy of the inventory;

d. the contents of the inventory, copying it verbatim or, if you will do so without a court order, attaching a copy of the inventory to your answers; and

e. the name(s) of the person(s) (you, your spouse, or both) whose property was inventoried.

80. Has any written inventory relating to your or your spouse's business been stolen or disposed of in the last five years? If so, for each disposition please state—

a. the nature of the disposition, such as theft or intentional destruction;

b. the date of the disposition;

c. the reason for the disposition;

d. the full name and complete address of the person making the disposition;

e. if theft occurred, whether it was reported to the police; and

f. the name(s) of the person(s) (you, your spouse, or both) whose inventory was disposed of.

* 81. Do you claim that any real estate or personal property of yours or your spouse's is exempt from the claims of creditors? If so, for each piece of property claimed to be exempt please state—

a. the legal and common descriptions of the property;

b. the present estimated value of the property;

c. your reason for claiming the property is exempt;

d. the nature of the property, describing it as either "rural" or "urban" if it is real estate;

e. the complete address of its location;

f. the amount paid for the property when acquired by you or your spouse; and

g. the name(s) of the person(s) (you, your spouse, or both) owning or having an interest in the property.

* 82. Do you or your spouse have an interest in a pension plan, retirement fund, annuity fund, or profit-sharing plan? If so, for each interest please state—

a. the full name and complete address of the administrator of the plan or, if you cannot provide that information, the full name and address of the employer through which the plan is provided;

b. the present value of the interest that you or your spouse has in the plan;

c. a detailed description of the terms under which you or your spouse may receive money or property under the plan; and

d. the name(s) of the person(s) (you or your spouse) having the interest.

83. At any time in the last five years, have you or your spouse used the services of an accountant, bookkeeper, or certified public accountant or had these services employed in behalf of you or your spouse? If so, for each such person please state—

a. the full name and complete address of the person;

b. the dates during which the services were employed;

c. a description of the services the person performed;

d. the contents of resulting reports, copying them verbatim or, if you will do so without a court order, attaching a copy of each report to your answers; and

e. the name(s) of the person(s) (you, your spouse, or both) for whom the services were performed.

84. Do you or your spouse have any charge accounts or credit cards? If so, for each please state—

a. the full name and complete address of the establishment carrying the account or issuing the card;

b. the account number or credit card number;

c. the name in which the account or card is listed; and

d. the balance now owed on the account or card.

85. Is any state or federal tax lien filed or outstanding against you or your spouse? If so, for each lien please state—

a. the name(s) of the person(s) (you, your spouse, or both) against whom the lien applies;

b. the date the lien was filed or became effective;

c. the kind of tax from which the lien arose; and

d. the date and amount of each payment made to reduce the lien.

86. Please state all reasons why you have not paid your debt to [**name of judgment creditor**].

87. If [**name of judgment creditor**] is willing to accept less than the full amount of the claim against you, how much money would you be able and willing to pay to [**name of judgment creditor**] within the next thirty days to settle this matter?

88. If arrangements for a lump-sum settlement cannot be made, please state when you could start making monthly or other periodic payments and how much you are able and willing to pay each month toward satisfying your debt to [**name of judgment creditor**].

89. Why are you unable or unwilling to pay more than the amount you listed in the answers to questions 87. and 88.?

_____

[**Name of debtor**]

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

Form 26-8

These interrogatories are to be used only as a guide and cannot be considered appropriate for all litigation. They may also be used as a guide for questioning the debtor's representative at oral deposition. This pattern set of questions is intended to locate the most common kinds of assets. The information already known about the judgment debtor will probably suggest additional questions, which must be specially drafted and included. Care should therefore be exercised in planning and drafting postjudgment interrogatories.

Information developed by the use of these questions may suggest other questions to be asked in subsequent interrogatories or by other kinds of discovery. With slight modification, most of these questions will be suitable for entities that are not corporations, such as associations, limited partnerships, and so on. For interrogatories to an individual debtor, see form 26-5 (short form) and form 26-7 (long form) in this chapter.

Questions marked with an asterisk (*) are so fundamental that they will be suitable for almost every set; the remaining questions should be considered in light of what is already known about the corporation and should be included as appropriate.

Pattern Interrogatories in Aid of Judgment—Corporate Debtor

[Long Form]

* 1. What is the full legal name of the person answering these interrogatories for the corporation? Also please state—

a. your date and place of birth;

b. your Social Security number;

c. the license number and state of issuance of each driver's license in any of your names;

d. your complete residential address and telephone number; and

e. your complete business address and telephone number.

2. Other than the full name listed above, what names have you used in business or otherwise at any time in your life? Please include all nicknames and aliases. If appropriate, please include your name before your marriage and all married names.

* 3. Please state the full legal name of the corporation and each other name by which it has ever been known.

* 4. Has the corporation ever used a trade name or assumed name? If it has, for each name please state—

a. the name used; and

b. the date and place of filing of each assumed name certificate.

* 5. Please state the full name and complete address of each registered agent for service designated by the corporation in any state.

* 6. On what date was the corporation incorporated?

7. Please name each state in which the corporation does business.

8. Please state the date of the most recent payment of Texas franchise taxes and the amount of franchise taxes paid by the corporation in each of the last five years.

* 9. Please state the corporation's present complete address (street address, city, county, state, zip code) and each telephone number, including area code, of the corporation at that address. Also please state each post office box address used.

* 10. Please state the complete address (street address, city, county, state, zip code) of each place in which the corporation is doing business or has done business within the last five years.

11. Please list each business telephone number, including area code, whether publicly listed or not, at which the corporation's officers can be reached.

* 12. For each person who is a director of the corporation or has been a director at any time in the last five years, please state—

a. the director's full name;

b. his or her complete present address;

c. the date of election as a director;

d. whether the person is now a director and, if not, when the directorship ended; and

e. the full name and complete address of each business in which the director owns an interest, with which the director is associated in any way, or by which the director is employed.

13. Regarding the initial meeting of the corporation's board of directors, please state—

a. the date of the meeting;

b. where the meeting was held; and

c. the full name of everyone present at the meeting.

14. Did the corporation receive at least $1,000 for issuance of its shares? If so, for each payment contributed to the $1,000 please state—

a. the full name and complete address of the person making the payment;

b. the form of payment; and

c. the date of payment.

15. Has any stock of the corporation been sold? If so, for each person or entity that has bought stock please state—

a. the full name and complete address of the buyer;

b. the number of shares purchased;

c. the amount paid for each share; and

d. the date of the purchase.

16. Has the corporation published any announcement of the corporation's formation? If so, for each notice please state—

a. the date of publication;

b. the full name and complete address of the newspaper or other publication in which it was printed; and

c. the contents of the notice, copying it verbatim or attaching a copy of the notice as printed.

17. Have any corporate minutes been prepared? If so, for each set of minutes please state—

a. the full name and complete address of the person who prepared the minutes;

b. the date the minutes were received; and

c. the date of the meeting on which they are based.

* 18. For each person who is an officer of the corporation or has been an officer at any time in the last five years, please state—

a. the officer's full name;

b. his or her complete present address;

c. the title of the office held;

d. the date of selection as an officer; and

e. whether the person is now an officer and, if not, when his or her service as an officer ended.

* 19. What is the nature of each business in which the corporation has engaged at any time in the last five years?

* 20. For each person or entity now owning, claiming any interest in, or having title to any stock, bond, or other security of the corporation, please state—

a. the full name of the person or entity;

b. the complete address of the person or entity;

c. a complete description of the security;

d. the number of shares involved;

e. the face value of each share;

f. the present market value of each share;

g. the payment or other consideration received by the corporation for the security; and

h. the date the security was issued.

21. Please state the full name and complete address of each institution or business organization with which the corporation has engaged in any joint venture or partnership at any time within the last five years and the nature of the corporation's involvement.

22. Has the corporation furnished or exhibited a statement of its financial condition to any person or entity in the last five years? If it has, for each occurrence please state—

a. the full name and complete address of the person or entity receiving the information;

b. the date and place the information was received; and

c. the contents of the financial statement, copying it verbatim or, if you will do so without a court order, attaching a copy of the statement to your answers.

* 23. If you will do so without a court order, please attach to your answers a copy of each of the corporation's federal income tax returns and IRS Forms 940 and 941 for the last five years. Please state—

a. the source and amount of each item of income listed;

b. the total income received for each year, whether reported or not;

c. the date each return was filed and the address of the Internal Revenue Service office where filed;

d. the amount and source of each receipt of income that is not shown on any of the returns that you are attaching to your answers; and

e. the full name and complete address of each person who worked on or helped prepare each return.

* 24. If you will do so without a court order, please attach to your answers a copy of each of the corporation's reports or plans relating to pensions or profit sharing. If these papers amount to more than one hundred pages, you may comply by stating that they may be inspected or will be made available without a court order.

* 25. If you will do so without a court order, please attach to your answers a copy of each life insurance policy purchased in whole or in part by the corporation. If these papers amount to more than one hundred pages, you may comply by stating that they may be inspected or will be made available without a court order.

* 26. Does the corporation have an ownership interest in, option to purchase, contract to sell, leasehold in, or other interest in any real property? If so, for each property please state—

a. the legal and common descriptions and the location of the property;

b. the size of the property;

c. a description of every structure or other improvement on the property;

d. the full name and complete address of each person or other entity having an interest in it;

e. the ownership of the property as stated in the title documents and the location of each document;

f. the present value of the corporation's equity interest in the property;

g. the present market value of the property; and

h. the amount paid for the property.

* 27. For each item of personal property, including but not limited to tools, equipment, inventory, livestock, boats, sporting goods, vehicles, aircraft, or stamp, coin, or other kinds of collections, regardless of location, that the corporation now owns, claims any interest in, or has title to, please state—

a. a complete description of the item, including as applicable the year, make, model, serial number, and other permanent identification numbers;

b. the estimated present market value of the item; and

c. the complete address of its present location.

* 28. Is any real or personal property that the corporation now owns, claims any interest in, or has title to now encumbered by a mortgage, security interest, or other kind of lien? If so, for each item of encumbered property please state—

a. a complete description of the item, including as applicable the year, make, model, serial number, and other permanent identification numbers;

b. the nature of the encumbrance;

c. the date the property was encumbered;

d. the full name and complete address of each person or entity holding the encumbrance;

e. the payment or other consideration received for the encumbrance; and

f. the full name and complete address of each person or entity who paid the consideration.

29. Does the corporation now own, claim any interest in, or have title to any personal property now pledged as security for a debt? If so, for each item please state—

a. a complete description of the item, including as applicable the year, make, model, serial number, and other permanent identification numbers;

b. the amount of the debt the property was pledged to secure and the current amount of the debt;

c. how the debt was incurred and when payment is due;

d. the date the debt was incurred;

e. the full name and complete address of the person or entity to whom the property is pledged; and

f. the date when possession of it was transferred to the person or entity to whom it is pledged.

* 30. If you will do so without a court order, please attach a copy of any instrument that secures a debt of the corporation or copy the instrument verbatim. If these copies amount to more than one hundred pages, you may comply by stating that they may be inspected or will be made available without a court order.

* 31. Does the corporation have any ownership interest in any other business? If so, for each business please state—

a. the full name of the business;

b. the complete address of the principal place of business or general office of the business;

c. the complete address of each place at which it conducts business;

d. the type of business it conducts;

e. the form of business organization (for example, corporation, partnership);

f. the date the corporation acquired its interest in the business;

g. the present value of the corporation's interest in the business and its percentage of the total value of the business;

h. the corporation's duties in the business;

i. the full name and complete address of each partner, officer, and director of the business; and

j. the full name and complete address of each bank at which the business maintains any type of checking or deposit account or from which the business has borrowed money.

32. Has any enterprise mentioned in the preceding answers filed any articles of incorporation, partnership agreement, or assumed name certificate? If so, for each document please state—

a. the nature of the document;

b. the complete address of the office where it was filed;

c. the date it was filed; and

d. the assumed name used, if applicable.

33. Does the corporation own any security (including but not limited to stocks and bonds) of any foreign or domestic entity or government? If so, for each such organization please state—

a. the full name and complete address of the organization;

b. a complete description of the security, its face value, the price the corporation paid for it, and its present market value;

c. the serial number of each security;

d. the date when each security was acquired by the corporation;

e. how each security was acquired by the corporation (purchase, gift, etc.);

f. the full name and complete address of each person or entity from whom the security was acquired, regardless of the means of acquisition;

g. the full name, complete address, and telephone number of each person or entity with whom the corporation shares ownership or control of the security; and

h. whether the corporation now owes any money to a person or entity for the purchase of the security.

* 34. Is any stock, bond, or other security that the corporation owns pledged, mortgaged, or subject to an option to repurchase by any person or entity? If so, for each such interest held by another please state—

a. the full name and complete address of the person or entity having the interest in the corporation's securities;

b. the date the interest was acquired; and

c. a complete description of the interest.

* 35. Is any stock, bond, or other security that the corporation owns held by a broker in the name of the corporation or of any person or other entity? If so, for each security please state—

a. the full name and complete address of the broker;

b. a complete description of the security;

c. the present market value of the security;

d. the date the broker acquired possession of the security; and

e. the balance of the corporation's account with the broker five calendar days before these interrogatories were received by the corporation.

* 36. Does the corporation maintain any bank account, including but not limited to checking accounts and savings accounts? If it does, for each account please state—

a. the full name and complete address of the institution holding the account;

b. where the account is located;

c. the full name and number under which it is carried;

d. the balance of the account five calendar days before these interrogatories were received by the corporation;

e. the identity of each authorized signature for the account at any time in the last five years and the dates between which the signature was authorized; and

f. the contents of the corporation's resolution establishing the account, copying the resolution verbatim or attaching a copy of it to your answers.

* 37. For each disbursement of the corporation in the last five years that exceeded $1,000, please state—

a. the full name and complete address of the payee;

b. the amount of the payment; and

c. the date it was paid.

* 38. Does the corporation have any money on deposit in a name other than its own? If it does, for each account please state—

a. the type of account;

b. where the account is maintained;

c. the full name and number under which the account is maintained;

d. the full name and complete address of the institution holding the deposits;

e. the balance of the account five calendar days before these interrogatories were received by the corporation; and

f. the amount or portion of the account that belongs to the corporation.

* 39. Does the corporation have check-writing authority on any account not already described in your answers? If it does, for each account please state—

a. where the account is maintained;

b. the full name and number under which the account is maintained;

c. the full name and complete address of the institution holding the account;

d. the full name and complete address of each person or entity owning or claiming an interest in it; and

e. the reason for the corporation's authority to write checks on the account.

* 40. Does the corporation maintain a pension plan, profit-sharing plan, or other entity or trust in which the corporation or any employee, officer, or shareholder of it has an interest? If so, for each plan please state—

a. where it is located;

b. the full name and complete address of the institution holding the account;

c. the full name and number under which the account is maintained; and

d. the balance of the account five calendar days before these interrogatories were received by the corporation.

* 41. Does the corporation hold any real or personal property in trust for any person or entity? If it does, for each trust please state—

a. a complete description of the property held in trust;

b. the complete address of the property's location;

c. the date the trust was created;

d. the source of the trust assets; and

e. the full name and complete address of each beneficiary who has an interest in the trust.

* 42. In the last five years, has the corporation created or contributed to any trust for the benefit of others? If so, for each trust please state—

a. the date the trust was created;

b. a complete description of the property contributed to the trust by the corporation and the property's present market value;

c. each trustee's full name and complete address;

d. each beneficiary's full name and complete address; and

e. whether any of the beneficiaries are related to each other and, if they are, the full names of the related beneficiaries and the nature of their relationship.

* 43. Does any person or entity hold any real or personal property in trust for the corporation? If so, for each trust please state—

a. a complete description of the property held in trust;

b. the complete address of the property's location;

c. the date the trust was created;

d. the source of the trust assets; and

e. the full name and complete address of each beneficiary of the trust.

44. Is the corporation a beneficiary under the terms of any will? If so, for each will please state—

a. the full name of the testator;

b. a complete description of the property given to the corporation under the will;

c. the name, number, and location of the court administering the estate;

d. if the will has not been offered for probate, the full name and complete address of the person who now has possession of the will;

e. whether the corporation has received any advancement from the testator or personal representative and, if so, the amount of each advancement received; and

f. whether the corporation has renounced any bequest or legacy and, if so, the date of each renunciation and the full name and complete address of each person or entity whose interest in the estate was enhanced as a result of the renunciation.

* 45. Does the corporation have the right to enter any depository, including but not limited to safes, vaults, and safe-deposit boxes, for securities, cash, or other valuables? If so, for each depository please state—

a. the full name and complete address of each person or entity to whom the depository is rented;

b. the full name and complete address of the bank or other institution in which the depository is located;

c. the full name and complete address of each person having access to the depository;

d. a complete description of the property contained in the depository on the date you are answering these interrogatories;

e. the date of each inventory of the depository;

f. the complete contents of each inventory, copying the inventories verbatim or, if you will do so without a court order, attaching copies of them to your answers; and

g. the date on which any person last opened the depository on behalf of the corporation.

* 46. Has anything been removed from any above-mentioned depository during the last twelve months? If it has, for each thing removed please state—

a. a complete description of the property removed;

b. the date it was removed;

c. why it was removed;

d. the full name and complete address of each person who removed it; and

e. the full name and complete address of each person or entity now having the property in its possession.

47. Does the corporation own any interest in a patent or copyright? If so, for each interest please state—

a. a complete description of the patent or copyright;

b. its registration number;

c. the full name and complete address of each person sharing an interest in the patent or copyright;

d. the extent of the corporation's share, expressed as a fraction or percentage; and

e. the annual income derived by the corporation from the patent or copyright.

* 48. At any time in the last five years has the corporation paid a premium on any life insurance policy? If it has, for each policy please state—

a. the full name, complete address, and telephone number of the issuing company;

b. the number of the policy;

c. the face value of the policy on the death of the insured;

d. the present cash value of the policy;

e. the date the policy was issued;

f. the name of the insured;

g. each date on which a payment was made;

h. the amount of each payment;

i. the complete address of the present location of each document or contract of insurance issued to the corporation in connection with or as evidence of the policy;

j. the full name of the owner of the policy;

k. the full name, complete address, and telephone number of each person having custody of a copy of the document or contract; and

l. the complete contents of the policy, copying it verbatim or, if you will do so without a court order, attaching a copy of the policy to your answers. If these policies amount to more than one hundred pages for all of them, you may comply by stating that they may be inspected or will be made available without a court order.

49. Has any beneficiary designation of any above-described insurance policy been changed in the last five years? If so, for each change please state—

a. the date on which the beneficiary designation was changed;

b. the name of the new beneficiary;

c. the name of the old beneficiary; and

d. why the change was made.

* 50. Does the corporation now have any right to payment of money from any person or entity for any reason, including but not limited to promissory notes, accounts receivable, certificates of deposit, securities, foreign currency, traveler's checks, treasury checks, treasury bills, and savings bonds? If so, for each claim please state—

a. a complete description of the claim;

b. the full name and complete address of the debtor;

c. the amount of the claim; and

d. whether any suit or action has been brought to reduce the claim to judgment; if so, please state—

(1) the title and number of the case;

(2) the name, number, and location of the court in which it was filed or is now pending; and

(3) the present status of the case.

* 51. In the last five years, has any above-described right of the corporation to receive money been assigned or disposed of other than by collection in full? If so, for each such account please state—

a. the full name of the account;

b. the kind of disposition;

c. the date of the disposition;

d. the full name and complete address of the person or entity taking the account;

e. the amount of reserve due the corporation;

f. the extent to which future accounts receivable were covered; and

g. the amount of payment received in exchange.

* 52. Has the corporation sold or assigned any account receivable and set up any reserve fund for its benefit out of that account receivable? If so, for each account please state—

a. the full name of the account;

b. the conditions for receiving reserves;

c. the full name and complete address of each person or entity holding the funds; and

d. the amount of the funds.

* 53. At any time in the last five years, has the corporation disposed of any real or personal property by sale, gift, or other action? If so, for each disposition please state—

a. a full description of the property disposed of;

b. the date of the disposition;

c. the full name and complete address of each person or entity to whom disposition was made;

d. the payment or other consideration received in exchange;

e. the manner of disposition (gift, sale, etc.);

f. the date the corporation acquired the property;

g. the estimated market value of the property when the corporation acquired it; and

h. the complete address of the property's present location.

* 54. At any time in the last five years, has the corporation made any disposition, by conveyance, transfer, gift, or otherwise, of property with any reservation of rights, benefits, or options for the reacquisition of the property at some future date? If so, for each disposition please state—

a. a full description of the property involved;

b. the date of the disposition;

c. the transferee's full name and complete address;

d. the nature of the reservation, benefit, or option;

e. the cost of the property when the corporation acquired it; and

f. the market value of the property at the time of disposition or the payment or other consideration received in exchange.

55. Has the corporation in the last five years assigned any thing or right to collect money? If it has, for each assignment please state—

a. a description of the thing or right assigned;

b. the date the assignment was made;

c. the full name and complete address of the assignee; and

d. the payment or other consideration received in exchange.

* 56. At any time in the last five years, has the corporation transferred, conveyed, or assigned any property or any rights in any property under any condition or made any loan or pledged any property to any officer, director, or shareholder, or to any relative, spouse,

spouse's relative, friend, or acquaintance of such a person? If so, for each transaction please state—

a. a complete description of the transaction;

b. the date of the transaction;

c. the full name and complete address of each person involved in the transaction; and

d. the payment or other consideration received or paid by the corporation in exchange.

* 57. Has the corporation at any time sold, transferred, or assigned all or a substantial part of its stock in trade or any trade fixtures in bulk? If it has, for each transaction please state—

a. the date the transaction occurred;

b. a complete description of the property disposed of;

c. the full name and complete address of each transferee or assignee;

d. the payment or other consideration received as the sales price;

e. whether any notice of the transaction was given and, if so, when and where the notice was recorded; and

f. whether any notice of the transaction was published in a newspaper and, if so, the name and location of the newspaper and the date of publication.

* 58. At any time in the last five years, has the corporation given consideration for any property that has been conveyed or transferred and is now being held for the corporation in the name of some person or other entity? If so, for each occurrence please state—

a. the full name and complete address of each title holder;

b. the date the conveyance or transfer was made;

c. a complete description of each item of property involved; and

d. the amount of payment or consideration given for the property.

59. In the last five years, has the corporation suffered any casualty loss from fire, wind, theft, or other cause? If it has, for each loss please state—

a. a description of the property lost or damaged;

b. the date of the loss;

c. the cause, nature, and amount of the loss;

d. whether the loss was covered by insurance and, if it was, the name of the insurance carrier, the policy number, the policy limits, and whether a claim was filed; and

e. if a claim was filed, the amount of the claim, the full name and address of the agent who processed it, and how much of the claim was paid.

* 60. At any time in the last five years, has the corporation been a party to any contract or other agreement by which the corporation granted an option to any person or other entity to purchase any or all of its assets? If so, for each agreement please state—

a. the date of the agreement;

b. where the agreement was made;

c. the full name and complete address of each person or entity that was a party to the agreement;

d. the payment or other consideration the corporation received in exchange for the agreement;

e. the full name and complete address of each person or entity furnishing the consideration;

f. a complete description of the property covered by the agreement; and

g. the terms of the agreement, copying it verbatim or, if you will do so without a court order, attaching a copy of the agreement to your answers.

* 61. At any time in the last five years, has the corporation made any payment in extension or compromise of a debt? If it has, for each payment please state—

a. the date of payment;

b. the debt's original amount and its current amount;

c. the full name and complete address of the owner of the debt; and

d. the basis for the debt.

62. Is any of the corporation's property rented, leased, or otherwise in another party's possession? If so, for each such piece of property please state—

a. a description of the property;

b. the full name and complete address of the person or entity having possession of the property;

c. the basis for the third party's possession (lease, rental, etc.); and

d. the payment or other consideration the corporation received in exchange for the arrangement.

* 63. Does the corporation presently owe more than $500 to any creditor? If it does, for each such debt please state—

a. the creditor's full name and complete address;

b. the amount of the debt owed by the corporation;

c. the date the debt was incurred;

d. the payment or other consideration the corporation received in exchange for the debt; and

e. a description of the security given by the corporation to secure the debt.

* 64. Has the corporation made any payment exceeding $500 to any creditor within the last four months? If it has, for each payment please state—

a. the date and amount of the payment; and

b. the full name and complete address of the recipient.

65. Is any state or federal tax lien filed or outstanding against the corporation? If so, for each lien please state—

a. the amount of the lien;

b. whether the tax has been paid;

c. the name of the governmental agency that filed the lien; and

d. the date it was filed.

66. Has the corporation received any notice of a tax deficiency? If it has, for each deficiency please state—

a. the amount of the alleged deficiency;

b. the full name and complete address of the governmental agency claiming the deficiency; and

c. the date of the notice.

67. At any time in the last five years, has the corporation made any payment as an extension or compromise of a tax claim? If it has, for each claim please state—

a. the date and amount of each payment; and

b. the full name and complete address of the governmental agency claiming the deficiency.

* 68. Is there any judgment against the corporation that is unpaid? If there is, for each unpaid judgment please state—

a. the date of the judgment;

b. its amount and how much remains unpaid;

c. the name of the party having the judgment against the corporation;

d. the name of the present holder of the judgment if different from the plaintiff;

e. the name, number, and location of the court in which the judgment was obtained; and

f. the cause number of the judgment.

69. Does the corporation have any abstract of judgment filed against it? If so, for each judgment please state—

a. the date of the judgment;

b. its amount and how much remains unpaid; and

c. the name of each county and the volume and page numbers of the record book where the abstract is recorded in each county.

* 70. Does the corporation claim that any real or personal property, tangible or intangible, is protected from the claims of its creditors? If it does, for each piece of property so claimed, please state—

a. the legal and common descriptions of the property;

b. the estimated value of the property;

c. the reason for claiming that it is exempt; and

d. the complete address of the property's location.

71. Does the corporation have any financing statement or UCC statement filed against it? If it does, for each statement please state—

a. the date and place of filing;

b. the full name and complete address of the party filing the statement;

c. the amount of the debt to which it pertains;

d. a complete description of the collateral securing the debt, as shown on the security agreement;

e. the date of maturity of the debt; and

f. the complete contents of the statement, copying it verbatim or, if you will do so without a court order, attaching a copy of the statement to your answers.

* 72. Does any person or entity now keep records (including but not limited to check-books, books, ledgers, memoranda, other written documents, tape recordings, and computer records) of receipts, disbursements, and other business transactions of the corporation, or have they been kept at any time in the last five years? If so, please attach copies of the records for the last five years if you will do so without a court order; if the records amount to more than one hundred pages for all of them, you may comply by stating that they may be inspected or will be made available without a court order. Further, please state—

a. the form in which the records are or were kept;

b. the accounting basis (cash or accrual) used;

c. the date they were first maintained;

d. the full name and complete address of each person or entity that prepared them;

e. the full name and complete address of each person or entity now having custody of them;

f. the complete address of each location of any such records relating to the last five years; and

g. whether the records accurately reflect the income reported in the corporation's federal income tax returns for each year during which the records were kept.

* 73. Has any record of the corporation's income, disbursements, or business affairs been stolen or disposed of in the last five years? If so, for each disposition please state—

a. the nature of the disposition, such as theft or intentional destruction;

b. the date of the disposition;

c. the reason for the disposition;

d. the full name and complete address of the person making the disposition; and

e. if theft occurred, whether it was reported to the police.

74. At any time in the last five years, has the corporation employed or used the services of an accountant, bookkeeper, or certified public accountant? If so, for each such person please state—

a. the full name and complete address of the person;

b. the dates during which the services were employed;

c. a description of the services the person performed;

d. the reason the person's services were employed; and

e. the contents of resulting reports, copying them verbatim or, if you will do so without a court order, attaching copies of the reports to your answers. If the reports amount to more than one hundred pages for all of them, you may

comply by stating that they may be inspected or will be made available without a court order.

* 75. At any time in the last five years, has anyone taken an inventory of the corporation's property? If so, for each inventory please state—

a. the date of the inventory;

b. the full name and complete address of each person who made the inventory or supervised it;

c. the full name and complete address of each person or entity having a copy of the inventory;

d. the total dollar value of the property as stated in the inventory;

e. the means used to evaluate the inventory;

f. the reason for making the inventory; and

g. a complete description of each item of property included in the inventory, copying it verbatim or, if you will do so without a court order, attaching a copy of the inventory to your answers. If the copies amount to more than one hundred pages, you may comply by stating that they may be inspected or will be made available without a court order.

* 76. In the last five years, has the corporation furnished a financial statement to any person or entity? If it has, for each financial statement please state—

a. why it was prepared;

b. the full name and complete address of each person or entity to whom it was furnished;

c. the date it was furnished;

d. the full name and complete address of the person or entity now owning each asset shown on the statement; and

e. the contents of the statement, copying it verbatim or, if you will do so without a court order, attaching a copy of the statement to your answers.

* 77. Does the corporation or any employee, officer, director, or shareholder of the corporation have any interest in any pension plan, retirement fund, annuity fund, or profit-sharing plan? If so, for each plan please state—

a. the full name and complete address of the plan's administrator;

b. the present value of the corporation's interest in the plan;

c. the present value of the interest belonging to any person in any of the above-described categories; and

d. a description of the terms under which the corporation or any person in any of the above-described categories can receive money or property under the plan.

78. Has any money, real property, or other personal property heretofore belonging wholly or partly to the corporation been transferred to, or is it in the possession of, any present or former shareholder, employee, agent, officer, or director of the corporation or any relative by blood or marriage, friend, or acquaintance of any of them? If so, for each transaction please state—

a. a complete description of the transaction;

b. a complete description of the property involved;

c. the full name and complete address of each person involved; and

d. the payment or other consideration the corporation received in exchange.

* 79. Is the corporation presently entitled to receive any money from a governmental office, such as a utility deposit, income tax refund, or security deposit? If so, for each payment please state—

a. the full name and complete address of the office owing the money;

b. the reason the corporation is owed the money;

c. the amount owed; and

d. the date it will be paid.

80. Has the corporation ever filed a petition in bankruptcy, entered into an assignment for the benefit of creditors, or been a party to a composition arrangement? If so, for each occurrence please state—

a. the nature of the proceeding or arrangement;

b. the date the proceeding began or the arrangement was made;

c. the name, number, and location of any court that was involved; and

d. the disposition or present status of the proceeding or arrangement.

81. Has any person or entity ever filed an insolvency proceeding against the corporation, including a state receivership action or a federal bankruptcy proceeding? If so, for each proceeding please state—

a. the full name and complete address of the person or entity that filed it;

b. the date it was filed;

c. the name, number, and location of the court in which it was filed;

d. the grounds alleged; and

e. the disposition of the proceeding or its present status.

* 82. In the last five years, has any person or entity paid or transferred to the corporation assets in any form, including money, worth more than $1,000? If so, for each transfer please state—

a. the full name and complete address of the person or entity making the transfer;

b. the date of the transfer;

c. a complete description of the assets transferred; and

d. the value of each asset transferred.

83. For each expense of the corporation that recurs on a monthly or other regular basis and exceeds $100, please state—

a. a complete description of the debt or expense;

b. the amount of each payment and either that this amount is the same for each payment or that this amount is an average for the past year;

c. the full name and complete address of the recipient of the payments;

d. whether each debt is paid;

e. the manner of payment (cash payment, transfer of inventory, etc.); and

f. if the debt is paid in cash, the full name and complete address of the source from which the cash is obtained.

84. For each bank or other financial or lending institution with which the corporation has transacted any type of business or maintained any account in the last five years, please state—

a. the full name and complete address of the institution;

b. the account or transaction number involved; and

c. a complete description of the transaction.

85. Please state all reasons why [**name of corporate debtor**] has not paid its debt to [**name of judgment creditor**].

86. If [**name of judgment creditor**] is willing to accept less than the full amount of the claim against [**name of corporate debtor**], would the corporation be able to obtain a lump sum of money to pay [**name of judgment creditor**]?

87. How much money would [**name of corporate debtor**] be able and willing to pay to [**name of judgment creditor**] in the next thirty days to settle this matter?

88. If arrangements for a lump-sum settlement cannot be made, please state when the corporation could start making monthly or other periodic payments and how much the corporation is able and willing to pay each month toward satisfying its debt to [**name of judgment creditor**].

89. If the corporation cannot start making monthly payments within the next thirty days, please state why not.

90. Why is the corporation unable or unwilling to pay more than the amounts listed in the answers to questions 87. and 88.?

_____

[**Name of debtor**]

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

Form 26-9

For a discussion of sanctions for failure to respond to interrogatories, see section 26.6 in this chapter and part VII. in chapter 18. Once the court has set a hearing, the attorney should ensure that the notice of hearing is complete and should send a copy of the motion and notice to the defendant or his attorney.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Motion to Compel Answers to Interrogatories in Aid of Judgment

1. *Parties.* Movant is [**name of plaintiff**], Plaintiff and judgment creditor in this cause, who moves that

Select one of the following. Select the first option if the respondent is an individual. Select the second option if the respondent is a corporation, governmental agency, partnership, or association.

Respondent, [**name of individual judgment debtor**], Defendant and judgment debtor in this cause,

Or

Respondent, [**name of individual to whom interrogatories were addressed**], as representative of Defendant and judgment debtor [**name of entity judgment debtor**],

Continue with the following.

be required to answer written interrogatories in aid of judgment pursuant to the provisions of rules 621a and 215 of the Texas Rules of Civil Procedure.

2. *Facts.* Judgment in this cause was rendered for [**name of judgment creditor**] against [**name of judgment debtor**] on [**date**]. The judgment has not been suspended by a supersedeas bond or by order of a proper court, and it has not become dormant under section 34.001 of the Texas Civil Practice and Remedies Code. On [**date**], Movant served written

interrogatories in aid of judgment on Respondent in the time and manner required by law. Respondent did not answer the interrogatories within the time specified, and Movant has not received any communication from Respondent regarding any reason for this refusal to answer. Neither a motion for an extension of time nor an objection to any interrogatory has been filed as provided for by rules 191.1 and 193.2 of the Texas Rules of Civil Procedure. Respondent's refusal to answer is without substantial justification.

3. *Grounds.* Under rule 215 of the Texas Rules of Civil Procedure, Respondent's refusal to answer Movant's interrogatories is grounds for this Court to enter an order compelling Respondent to answer.

4. *Attorney's Fees.* As a result of Respondent's failure to answer the interrogatories, Movant has been forced to employ the undersigned attorney to bring this proceeding to compel answers. Under rules 215 and 621a of the Texas Rules of Civil Procedure, Movant is entitled to recover reasonable expenses, including reasonable attorney's fees, incurred in obtaining an order to compel answers to these interrogatories. Reasonable attorney's fees for the services rendered and to be rendered in this regard are at least $[**amount**].

5. *Prayer.* Movant prays that—

a. the Court set this matter for hearing;

b. Respondent, after notice and hearing, be ordered to answer Movant's written interrogatories in aid of judgment and to forward the written answers to Movant's attorney of record within the time specified by the Court;

c. Movant be granted reasonable attorney's fees of at least $[**amount**] incurred in obtaining the order;

d. Movant be granted reasonable expenses incurred in obtaining the order; and

e. Movant be granted all further relief to which Movant may be entitled.

[**Name**]
Attorney for Movant
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Include a certificate of service (form 19-1) and a notice of hearing (form 19-2). Prepare the order compelling answers (form 26-10).

Form 26-10

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Order Compelling Answers to Interrogatories in Aid of Judgment

On [**date**], a hearing was held on the motion of [**name of plaintiff**], Movant, to compel [**name of respondent**], Respondent, to answer Movant's written interrogatories in aid of judgment.

The Court finds that the interrogatories were served on Respondent in the time and manner prescribed by law. The Court further finds that Respondent has not answered Movant's interrogatories within the time and in the manner required by law and has not objected to the interrogatories or moved for an extension of time to answer them.

Accordingly the Court finds that the Motion to Compel Answers to Interrogatories in Aid of Judgment should be sustained. The Court further finds that Respondent's refusal to answer the interrogatories was without substantial justification, and accordingly the Court finds that Movant is entitled to recover $_____ as reasonable expenses incurred in obtaining this order and $_____ as reasonable attorney's fees.

It is therefore ORDERED that the Motion to Compel Answers to Interrogatories in Aid of Judgment is hereby sustained in all things; and

Respondent is ORDERED to forward to Movant's attorney on or before _____ a complete, sworn set of written answers to Movant's interrogatories that were addressed to Respondent and served on [**date**]; and

It is further ORDERED that Movant recover from Respondent $_____ for expenses and $_____ for reasonable attorney's fees, for which execution may issue.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
[Name]
Attorney for Movant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

_____
[Name]
Attorney for Respondent
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach the order to the motion (form 26-9) and file with the court clerk. Send a copy of the order as approved by the court to the defendant, using the transmittal letter at form 26-11.

Form 26-11

This form may be used to encourage the respondent's compliance with the order compelling cooperation with discovery in aid of judgment by informing him that contempt will be sought if he does not comply. This form should be sent by both certified and regular first-class mail.

Transmittal Letter to Respondent Following Hearing on Motion to Compel

[**Date**]

[**Name and address of respondent**]

Re: [**style of case**]
Cause No. [**number**]
[**designation and location of court**]

[**Salutation**]

Enclosed is a copy of the court order signed by the judge at the hearing on the motion to compel [answers to interrogatories/give deposition] in aid of judgment.

Please be sure your answers are in our offices on the date indicated in the order. If you fail to do so, we will have no alternative but to ask the court to hold you in contempt.

Sincerely yours,

_____

[**Name of attorney**]

Certified Mail No. [**number**]
Return Receipt Requested

Enc.

Form 26-12

The defendant's disobedience of an order compelling answers to interrogatories or to give deposition is punishable by contempt. Tex. R. Civ. P. 215.2(b)(6). See sections 26.6 and 26.7 in this chapter. Once the court has set a show-cause hearing, the attorney should have a copy of the show-cause order and motion personally served on the respondent. See section 26.7:4.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Motion to Hold [name of respondent] in Contempt and for Show-Cause Order for Failure to [Answer Interrogatories/Give Deposition] in Aid of Judgment

1. *Parties.* Movant is [**name of plaintiff**], Plaintiff and judgment creditor in this cause, who moves that

Select one of the following. Select the first option if the respondent is an individual. Select the second option if the respondent is a corporation, governmental agency, partnership, or association.

Respondent, [**name of individual judgment debtor**], Defendant and judgment debtor in this cause,

Or

Respondent, [**name of individual ordered to answer interrogatories**], as representative of Defendant and judgment debtor [**name of corporate judgment debtor**],

Continue with the following.

be held in contempt of court for disobeying this Court's order to [answer interrogatories/give deposition]. Respondent may be served with process at [**address, city, state**].

Select one of the following.

2. *Facts.* On [**date**], this Court ordered Respondent to forward to Movant's attorney of record on or before [**date**] a complete, sworn set of written answers to Movant's interroga-

tories in aid of judgment that were addressed to Respondent and served on [**date**]. Respondent has not forwarded to Movant's attorney answers to Movant's interrogatories.

Or

2. *Facts.* On [**date**], this Court ordered Respondent to appear and give a deposition and produce certain documents at [**address, city, county**] County, Texas, on [**date**], at [**time**]. Respondent, although having had proper notice of the order of the Court, has willfully failed and refused to obey the lawful orders of this Court. Respondent failed to appear at the offices of Movant's attorneys, produce the requested documents, and give a deposition at the time ordered to do so and has not contacted Movant's attorneys to schedule another time agreeable to the parties to give the deposition and produce the requested documents.

Continue with the following.

1. *Grounds.* Under rule 215 of the Texas Rules of Civil Procedure, Respondent's refusal to comply with this Court's order is a contempt of court. Respondent should be punished for contempt and jailed thereafter until Respondent complies with this Court's order.

2. *Attorney's Fees.* As a result of Respondent's failure to obey the order of this Court entered on [**date**], Movant has brought this Motion to Hold [**name of respondent**] in Contempt. Under rule 215 of the Texas Rules of Civil Procedure, Movant is entitled to reasonable expenses and attorney's fees incurred in bringing this motion. Reasonable attorney's fees for the services rendered in this matter are at least $[**amount**].

3. *Prayer.* Movant prays that—

a. the Court set this matter for hearing;

b. Respondent be ordered to appear and show cause why Respondent should not be held in contempt of court for refusing to comply with the Court's order [compelling answers to interrogatories in aid of judgment/compelling

Respondent to appear and give a deposition and to produce certain documents];

c. Respondent, after notice and hearing, be held in contempt of court;

d. a writ of attachment be issued for Respondent;

e. Respondent be fined $[**amount**];

f. Respondent be confined in jail for [**time period**] and thereafter until Respondent purges himself of contempt by complying with the orders of this Court;

g. Respondent be required to post bond payable to Movant to ensure Respondent's appearance if released from confinement;

h. Respondent be ordered to pay all court costs of this proceeding;

i. Respondent be required to pay reasonable expenses incurred by Movant in making this motion and obtaining an order for contempt;

j. Respondent be required to pay at least $[**amount**] as reasonable attorney's fees incurred by Movant in making this motion and obtaining an order for contempt; and

k. Movant be granted all further relief to which Movant may be entitled.

[Name]
Attorney for Movant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

If contempt is sought for failure to obey a subpoena, attach the following affidavit.

Before me, the undersigned authority, on this day personally appeared [**name of attorney**], who, being by me duly sworn, did on oath state:

I am over the age of twenty-one years, have never been convicted of a criminal offense, and am competent to testify. I am the attorney of record for [**name of plaintiff**], have personal knowledge of the facts in this affidavit, and they are true and correct. All fees due [**name of person subpoenaed**], as a witness, by law were paid or tendered.

_____

[**Name of attorney**]

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

Order

It is ORDERED that the clerk issue notice to Respondent, [**name of respondent**], to appear, and Respondent is hereby ORDERED to appear before this Court on _____ at ____ __.M., at [**location of court**], to show cause why Respondent should not be held in contempt for disobedience of this Court's order as alleged in the attached Motion to Hold [**name of respondent**] in Contempt.

SIGNED on _____.

_____
JUDGE PRESIDING

File the motion with the court clerk. Ask the clerk to issue a show-cause notice (form 26-13) to be served on the respondent along with this motion. Set the hearing date for the show-cause hearing. Do not mail the show-cause order to the respondent; instead send it to the officer for service, using the transmittal letter at form 26-14. If the respondent is represented by an attorney, send a copy of the motion, show-cause order, and notice to the attorney for the respondent.

Form 26-13

Note that in some counties, this form may also be called a show-cause order. If the clerk does not prepare his own show-cause notice, this form may be used.

Show-Cause Notice

STATE OF TEXAS)

COUNTY OF)

To: [**name and address of respondent**]

WHEREAS, in Cause No. [**number**], pending in the [**designation**] Court of [**county**] County, Texas, in which [**name of plaintiff**] is Plaintiff and [**name of defendant**] is Defendant, a Motion to Hold [**name of respondent**] in Contempt has been filed. A copy is attached and reference is made to it for the relief sought. On presentation and consideration of the motion, the Honorable [**name of presiding judge**], Judge of the Court, has entered an Order to Show Cause;

AND WHEREAS the motion has been set for hearing;

THEREFORE you, [**name of respondent**], are hereby notified to appear before the Judge of the Court at the [**county**] County Courthouse, in the city of [**city**], Texas, on [**date of hearing**] at [**time**] to show cause why the motion should not be granted.

HEREIN FAIL NOT to obey this writ.

Witness my hand and seal of office at [**city, county**] County, Texas, on

_____.

_____

Clerk of the [**designation**] Court of
[**county**] County, Texas

By _____
Deputy

Officer's Return

I received this writ on _____ at ____ __.M. and executed it on _____ at ____ __.M. by _____

_____

_____.

I actually and necessarily traveled _____ miles in executing this writ, and my fees are $_____.

This original returned on _____.

_____
[Name of officer if known]
[Identification of officer]
_____ County, Texas

By _____
Deputy

Form 26-14

The show-cause notice, order, and motion should be personally served on the respondent rather than being mailed to him (see section 26.7:4 in this chapter), and the attorney should inspect the order and send it to the sheriff or constable rather than having the clerk do so. See section 27.13 regarding writs of execution. Additional information, such as directions to help locate the defendant, should be included in the motion for contempt to the extent feasible but could also be included in this cover letter, although the cover letter might get lost during processing. In addition, fees may be charged for services by sheriffs or constables. *See* Tex. Loc. Gov't Code § 118.131. The officer should be contacted to determine the correct fee. In some counties, the clerk collects the fee; if so, it is unnecessary to send payment with this letter.

Letter to Officer Transmitting Show-Cause Notice, Order, and Motion for Personal Service

[Date]

[Name, title, and address of officer]

Re: Defendant: [**name of defendant**]
[style of case]
Cause No. [**number**]
[designation and location of court]

[Salutation]

Enclosed is a show-cause notice, order, and motion for contempt in the referenced cause.

Include any appropriate special instructions.

Please serve the respondent with a copy of the show-cause notice, order, and motion and complete your return on the original notice by inserting the hour and date of receipt, the hour and date of service, and the manner of service and by signing it in your official capacity.

Please mail the completed return to me in the enclosed addressed, stamped envelope.

My check for your fee is enclosed. If you have a question or need additional information, please telephone me (collect if long distance).

Thank you for your prompt attention to this matter.

Sincerely yours,

_____

[Name of attorney]

Certified Mail No. [**number**]
Return Receipt Requested

Enc.

Form 26-15

The respondent may not be incarcerated for contempt unless he personally appeared at the show-cause hearing. If the respondent did not appear, he may be brought into court under a capias or writ of attachment. See section 26.7:8 in this chapter. This form assumes that the respondent appeared at the hearing. A writ of attachment and commitment order is at form 26-16. For the motion on which this order is based, see form 26-12. See also section 26.7:5 regarding contempt judgments generally.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Contempt Judgment

On [**date**], a hearing was held on the motion of [**name of plaintiff**], Movant, to hold [**name of respondent**], Respondent, in contempt of court for refusing to obey this Court's order to [answer interrogatories/give deposition].

Movant appeared [by attorney/in person and by attorney].

Respondent appeared [in person/in person and by attorney].

The Court considered the pleadings and official records on file in this cause and the evidence and argument of counsel.

Select one of the following.

The Court finds that on [**date**], this Court ordered [**name of respondent**], Respondent, to forward to Movant's attorney of record on or before [**date**] a complete, sworn set of written answers to the interrogatories in aid of judgment that Movant addressed to Respondent and served on [**date**].

The Court further finds that Respondent did not forward to Movant's attorney of record any answers to Movant's interrogatories.

Or

The Court finds that on [**date**], this Court ordered [**name of respondent**], Respondent, to appear and give [his/her] deposition and produce certain documents at [**address, city, county**] County, Texas, on [**date**], at [**time**].

The Court further finds that Respondent did not appear and give [his/her] deposition and did not produce certain documents as ordered.

Continue with the following.

The Court further finds that Respondent's refusal to comply with this Court's order was without substantial justification.

The Court further finds that, under rule 215 of the Texas Rules of Civil Procedure, Respondent's refusal to comply with this Court's order is a contempt of court and that Respondent should be punished for contempt and jailed until Respondent complies with this Court's order.

The Court further finds that Respondent should pay all court costs of this proceeding.

It is accordingly ADJUDGED that [**name of respondent**], Respondent, is in contempt of this Court.

It is ORDERED that Respondent be fined $[**amount**] and confined in the county jail of [**county**] County, Texas, for a period of [**period of time**].

Select one of the following.

It is further ORDERED that Respondent thereafter be further confined in that jail until Respondent has fully purged himself of this contempt by forwarding to Movant's attorney of record, [**name of attorney**], at [**address, city, state**] a complete, sworn set of written answers to the interrogatories in aid of judgment that Movant addressed to Respondent and served on [**date**].

Or

It is further ORDERED that Respondent thereafter be further confined in that jail until Respondent has fully purged [himself/herself] of this contempt by

1. giving [his/her] deposition to Plaintiff's attorneys at a time agreed on by Plaintiff's attorney between the hours of 8:00 A.M. and 5:30 P.M., on any Monday, Tuesday, Wednesday, Thursday, or Friday, the deposition to take place within seventy-two hours of notification of Plaintiff's attorneys of Respondent's desire to give the deposition. Respondent may orally notify Plaintiff's attorney by telephone between the hours of 8:00 A.M. and 5:30 P.M. at [**phone number**] by speaking with or leaving a message for [**name**]. Respondent may notify Plaintiff's attorneys in writing by mail at [**address**], with notice to [**name**];

2. delivering to [**name of attorney**], Movant's attorney of record, at [**address, city, state**], the following documents: [**list documents as in subpoena or deposition notice**]

Continue with the following.

It is further ORDERED that Respondent—

1. pay to the clerk of this Court $[**amount**] as costs of this proceeding; and

2. pay to Movant $[**amount**] as attorney's fees and $[**amount**] as expenses incurred by Movant in bringing this proceeding.

It is further ORDERED that [**name of respondent**], Respondent, be committed to the custody of the sheriff of [**county**] County, Texas, to be confined in the county jail of [**county**] County, Texas, as herein ordered.

It is further ORDERED that Respondent may be released on execution of a surety bond in the amount of $[**amount**] executed by a corporate surety licensed to do business as such in Texas, payable to [**name of judgment plaintiff**], and delivered to the officer executing the

attachment, conditioned that on or before **[date]**, Respondent will comply with all requirements of this contempt judgment against Respondent, and that if Respondent does not do so Respondent's bond will be forfeited and Respondent will be arrested and jailed under this contempt judgment. Personal recognizance in lieu of bond will not be permitted.

It is further ORDERED that all commitments, writs, attachments, and other process necessary for the enforcement of this order be issued.

A certified copy of this judgment is to be attached to the order of commitment to show the authority of the clerk for issuance.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
[Name]
Attorney for Movant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

_____
[Name]
Attorney for Respondent
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach the judgment to the motion (form 26-12) and file with the court clerk.

Form 26-16

Usually the court clerk will prepare the writ of attachment on a printed form. In some counties it may be necessary for the plaintiff's attorney to provide it, in which case this form may be used.

Writ of Attachment and Commitment Order

STATE OF TEXAS)

COUNTY OF)

TO ANY SHERIFF OR ANY CONSTABLE WITHIN THE STATE OF TEXAS:

[**Name of respondent**], Respondent, was adjudged to be in contempt of court on [**date**] by the [**designation**] Court in Cause No. [**number**], styled "[**style of case**]." Therefore, in obedience to an order of this Court made and entered on [**date**]:

You are hereby COMMANDED to take into your custody and commit to the jail of your county and safely keep [**name of respondent**] until, as required by the contempt judgment, [**name of respondent**] [has forwarded to Movant's attorney of record, [**name of attorney**], at [**address, city, state**], a complete sworn set of answers to interrogatories in aid of judgment that Movant addressed to Respondent and served on [**date**],/has given [his/her] deposition at the set time as set out in the contempt judgment; and delivered to [**name of attorney**] at [**address, city, state**], the documents set out in the contempt judgment] or been otherwise legally ordered discharged.

It is ORDERED that Respondent may be released on execution of a surety bond executed by a corporate surety licensed to do business as such in Texas, in the amount of $[**amount**], payable to [**name of judgment plaintiff**], conditioned that on or before [**date**] Respondent will comply with all requirements of the contempt judgment against Respondent signed by this Court on [**date**], and that if Respondent does not do so Respondent's bond will be forfeited and Respondent will be arrested and jailed under the contempt judgment.

HEREIN FAIL NOT, but make due return of this writ, showing how you have executed it.

Witness my hand and seal of office at [**city, county**] County, Texas, on _____.

_____
Clerk of the [**designation**] Court of
[**county**] County, Texas

By _____
Deputy

Officer's Return

I received this writ on _____ at ____ __.M. and executed it on _____ at ____ __.M. by _____
_____
_____.

I actually and necessarily traveled _____ miles in executing this writ, and my fees are $_____.

This original returned on _____.

_____
[Name of officer if known]
[Identification of officer]
_____ County, Texas

By _____
Deputy

Form 26-17

This form may be used if the respondent fails to appear at the show-cause hearing and the movant is unable to show a voluntary, knowing, and intelligent waiver.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Order for Writ of Attachment

On [**date**], a hearing was held on the motion of [**name of plaintiff**], Movant, to hold [**name of respondent**], Respondent, in contempt of court for refusing to obey this Court's order to [answer interrogatories/give deposition].

Movant appeared by attorney. The Court finds that Respondent, although having been personally served with a copy of the Motion to Hold [**name of respondent**] in Contempt, the Show-Cause Order, and the Show-Cause Notice on [**date**], failed to appear.

The Court finds that on [**date**], this Court ordered [**name of respondent**], Respondent, to [forward to Movant's attorney of record on or before [**date**] a complete, sworn set of written answers to Movant's interrogatories that were addressed to Respondent on [**date**]/appear and give [his/her] deposition and produce certain documents at the offices of Movant's attorney of record on or before [**date**]] and that Movant recover reasonable attorney's fees in the sum of $[**amount**] against Respondent.

The Court further finds that Respondent did not [deliver a complete copy of answers to Movant's interrogatories/appear and give [his/her] deposition and produce certain documents] to Movant's attorney of record and did not pay the attorney's fees as ordered.

As it appears to the Court that Respondent may have committed contumacious acts by Respondent's refusal to obey this Court's order to [answer interrogatories/appear and give [his/her] deposition and produce certain documents]:

It is therefore ORDERED that a writ of attachment be issued and served on Respondent; that Respondent be personally attached; and that the attaching officer be directed to notify the Court and Movant's attorney immediately on attaching Respondent so that a hearing may be immediately scheduled for the purpose of Respondent's showing cause why [he/she] should not be held in contempt for refusing to obey this Court's order to [answer interrogatories/appear and give [his/her] deposition and produce certain documents].

Select one of the following.

It is further ORDERED that in no event shall the writ of attachment be served so as to require Respondent to be detained overnight before the show-cause hearing.

Or

It is further ORDERED that in lieu of detainment in the custody of the officer executing this writ, Respondent may be released on posting a bond in the sum of $[**amount**], payable to Movant, with two or more good and sufficient sureties, to be approved by the Court, conditioned that on [**date**], Respondent appear before the Court and remain in attendance until discharged by the Court. Personal recognizance in lieu of bond will not be permitted.

Continue with the following.

A copy of this Order is to be attached to the writ of attachment to show the authority of the clerk for such issuance.

SIGNED on _____.

_____
JUDGE PRESIDING

Form 26-18

This form may be used if the respondent fails to appear at the show-cause hearing, allowing a sheriff or constable to bring the respondent to the court so the judge can hold the respondent in contempt.

Writ of Attachment

STATE OF TEXAS)

COUNTY OF)

TO ANY SHERIFF OR ANY CONSTABLE WITHIN THE STATE OF TEXAS:

[**Name of respondent**], Respondent, although personally served with notice, did not appear on [**date**] for a hearing held on the motion of [**name of plaintiff**], Movant, to hold [**name of respondent**] in contempt of court in the [**designation**] Court of [**county**] County, Texas, in Cause No. [**number**], styled "[**style of case**]." Therefore, in obedience to an order of this Court made and entered on [**date**]:

You are hereby COMMANDED to take immediately into your custody and bring before this Court [**name of respondent**], Respondent, for the purposes of Respondent's showing cause why [he/she] should not be held in contempt for refusing to obey this Court's order to [answer interrogatories/give [his/her] deposition].

The attaching officer is directed to notify the Court and Movant's attorney immediately on attaching Respondent so that a hearing may be immediately scheduled.

Select one of the following.

In no event shall this Writ of Attachment be served so as to require Respondent to be detained overnight before the show-cause hearing.

Or

In lieu of detainment, Respondent may be released on posting a bond in the amount of $[**amount**], payable to Movant, with two or more good and sufficient sureties, to be approved by the Court, conditioned that on [**date**], Respondent appear before the Court and remain in attendance until discharged by the Court. Personal recognizance in lieu of bond will not be permitted.

Continue with the following.

HEREIN FAIL NOT, but make due return of this writ, showing how you have executed it.

Witness my hand and seal of office at [**city, county**] County, Texas, on _____.

_____
Clerk of the [**designation**] Court of
[**county**] County, Texas

By _____
Deputy

Officer's Return

I received this writ on _____ at ____ __.M. and executed it on _____ at ____ __.M. by _____

_____

_____.

I actually and necessarily traveled _____ miles in executing this writ, and my fees are $_____.

This original returned on _____.

_____

[Name of officer if known]

[Identification of officer]

_____ County, Texas

By _____

Deputy

Form 26-19

For a discussion of sanctions for failure to appear to give deposition, see section 26.6 in this chapter and part II. in chapter 18 of this manual. Once the court has set a hearing, the attorney should ensure that the notice of hearing is complete and should send a copy of the motion and notice to the defendant or his attorney.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Motion to Compel [name of respondent] to Give Deposition in Aid of Judgment

Select one of the following.

1. *Service of Subpoena Duces Tecum.* Respondent, [**name of respondent**], was personally served with a subpoena duces tecum to appear for deposition and to produce certain documents at such time.

Or

1. *Service of Notice for Oral Deposition in Aid of Judgment.* Respondent, [**name of respondent**], was given notice to appear for deposition and to produce certain documents at such time.

Continue with the following.

2. *Failure to Depose.* Respondent failed to appear for the deposition and produce the documents required by the [subpoena/notice].

3. *Attorney's Fees.* As a result of Respondent's failure to appear for deposition and produce the documents required by the [subpoena/notice], Movant, [**name of movant**], has been forced to employ the undersigned attorney to bring this proceeding to compel deposition. Under rules 215 and 621a of the Texas Rules of Civil Procedure, Movant is entitled to recover reasonable expenses, including reasonable attorney's fees, incurred in obtaining an order to

compel Respondent to appear for deposition and produce the documents described in the [subpoena/notice]. Reasonable attorney's fees for the services rendered and to be rendered in this regard are at least $[**amount**].

4. *Prayer.* Movant prays that—

   a. the Court set this matter for hearing;

   b. Respondent, after notice and hearing, be ordered to produce all documents described in the [subpoena duces tecum/notice], which was served on Respondent at [**location**] and to give deposition in aid of judgment to Movant's attorneys; and,

   c. Movant be granted reasonable attorney's fees of at least $[**amount**] incurred in obtaining such order.

   d. Movant be granted reasonable expenses incurred in obtaining the order; and

   e. Movant be granted all further relief to which Movant may be entitled.

[Name]
Attorney for Movant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Include a certificate of service (form 19-1) and a notice of hearing (form 19-2). Prepare the order compelling deposition (form 26-20).

Form 26-20

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Order Compelling [name of respondent] to Give Deposition in Aid of Judgment

On [**date**], a hearing was held on the motion of [**name of movant**], Movant, to compel [**name of respondent**], Respondent, to give [his/her] deposition in aid of judgment.

Movant having appeared by and through [its/his/her] attorney of record, and the Respondent having had notice of such hearing but having failed to appear, and the Court having considered such Motion and the evidence, and being of the opinion that same should be granted:

It is therefore, ORDERED that Respondent, [**name of respondent**], appear at the offices of [**name of attorney**] [**address, city, county**] County, Texas, on [**date**], at 9:00 A.M., and at such time, Respondent is ordered to:

(a) Produce the following documents: [**list documents in original notice or subpoena, for example**]:

1. All canceled checks, bank statements, check stub records, and other banking records pertaining to Defendant's, [**name of defendant**], financial affairs and those of his spouse, or for any account upon which Defendant has had signatory authority within the last two years.

2. Copies of all books, records and financial statements kept or issued by Defendant for the last two years.

3. Copies of Defendant's income tax returns and those of his spouse, for the last two years.

4. All papers and records pertaining to debts owed Defendant by others, and ANY OTHER PAPERS OF ANY SORT PERTAINING TO DEFENDANT'S BUSINESS OR FINANCIAL AFFAIRS FOR THE PERIOD OF TWO YEARS IMMEDIATELY PRECEDING DATE HEREOF, including but not limited to any and all certificates of title to vehicles, share certificates, deeds or contracts concerning real estate, or other indications of ownership of real or personal property.

(b) Give deposition to Movant's attorneys at that time.

It is further ORDERED that Movant recover reasonable attorney's fees in the sum of $[**amount**] against Respondent and that such fees be taxed as costs of court.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
[Name]
Attorney for Movant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[**Name**]
Attorney for Respondent
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach the order to the motion (form 26-19) and file with the court clerk. Send a copy of the order as approved by the court to the defendant, using the transmittal letter at form 26-14.

Form 26-21

Checklist of Deposition Topics

A. Identification

1. Full legal name
2. Name debtor uses
3. Aliases
4. Social Security number
5. Driver's license number
6. Date of birth
7. Names of immediate family members (if divorced, obtain details of divorce(s) filing and property division)
8. Home address and phone numbers (landline, if any, and mobile)
9. E-mail address and website URLs

B. Employment (for both debtor and spouse)

1. Employers and addresses
2. Manner of compensation—wages, commissions, independent contract
3. When paid, i.e., monthly, every Friday
4. When any bonuses paid

5. Any ownership interest in the company

6. Job descriptions, any licenses required

C. Real Property

1. Lease/Rent: landlord identification; monthly rent; any rent-to-own options

2. Ownership

   a. Homestead

      i. address and property description

      ii. when acquired, purchase price, monthly payment, status of payments, mortgagee, current balance

      iii. rural vs. urban homestead; number of acres; if urban, whether adjacent lots

      iv. occupied or abandoned

      v. additional principal reductions; payments in fraud of creditors

      vi. names on title

      vii. if the homestead was acquired less than 1,215 days before the deposition, it is good practice to inquire about previous homestead ownership to gain information to analyze vulnerability of the homstead in the event of bankruptcy

   b. Other Real Property

      i. addresses and property descriptions

ii. when acquired, purchase prices, monthly payments, status of payments

iii. all liens, mortgagee, current balance

iv. rental incomes, identity of renters

v. names on title

c. Miscellaneous Real Property Interests

i. property owned by partnerships and corporation in which debtor has an interest

ii. oil, gas and mineral interests

iii. anticipated inheritances

iv. property in which debtory owns an undivided interest (determine owners of remaining undivided interests)

D. Personal Property

1. Vehicles (including two-, three-, or four-wheeled motor vehicles)

a. model

b. license plate numbers/VINs

c. when acquired

d. purchase prices

e. monthly payments

f. lienholders

g. name on titles

h. number of individuals in family who can drive or who relies on another to drive

i. usual locations of vehicles

2. Banks/Savings Accounts/Checking Accounts/Safe-Deposit Boxes/CDs/Cash

a. names of the institutions

b. account numbers

c. names on account and signatories

d. whether owe debt to the institution

e. review bank statements with cancelled checks

f. whether direct deposit of paycheck and when

g. contents of safe-deposit boxes and ownership of contents

h. any cash or cash equivalent in hand not in the accounts

3. Stocks, Bonds, Securities

a. locations of certificates or accounts

b. names on certificates or stock accounts

c. identity of securities

d. whether pledged

e. review monthly statement from securities accounts

4. Boats and RVs

a. descriptions

b. identification numbers

c. locations

d. values

e. liens

f. whether boats used in debtor's business

5. Planes

a. descriptions

b. identification numbers

c. locations

d. values

e. liens

6. Claims against Third Parties

a. does anyone owe you money?—accounts receivable, notes receivable; identify and determine status

b. do you have any lawsuits or judgments against anyone?

c. do you have any claims that would make the basis for a lawsuit?

d. any expected claims in the future?

e. expected inheritances?

f. expected insurance proceeds?

7. Collections (i.e., stamp, gun, coin)

a. descriptions

b. values

c. locations

d. liens

8. Additional Exempt Property Information: get description; location; value; liens on

a. home furnishings (including art work)

b. farming and ranching vehicles and implements

c. tools, equipment, books, and apparatuses used in a trade or business

d. wearing apparel

e. jewelry

f. firearms (limit to two exempt)

g. athletic and sporting equipment

h. household pets

i. animals and forage for their consumption

i. horses, mules, and donkeys with bridles (limit two)

ii. cattle (limit twelve)

iii. other livestock (limit sixty)

iv. fowl (limit 120)

9. Insurance

a. companies issuing

b. policy numbers

c. dates issued

d. types of insurance

e. beneficiaries

f. capacity to borrower against policies

g. large premium payments made in fraud of creditors

10. Retirement Accounts and IRAs

a. review plan documents to determine if qualified

b. account value and history of contributions

11. Trusts

a. beneficiary or trustor

b. property held in the trust

c. whether trust is spendthrift (insist on review of trust documents)

12. Other Intangibles: patents, trademarks, licenses, franchises, etc.; country club memberships

E. Business Interests

1. Sole Proprietorship

a. assest used in business

b. liens on assets

c. checking, savings, etc. accounts for business

d. cash flow analysis

2. Partnerships and LLCs

a. assets used in business

b. liens on assets

c. checking, savings, etc. accounts for business

d. cash flow analysis

e. partners (members) and their percentage ownerships

f. review partnership (LLC) documents

3. Corporations

a. assets used in business

b. liens on assets

c. checking, savings, etc. accounts for business

d. cash flow analysis

e. other shareholders and their share ownership

f. review corporate documentation

F. Transfers, Conversions, Third Parties

1. Property Transferred (within four years)

   a. identify property transferal and current location

   b. transferee

   c. consideration given (or was it a gift)

   d. date of transfer

   e. review historical financial statements to detect transfers

2. Personal Property Converted from Nonexempt to Exempt

   a. exempt property purchased (or traded for) within two years

   b. review historical financial statements to detect conversions

3. Property Held by Someone Else

   a. real property

   b. personal property

c. bank and savings accounts

d. other intangibles

4. Marital Property Agreements

a. prenuptial/postnuptial

b. partitions

5. Closely Held Business That Closed

a. who got assets, phone number, client lists

b. payments to insiders for antecedent debts

c. accounts and note receivable

G. Debts

1. amounts owed

2. whether suit filed or judgment taken

3. collateral

4. when incurred

5. status of payments and if any extraordinary payments made

H. Other Income/Sources of Cash

1. review tax returns for sources of income

2. tax refunds

3. anticipated inheritances

I. Cash Flow Analysis/Monthly Receipts and Expenses

J. Payment Proposals

1. monthly

2. lump sum

3. bankruptcy—past filings, intent to file in future

K. Documents Review—go over documents requested in notice or subpoena duces tecum

L. If Corporate Debtor (remember: corporations have no exempt property)

1. name, assumed names

2. incorporation date, whether $1,000 paid in

3. shareholders, directors, officers

4. status of franchise tax payments

5. location(s) of business

6. nature of business

7. identify deponent (see A above)

8. review property issues (see C through K above)

Chapter 27

Postjudgment Remedies

I. Judgment Lien and Abstract of Judgment

II. Execution

III. Property Subject to and Exempt from Execution

IV. Postjudgment Garnishment

V. Turnover

VI. Other Postjudgment Collection Devices

Forms

Chapter 27

Postjudgment Remedies

I. Judgment Lien and Abstract of Judgment

§ 27.1 Creation of Judgment Lien

A judgment lien is created only when an abstract of judgment is properly filed and indexed in the appropriate county records. The judgment itself creates no lien. *C.I.T. Corp. v. Haynie*, 135 S.W.2d 618, 622 (Tex. Civ. App.—Eastland 1939, no writ).

§ 27.2 Availability of Judgment Lien

§ 27.2:1 Judgment Lien Generally

The judgment on which the lien is based must be final; it cannot be interlocutory. *Blankenship & Buchanan v. Herring*, 132 S.W. 882 (Tex. Civ. App. 1910, no writ). The abstract should be filed immediately after rendition of judgment, to perfect the lien as soon as possible.

§ 27.2:2 Pending Appeal

An abstract can be obtained and filed, even if the judgment is being appealed or a supersedeas bond has been filed. If the plaintiff has taken the necessary steps to obtain a lien before the judgment is appealed, the appeal does not impair the judgment, and the lien is preserved pending the appeal. *Roman v. Goldberg*, 7 S.W.2d 899 (Tex. Civ. App.—Waco 1928, writ ref'd).

If the defendant wants to prevent enforcement of the judgment lien pending appeal, he must obtain a finding from the trial court that the creation of the lien would not substantially increase the security of the plaintiff's recovery when balanced against the cost to the defendant after all appeals have been exhausted. Recording a certified copy of this finding in the judgment records in which the abstract of judgment is filed neutralizes the lien pending appeal. The defendant must also post appropriate security. Tex. Prop. Code § 52.0011(a); *see also* Tex. R. Civ. P. 24. The court may withdraw its finding at any time. If it does so, the filing of a certified copy of the withdrawal reinstates the lien. Tex. Prop. Code § 52.0011(b).

See section 27.25 below regarding enforcement of the judgment itself pending appeal and how the defendant may postpone that enforcement.

§ 27.3 Property to Which Lien Attaches

§ 27.3:1 Real Property

A properly recorded and indexed abstract of judgment creates a lien on the defendant's nonexempt real property in the county in which the abstract is recorded, if the judgment itself is not dormant. Tex. Prop. Code § 52.001; *see Donley v. Youngstown Sheet & Tube Co.*, 328 S.W.2d 192, 197 (Tex. Civ. App.—Eastland 1959, writ ref'd n.r.e.). The lien continues for ten years from the date of recording and indexing, as long as the judgment does not become dormant (although a judgment in favor of the state or a state agency is treated differently). Tex. Prop.

Code § 52.006. The defendant's homestead is exempt, as discussed in section 27.3:3 below. The judgment lien also attaches to after-acquired real property of the defendant. Tex. Prop. Code § 52.001. The judgment lien does not attach to the defendant's personal property. *Donley*, 328 S.W.2d at 197.

§ 27.3:2 Inherited Real Property

When a person dies, whether testate or intestate, his property vests immediately in his legatees or heirs, subject to payment of his debts. Tex. Est. Code §§ 101.001, 101.051. A properly filed and indexed abstract of judgment against such a legatee or heir creates a lien against the inherited real property. An executor or administrator can sell the property free of the lien, however, to satisfy debts of the estate. *Woodward v. Jaster*, 933 S.W.2d 777, 780–82 (Tex. App.—Austin 1996, no writ).

§ 27.3:3 Homestead

A recorded judgment lien against the owner of homestead property will attach to the property when it ceases to be his homestead, if it is still owned by him. *Walton v. Stinson*, 140 S.W.2d 497, 499 (Tex. Civ. App.—Dallas 1940, writ ref'd). The homestead is discussed at sections 27.34 through 27.40 below.

Although the abstract does not create a lien on the defendant's homestead, it can still create a cloud on the title. The defendant may have a claim for damages against a plaintiff who refuses to release the lien as to the homestead when requested to do so by the defendant. *Tarrant Bank v. Miller*, 833 S.W.2d 666, 667–68 (Tex. App.—Eastland 1992, writ denied).

The Texas Property Code sets out requirements for a release of record of lien on homestead property. *See* Tex. Prop. Code § 52.0012. For a homestead affidavit as release of judgment lien, see form 27-26 in this chapter.

§ 27.4 Burden for Compliance with Abstract of Judgment Statutes

A judgment lien is a statutory creation and therefore must comply with the governing statutes. *Day v. Day*, 610 S.W.2d 195, 197 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.). The attorney should be absolutely certain that the abstract is properly prepared, recorded, and indexed and that all requirements of law are met. The party attempting to establish a judgment lien has the burden of proving that all statutory requirements have been met. *See Alkas v. United Savings Ass'n*, 672 S.W.2d 852, 859 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.); *McGlothlin v. Coody*, 59 S.W.2d 819, 821 (Tex. Comm'n App. 1933, holding approved). The requirements for preparing and recording the abstract of judgment are discussed at sections 27.5 and 27.6 below.

§ 27.5 Contents of Abstract of Judgment

An abstract of judgment must contain—

1. a mailing address for each plaintiff or judgment creditor;
2. the name of each plaintiff and defendant;
3. the date of birth of each defendant, if available to the clerk;
4. the last three numbers of the driver's license of each defendant, if available;
5. the last three numbers of the Social Security number of each defendant, if available;
6. the cause number of the suit in which the judgment was rendered;
7. the address of each defendant if shown in the suit in which the judgment was rendered or, if not shown in the suit,

the nature of the citation and the date and place it was served;

8. the date the judgment was rendered;
9. the amount of the judgment as rendered and the balance due on the judgment;
10. the amount of the balance due, if any, for child support arrearage; and
11. the interest rate specified in the judgment.

Tex. Prop. Code §§ 52.003(a), 52.0041.

In justice or small claims courts, the justice of the peace or the attorney of a person in whose favor a judgment is rendered prepares the abstract. In all other state courts, the plaintiff or his agent or attorney may either prepare the abstract himself or have the court clerk prepare it. If someone other than a clerk or justice of the peace prepares the abstract, it must be verified. Tex. Prop. Code § 52.002.

The attorney should review the abstract before recording to make sure it complies with all statutory requirements. Any error may invalidate the abstract and preclude the lien. *See, e.g., Bonner v. Grigsby*, 19 S.W. 511 (Tex. 1892) (cause number omitted); *Evans v. Frisbie*, 19 S.W. 510 (Tex. 1892) (credits on judgment not shown); *Allied First National Bank v. Jones*, 766 S.W.2d 800 (Tex. App.—Dallas 1988, no writ) (debtor's address omitted); *Texas American Bank/Fort Worth v. Southern Union Exploration Co.*, 714 S.W.2d 105 (Tex. App.—Eastland 1986, writ ref'd n.r.e.) (no debtor's address or nature of citation); *Reynolds v. Kessler*, 669 S.W.2d 801 (Tex. App.—El Paso 1984, no writ) (no date of judgment or interest rate); *Rushing v. Willis*, 28 S.W. 921 (Tex. Civ. App. 1894, no writ) (incorrect date).

The standard for meeting the requirements of Tex. Prop. Code § 52.003 is substantial compliance. *Citicorp Real Estate, Inc. v. Banque Arabe Internationale D'Investissement*, 747 S.W.2d 926, 929 (Tex. App.—Dallas 1988, writ denied); *see also Hoffman, McBryde & Co. v. Heyland*, 74 S.W.3d 906, 912–13 (Tex. App.—Dallas 2002, pet. denied) (if abstract reflects balance due when issued, credits to judgment before abstract is filed need not be shown); *Smith v. Adams*, 333 S.W.2d 892, 895–96 (Tex. Civ. App.—Eastland 1960, writ ref'd n.r.e.) (discrepancy of one day between actual date of judgment and date shown on abstract did not affect lien's validity). Omission of mandatory information such as the defendant's address or citation information is not substantial compliance, however, even if other parties, such as a competing lien claimant, have actual knowledge of the missing information. *Citicorp Real Estate, Inc.*, 747 S.W.2d at 929–30.

The clerk must include the defendant's date of birth and driver's license number only if that information is reasonably available. If the information is not available, the clerk is not required to state that fact on the face of the abstract. *Fred Rizk Construction Co. v. Cousins Mortgage & Equity Investments*, 627 S.W.2d 753, 756 (Tex. App.—Houston [1st. Dist.] 1981, writ ref'd n.r.e.). The requirement that the abstract contain the defendant's address also applies to prevailing counterplaintiffs. *Allied First National Bank*, 766 S.W.2d at 803.

For an abstract of judgment, see form 27-1 in this chapter. For a letter explaining the judgment lien to the client, see form 27-2.

§ 27.6 Recording of Abstract of Judgment

The county clerk must, on request, immediately record a properly authenticated abstract of judgment in the judgment records. The clerk must note the day and hour of recording on the abstract and enter it in an alphabetical index to the judgment records, showing the name of each plaintiff and defendant in the judgment and the

volume and number of the page in the records where the abstract is recorded. Tex. Prop. Code § 52.004. Failure to properly index the abstract can destroy the lien. *City State Bank v. Bailey*, 214 S.W.2d 901, 903–04 (Tex. Civ. App.—Amarillo 1948, writ ref'd) (lien failed because judgment for City State Bank indexed under "B" as "Bank, City State"); *but see Houston Investment Bankers Corp. v. First City Bank of Highland Village*, 640 S.W.2d 660, 662 (Tex. App.—Houston [14th Dist.] 1982, no writ) (abbreviation of "First City Bank of Highland Village" to "First City Bank HV" did not invalidate lien).

The name of each plaintiff and defendant named in the judgment must be indexed; omission of any name can destroy the lien on the other defendants. *Reynolds v. Kessler*, 669 S.W.2d 801, 805 (Tex. App.—El Paso 1984, no writ); *McGlothlin v. Coody*, 59 S.W.2d 819 (Tex. Comm'n App. 1933, holding approved).

Suggested counties in which to record the abstract include those of the defendant's residence; his principal place of business or employment; his previous residence; his family's residence (for inheritance possibilities); and a former ownership of property, because he may reside or invest there again.

The attorney should ascertain the correct filing fee from the county clerk's office before filing the abstract. After the abstract is recorded, the county clerk will return it to the address indicated at the end of the document.

§ 27.7 Discharge and Cancellation of Judgment

If the defendant pays the judgment, the plaintiff or his attorney should execute a release of the judgment lien and send it to the defendant. When doing so, he should advise the defendant of all counties in which the abstract was recorded, so that the defendant may record the release in those counties. A release of judgment lien is at form 27-3 in this chapter.

A judgment and judgment lien may also be discharged and canceled if the defendant obtains a discharge in bankruptcy. If the abstract of judgment was recorded before September 1, 1993, the defendant must apply to the court rendering the judgment for an order discharging and canceling the judgment and judgment lien. Tex. Prop. Code §§ 52.021–.025. For judgments for which abstracts were recorded on or after September 1, 1993, the defendant's discharge in bankruptcy automatically cancels the judgment and the lien, unless the debt was not discharged or the property was not exempted in the bankruptcy and was abandoned during the bankruptcy. Tex. Prop. Code §§ 52.041–.043.

If the judgment creditor refuses to accept payment of the judgment or accepts payment and refuses to execute a release, the judgment debtor has a statutory remedy to obtain a release. Tex. Civ. Prac. & Rem. Code § 31.008(g).

§ 27.8 Keeping Judgment and Lien Alive

§ 27.8:1 Expiration of Judgment Lien

Once a lien is created, it continues for ten years following the date of recording and indexing the abstract, unless the judgment becomes dormant during that period (although a judgment favoring the state or a state agency is treated differently, as is a judgment for child support under the Family Code). Tex. Prop. Code § 52.006; *see also* Tex. Civ. Prac. & Rem. Code § 34.001(c). It is essential both to keep the judgment lien alive and to keep its priority in place by recording and indexing a new abstract before the expiration of ten years from the date the last abstract was recorded and executing on the judgment to keep it from becoming dormant. Because each abstract creates a new lien, recording and index-

ing an abstract more than ten years after the immediately preceding one was recorded and indexed creates a new lien, but the break causes a loss of the preceding lien and its priority in the chain of title. *See Burton Lingo Co. v. Warren*, 45 S.W.2d 750 (Tex. Civ. App.—Eastland 1931, writ ref'd). Revival of dormant judgments is discussed at section 27.16 below. Note that certain student loans are not subject to state-determined limitations periods. 20 U.S.C. § 1091a. Furthermore, judgment liens for debts owed to the United States are subject to different rules than those described in this section. *See, e.g.*, 28 U.S.C. § 3201.

The following table illustrates how the interaction of the dates of judgment, recording, and execution affect the duration of the lien. Note that judgments favoring the state or a state agency are treated differently. *See* Tex. Prop. Code § 52.006.

	Judgment Signed	*Abstract Recorded*	*Writ of Execution Issued*	*New AJ Recorded?*	*Lien Expires*
a.	1/2/10	1/2/10	none	no	1/2/20
Lien lasts for ten years from date of recording (Tex. Prop. Code § 52.006); judgment went dormant ten years from date of rendition (Tex. Civ. Prac. & Rem. Code § 34.001(a)).					
b.	1/2/10	6/2/10	12/1/19	no	6/2/20
Judgment did not go dormant because of execution within ten years from date of rendition; judgment lien lasted ten years from date of recording.					
c.	1/2/10	6/1/15	none	no	1/2/20
Even though judgment lien ordinarily lasts for ten years from date of recording, this judgment went dormant ten years from date of rendition; lien expired on date of dormancy.					
d.	1/2/10	6/1/15	12/1/19	no	6/1/25
Lien lasts for ten years from date of recording; it was kept alive by execution within ten years of rendition.					
e.	1/2/10	6/2/10	12/1/19	6/1/20	12/1/29
Recording of new abstract within ten years of recording first abstract perpetuated judgment lien; judgment lien went dormant ten years after first execution. A second execution issued on or after 6/1/20 and before 12/1/29 could have kept lien alive until 6/1/30. Tex. Civ. Prac. & Rem. Code § 34.001(b).					
f.	1/2/10	6/2/10	12/1/19	8/3/20	12/1/29
Lien expires 12/1/29 as in example e., but plaintiff loses lien priority because he did not record new abstract within ten years of recording first abstract. Any lien or claim against property recorded before rerecorded abstract takes priority over it.					

§ 27.8:2 Effect of Limitations on Life of Judgment Lien

In *Jones v. Harrison*, 773 S.W.2d 759 (Tex. App.—San Antonio 1989, writ denied), the plaintiff abstracted his lien. Later, the defendant conveyed real property to third parties. When the plaintiff tried to enforce his judgment lien, the court held that his action was barred by limitations title in the grantees of the defendant. *Harrison*, 773 S.W.2d at 760. This holding suggests that regular postjudgment discovery may

be required in order to ensure the life of the lien, so that a transfer of property can be discovered before limitations title is perfected. If the defendant and his transferee seek to remove a judgment lien by claiming limitations title in this manner, the transaction should be scrutinized as a possible fraudulent transfer. See Tex. Bus. & Com. Code § 24.005 and section 14.10 in this manual. Furthermore, *Harrison* may be subject to challenge because the judgment creditor has no right of possession.

§ 27.8:3 Responsibilities of Attorney and Client in Keeping Judgment and Lien Alive

The attorney and his client should agree on who has the responsibility for keeping the judgment and all judgment liens alive. It is the better practice to place these responsibilities with the client. A suggested letter to this effect is at form 27-4 in this chapter. If the attorney undertakes these responsibilities, he must be careful to keep an accurate tickler system and to keep up with the whereabouts of both the defendant and the client. See section 27.16 below for a discussion of dormancy of judgments and expiration of liens.

§ 27.8:4 Tolling Limitations on Judgment

Fraud or concealment by the defendant will toll the ten-year dormancy rule under Tex. Civ. Prac. & Rem. Code § 34.001. Limitations will begin to run from the time the fraud is discovered or could have been discovered by the defrauded party using reasonable diligence. *Estate of Stonecipher v. Estate of Butts*, 591 S.W.2d 806, 809 (Tex. 1979).

§ 27.9 Unclaimed Judgment

If the plaintiff cannot be found, the defendant can obtain a release of the judgment by paying the amount of the judgment into the registry of the court. Tex. Civ. Prac. & Rem. Code § 31.008. This procedure allows defendants to clear judgment liens from the title to their real property and to update their credit histories when the plaintiff cannot be located.

[Section 27.10 is reserved for expansion.]

II. Execution

§ 27.11 Purpose and Use of Execution

A writ of execution is a judicial writ directing the enforcement of a district, county, or justice court judgment. *See* Tex. R. Civ. P. 621. The writ typically directs the sheriff or constable to levy on a defendant's nonexempt property, sell it, and deliver the sale proceeds to the plaintiff to be applied toward satisfaction of the judgment. *See* Tex. R. Civ. P. 637. Property subject to and exempt from execution is discussed in part III. in this chapter. Garnishment, another judgment collection procedure, is discussed in part IV.

§ 27.12 Issuance of Writ of Execution

§ 27.12:1 Time for Issuance

A judgment creditor has the right, as a matter of law, to have a writ of execution issued unless and until the defendant files a proper supersedeas bond. Tex. R. Civ. P. 627; *see Merrell v. Fanning & Harper*, 597 S.W.2d 945, 950 (Tex.

Civ. App.—Tyler 1980, no writ). If no supersedeas bond is filed and approved, a writ of execution must be issued if the plaintiff applies for it after the expiration of thirty days from the time final judgment is signed. If a motion for new trial is timely filed but is denied, the clerk must issue the writ after the expiration of thirty days from the time the order overruling the motion is signed or from the time the motion is overruled by operation of law. Tex. R. Civ. P. 627; *see also* Tex. R. Civ. P. 329b.

The writ may issue before the thirtieth day if the plaintiff files an affidavit that the defendant is about to (1) remove his nonexempt personal property from the county or (2) transfer or secrete his nonexempt personalty to defraud his creditors. Tex. R. Civ. P. 628. For the first ground, it is not necessary that the defendant be trying to defraud his creditors. *Clifford v. Lee*, 23 S.W. 843, 844 (Tex. Civ. App. 1893, no writ). If the defendant received a hearing on the sufficiency of the plaintiff's affidavit, the sufficiency of the affidavit may not be challenged on appeal, even if the hearing was held after execution was granted. *See Perfection Casting Corp. v. Aluminum Alloys, Inc.*, 733 S.W.2d 385, 386 (Tex. App.—San Antonio 1987, no writ) (no statement of facts appeared in appellate record; appellate court assumed evidence at hearing was sufficient).

§ 27.12:2 Diligence in Issuance

The attorney must make sure that the writ is prepared and issued by the clerk, placed in the officer's hands, and executed by the officer, all in a timely and proper manner. The burden is on the plaintiff to prove that the writ was issued on his judgment within the statutory period. *See Boyd v. Ghent*, 64 S.W. 929, 930 (Tex. 1901). Issuance means more than mere clerical preparation; it includes unconditional delivery to an officer for enforcement. *See Harrison v. Orr*, 296 S.W. 871, 875–76 (Tex. Comm'n App. 1927, judgm't adopted), *modified*, 10 S.W.2d 381 (Tex. Comm'n App. 1928). The same diligence must be exercised in obtaining issuance of a writ of execution on a judgment as when obtaining service of citation when a suit is originally brought. Execution is not said to have "issued," even though the writ has been prepared and attested, if it has not been actually and unconditionally delivered to the officer for enforcement. There must be reasonable diligence in making delivery to the officer. *Ross v. American Radiator & Standard Sanitary Corp.*, 507 S.W.2d 806, 809 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.).

The question of issuance of execution turns on the diligence and good faith of the plaintiff. *See Williams v. Short*, 730 S.W.2d 98, 99–100 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.); *R.B. Spencer & Co. v. Harris*, 171 S.W.2d 393, 395 (Tex. Civ. App.—Amarillo 1943, writ ref'd). When the sheriff was instructed to return the writ on the last day for return without actually attempting to execute it, there was no valid issuance of execution. *Harrison*, 296 S.W. at 875. *See also Hughes v. Rutherford*, 201 F.2d 161, 163 (5th Cir. 1953). But when the writ was delivered to the sheriff with the request that it be returned *nulla bona* and the sheriff searched the tax rolls, found no property subject to the writ, and returned it *nulla bona*, there was valid issuance, because there was no want of diligence or lack of good faith. *R.B. Spencer & Co.*, 171 S.W.2d at 395.

§ 27.12:3 Presumption That Officer Performed His Duty

Proof of delivery of the writ to the officer creates a presumption that he performed his duty. The absence of a return does not negate issuance. If there is no showing that the officer was in any way thwarted or deterred from performing his duty, issuance is complete on unconditional delivery to the officer for enforcement. *Carpenter v. Probst*, 247 S.W.2d 460, 461–62 (Tex. Civ. App.—San Antonio 1952, writ ref'd);

cf. Cotten v. Stanford, 147 S.W.2d 930, 933 (Tex. Civ. App.—Amarillo 1941, no writ).

§ 27.13 Requisites of Writ of Execution

§ 27.13:1 Inspection of Writ by Attorney

The writ is usually prepared by the clerk of the court that rendered the judgment. The attorney should request the clerk to send the completed writ of execution to him for review; see form 27-5 in this chapter. Before sending it to the officer, the attorney should check the writ to make sure that the information has been entered correctly, the correct form was used, and all legal requirements have been met.

§ 27.13:2 General Requirements

Every writ of execution must—

1. be styled "The State of Texas";
2. be directed to any sheriff or any constable within the state, not to a particular county (*see also* Tex. R. Civ. P. 622);
3. describe the judgment, stating—
   a. the court in which it was rendered;
   b. the time when it was rendered; and
   c. the names of the parties in whose favor and against whom it was rendered;
4. contain a correct copy of the bill of costs taxed against the defendant in execution (*see also* Tex. R. Civ. P. 622);
5. require the officer to execute it according to its terms and to recover the costs adjudged against the defendant in execution and the further costs of executing the writ;
6. require the officer to return it within thirty, sixty, or ninety days as directed by the plaintiff or his attorney (see section 27.13:7 below);
7. be signed officially by the clerk or justice of the peace; and
8. bear the seal of the court if issued from a district or county court.

Tex. R. Civ. P. 629. Additional requirements for particular kinds of writs are discussed in the following sections.

§ 27.13:3 Money Judgment

If an execution is issued on a judgment for an amount of money, or directing the payment simply of an amount of money, the writ must specify the amount of money recovered or directed to be paid, the amount actually due when the writ was issued, and the interest rate on that amount. The writ must order the officer to satisfy the judgment and costs out of the property of the defendant subject to execution. Tex. R. Civ. P. 630.

§ 27.13:4 Sale of Particular Property

If the judgment orders the sale of particular property, the writ must particularly describe the property and direct the officer to make the sale by giving the required public notice of sale. Tex. R. Civ. P. 631.

§ 27.13:5 Delivery of Certain Personal Property

If the judgment orders the delivery of possession of property, the writ must particularly describe the property and the person entitled to possession and order the officer to deliver the property to that person. Tex. R. Civ. P. 632.

§ 27.13:6 Possession or Value of Personal Property

If the judgment is for the recovery of personal property or its value, the writ must order the officer either to recover the property or, if the property cannot be recovered, to levy on the defendant's property subject to execution and collect the value of the property. Tex. R. Civ. P. 633.

§ 27.13:7 Request for Return of Execution in Less Than Ninety Days

The plaintiff can ask the clerk to make the execution returnable within thirty, sixty, or ninety days. Tex. R. Civ. P. 629. Without such a request, the full ninety days will be allowed, and many form writs of execution are so printed. The plaintiff's attorney will usually have no need to require a return in less than ninety days. But a shorter period may be desired if, for example—

1. before seeking a writ of garnishment, the attorney wants to establish evidence that there is insufficient property to satisfy the execution, or
2. there is some reason to levy against one defendant before levying against another defendant and a ninety-day execution might unduly delay the second levy.

§ 27.14 Suspending Execution

A justice court execution can be stayed for three months from the date of judgment if, within ten days after rendition, the defendant and one or more sureties appear before the justice and acknowledge themselves bound to the plaintiff for the full amount of the judgment plus interest and costs. The acknowledgment must be entered on the docket in writing and signed by the sureties. In addition, the party seeking the stay must file an affidavit that he does not have enough money to pay the judgment and that enforcement before three months' time would be a hardship and would cause a sacrifice of his property that likely would not be caused if the execution were stayed. At the end of three months, execution will issue if the judgment is not paid. *See* Tex. R. Civ. P. 635.

See also section 27.25 below.

§ 27.15 Execution against Estate

If a money judgment is against the personal representative of an estate acting in that capacity, the judgment must state that it is to be paid in the course of administration, and no execution may issue on it. The judgment is to be certified to the probate court or county court sitting in probate and paid in the course of administration. This procedure does not apply if the decedent's will dispenses with the need for court-supervised administration; in that case, the plaintiff may execute on property of the testator held by the executor of the estate. Tex. R. Civ. P. 313. A judgment against a personal representative acting as such must state that it is to be paid in the course of administration. An erroneous recitation in the judgment to "let execution issue" will not render the judgment void, however, nor will it subject the judgment to collateral attack, if the court rendering the judgment had jurisdiction over the subject matter and parties and had the power to adjudicate the extent of liability. Furthermore, a personal representative who has full knowledge of the judgment has the duty to present it to the county or probate court for inclusion in the distribution of the estate. *See State v. Blair*, 629 S.W.2d 148, 150 (Tex. App.—Dallas), *aff'd*, 640 S.W.2d 867 (Tex. 1982). A judgment against a judgment defendant who later dies is not enforceable as a judgment against the estate. The judgment creditor must pursue it as any other claim against the

estate. See generally chapter 29 in this manual regarding claims in probate.

§ 27.16 Dormant Judgment

If a writ of execution has not been issued within ten years after rendition of judgment, the judgment will become dormant, and execution may not issue on it unless it is revived. A second writ may issue at any time within ten years after issuance of the first writ. If the writ is issued within ten years after rendition of judgment, but a second writ is not issued within ten years after issuance of the first writ, the judgment then becomes dormant. This, however, does not apply to a judgment for child support under the Family Code. Tex. Civ. Prac. & Rem. Code § 34.001. See section 27.8:1 above regarding how the interaction of the dormancy and abstract of judgment statutes affects the duration of the judgment lien.

A dormant judgment may be revived by scire facias or by an action of debt brought not later than the second anniversary of the date that the judgment becomes dormant. Tex. Civ. Prac. & Rem. Code § 31.006. See forms 27-8 and 27-9 in this chapter for a petition to revive a judgment and a judgment reviving a dormant judgment.

§ 27.17 Recovery of Seized Property and Plaintiff's Liability

A defendant may recover property that has been seized through execution if the judgment on which the execution is issued is later reversed or set aside and the property has not been sold at execution sale. Tex. Civ. Prac. & Rem. Code § 34.021. If the property has been sold, the person is entitled to recover from the plaintiff its market value at the time of sale. Tex. Civ. Prac. & Rem. Code § 34.022.

§ 27.18 Court Proceedings to Reach Nonexempt Property

If the defendant owns nonexempt property, the plaintiff may obtain injunctive, turnover, or other relief in reaching the property. Tex. Civ. Prac. & Rem. Code § 31.002(a). See parts V. and VI. in this chapter for discussion.

§ 27.19 Method of Levy on Particular Kinds of Property

§ 27.19:1 Real Property

To levy on real property, the officer need not go on the property but can merely endorse the levy on the writ. Tex. R. Civ. P. 639. The sale procedure is discussed at section 27.21:1 below.

§ 27.19:2 Personal Property

If the defendant is entitled to possession of personal property, the officer levies on it by taking possession of it. If the defendant has an interest in the personal property but is not entitled to possession of it, levy is made by giving notice to the person who is entitled to possession or, if several persons are entitled to possession, to one of them. Tex. R. Civ. P. 639.

§ 27.19:3 Immovable or Bulky Property

In the case of immovable or bulky property that is so cumbersome that it may not be moved except at great expense and effort, the levying officer need only go on the premises, point out the property, assume dominion over it, and forbid its removal by the person against whom the writ has issued. *Beaurline v. Sinclair Refining Co.*, 191 S.W.2d 774, 777 (Tex. Civ. App.—San Antonio 1945, writ ref'd n.r.e.). The officer will likely require the judgment creditor to advance the cost of a bonded guard until the property can be sold.

§ 27.19:4 Collateral

Property that has been assigned, mortgaged, or pledged as collateral can be levied on and sold at execution sale. If the collateral is held by the assignee, mortgagee, or pledgee, the buyer at execution sale can take possession of the property by complying with the terms of the mortgage or security agreement. Tex. R. Civ. P. 643. See section 27.41:6 below regarding property subject to a security interest or mortgage.

§ 27.19:5 Corporate Shares

An officer may levy on certificated shares of a corporation or joint-stock company by taking possession of the certificate. Tex. R. Civ. P. 641. See Tex. Bus. & Com. Code § 8.112 regarding particular situations involving certificated and uncertificated securities.

§ 27.19:6 Livestock

An officer can levy on livestock that are running at large on the range and cannot be herded and penned without great inconvenience and expense by making a reasonable estimate of the number of animals and describing them by their marks or brands. The levy must be made in the presence of two or more credible persons, and written notice of the levy must be given to the owner, his herder, or his agent, if they reside within the county and are known to the officer. Tex. R. Civ. P. 640.

§ 27.20 Defendant's Right to Designate Property for Levy

Unless the writ of execution orders the sale of specific property, the officer must first call on the defendant to designate the property the defendant prefers to have sold. If the officer believes the designated property will not sell for enough to satisfy the execution and costs of sale, he must require the defendant to designate additional property.

If the defendant does not designate any property, the officer must levy on any of the defendant's property subject to execution. If the defendant cannot be found to make a designation or if the defendant is absent, the officer may call on any known agent of the defendant in the county to make the designation. Tex. R. Civ. P. 637.

§ 27.21 Sale of Property under Writ of Execution

§ 27.21:1 Real Property

Realty is sold at public auction held at the courthouse door of the county in which it is located between 10:00 A.M. and 4:00 P.M. on the first Tuesday of the month, although the court may order the sale to be held at the site of the property. Tex. R. Civ. P. 646a. If the property consists of several lots in a city or town, each lot must be offered for sale separately, unless the lots are not susceptible to separate sale because of the character of improvements. Tex. Civ. Prac. & Rem. Code § 34.042. See also Tex. Civ. Prac. & Rem. Code § 34.043 regarding the sale of rural property.

Before sale, the officer must advertise the time and place of sale. The advertisement must be published once a week for three consecutive weeks before the sale in a newspaper published in the county in which the property is located, with the first publication appearing not less than twenty days before the sale. He must also give the defendant or his attorney written notice of the sale, by mail or in person. The notice given to the defendant or his attorney must substantially conform to the requirements of the published advertisement of the sale. Tex. R. Civ. P. 647. For purposes of calculating twenty days before the sale, the date the first notice is published counts as the first day. The twentieth and

last day counted is the day before the day of the sale. *Concrete, Inc. v. Sprayberry*, 691 S.W.2d 771, 772 (Tex. App.—El Paso 1985, no writ).

The advertisement must contain—

1. a statement of the authority by which the sale will be made;
2. the time of levy;
3. the time and place of sale;
4. a brief description of the property;
5. the number of acres, original survey, and location in the county; and
6. the name by which the land is most generally known.

It is not necessary that the advertisement contain field notes. Tex. R. Civ. P. 647. The officer prepares the notice; the plaintiff's attorney should request a copy. See the letter at form 27-7 in this chapter.

Persons eligible to purchase real property at execution sales must present the officer conducting the sale with a written statement from the county tax assessor-collector that they owe no delinquent taxes. *See* Tex. Tax Code § 34.015 (prescribing the form of the required statement). The deed executed by the officer conducting the sale must recite that this requirement was met by the successful bidder. Tex. Civ. Prac. & Rem. Code § 34.0445(c). In counties with a population of less than 250,000, this requirement applies only if the commissioners court has by order adopted the requirement. Tex. Civ. Prac. & Rem. Code § 34.0445.

Due to the length of time it often takes to advertise an execution sale of real estate, the writ of execution may expire. To continue the life of the writ beyond the usual ninety days, the court clerk can issue a venditioni exponas, referenced in Tex. R. Civ. P. 647 and defined in *Black's Law Dictionary* (11th ed. 2019). See form 27-10 for a venditioni exponas.

§ 27.21:2 Personal Property

Personalty is to be sold at the premises where it was taken in execution, the courthouse door of the county in which it is located, or some other place if it is more convenient to exhibit it to purchasers at that place because of the nature of the property. Except for shares of stock, property in which the defendant has only an interest without the right to exclusive possession, and livestock running at large on the range, personal property cannot be sold without being presented for viewing by those attending the sale. Tex. R. Civ. P. 649. Notice of the sale must be given by posting a notice for ten successive days immediately before the sale, at the courthouse door of any county and at the place where the sale is to be made. Tex. R. Civ. P. 650. The officer prepares the notice; the plaintiff's attorney should request a copy. See the letter at form 27-7 in this chapter.

§ 27.21:3 Penalty for Sale of Property without Notice

If the officer sells property without giving the required notice or sells property in a manner other than that prescribed by law, the officer is liable only for actual damages sustained by the injured party, who has the burden to prove that the sale was improper and any actual damages suffered. Tex. Civ. Prac. & Rem. Code § 34.066.

§ 27.21:4 Irregularities of Sale

The execution sale can be set aside on a showing that the bid price was grossly inadequate and that there were irregularities involved with the sale. *See Collum v. DeLoughter*, 535 S.W.2d 390, 392–93 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.) (failure to notify defendant of sale, failure to allow defendant to designate property to be sold, and misdescription of property were sufficient irregularities); *Pantaze v. Slocum*, 518 S.W.2d 407, 409 (Tex. Civ. App.—Fort Worth 1974, writ ref'd n.r.e.) (slight irregu-

larities in sale, coupled with gross inadequacy of bid price, justified setting aside sale); *but see Brimberry v. First State Bank of Avinger*, 500 S.W.2d 675, 676–77 (Tex. Civ. App.—Texarkana 1973, writ ref'd n.r.e.) (slight irregularities not sufficient to set aside sale, because bid price not grossly inadequate).

§ 27.21:5 Purchaser's Failure to Comply with Terms of Sale

If the purchaser at execution sale fails to comply with the terms of sale, he will be liable to the plaintiff for 20 percent of the value of the property bid for, plus costs. The plaintiff must file a motion to recover this amount, and the defaulting purchaser is entitled to at least five days' notice of a hearing on the motion. Also, if the property sells for less at a later sale than the high bid price at the first sale, the defaulting purchaser is liable for the difference. Tex. R. Civ. P. 652. *See also Jackson v. Universal Life Insurance Co.*, 582 S.W.2d 207, 209 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.); *Childress v. Ely & Walker*, 489 S.W.2d 628, 631 (Tex. Civ. App.—Texarkana 1973, no writ).

§ 27.22 Defendant's Right to Replevy

§ 27.22:1 Return of Property to Defendant

Personal property taken in execution may be returned to the defendant by the officer if the defendant gives the officer a delivery bond payable to the plaintiff, with two or more sureties approved by the officer. The defendant must agree in the bond to pay the officer the fair value of the property, as stated in the bond, or return the property to the officer at the time and place stated in the bond, to be sold. Tex. R. Civ. P. 644. The defendant may dispose of the property and pay the officer the amount stated in the bond. Tex. R. Civ. P. 645.

§ 27.22:2 Forfeiture of Delivery Bond

If the defendant does not return the property or pay the stated value under the terms of the delivery bond, the officer is to mark the bond as forfeited and return it to the clerk or justice of the peace who issued it, who will then issue a writ of execution against the principal defendant and his sureties. Tex. R. Civ. P. 646.

§ 27.23 Duties and Liabilities of Officer

§ 27.23:1 Duty of Officer to Levy

When an officer receives a writ of execution, he is required to proceed without delay to levy on the defendant's nonexempt property found in his county, unless directed otherwise by the plaintiff or his agent or attorney. Tex. R. Civ. P. 637. The sheriff must execute all process and precepts directed to him by legal authority and must return the process or precept to the proper court on or before the date the process or precept is returnable. Tex. Loc. Gov't Code § 85.021(a). Constables have a similar duty. *See* Tex. Loc. Gov't Code § 86.021(a).

The officer must endorse the writ when he receives it with the day and hour of receipt. If the officer receives more than one execution on the same day against the same person, he must number them as received. Tex. R. Civ. P. 636. Improper or false endorsement renders the officer and the officer's sureties liable for damages suffered by the plaintiff. Tex. Civ. Prac. & Rem. Code § 34.063(a). The plaintiff has the burden to prove that the officer failed to properly number or endorse the writ, the officer's failure precluded the levy of executable property owned by the judgment debtor, such property was not exempt from execution or levy, and the plaintiff suffered actual damages. Tex. Civ. Prac. & Rem. Code § 34.063(b).

An officer receiving a writ of execution does not have a duty to (1) search for property belonging to the judgment debtor, (2) determine whether property belongs to a judgment debtor, (3) determine whether property belonging to the judgment debtor is exempt property not subject to levy, (4) determine the priority of liens asserted against property subject to execution, or (5) make multiple levies for cash or multiple levies at the same location. Tex. Civ. Prac. & Rem. Code § 34.071. An officer also does not have a duty to levy on or sell property not within the officer's county, unless it is real property that is partially in the officer's county and partially within a contiguous county. Tex. Civ. Prac. & Rem. Code § 34.073(b).

§ 27.23:2 Timing of Execution and Return

An officer receiving a writ of execution may return the writ after the first levy or attempted levy if the judgment creditor cannot designate any more executable property currently owned by the judgment debtor at the time of the first levy or first attempted levy. Tex. Civ. Prac. & Rem. Code § 34.072(a). Notwithstanding rule 637 of the Texas Rules of Civil Procedure, an attempt to levy on property may begin any time during the life of the writ, provided that the officer allows enough time for completing the sale of the property.

§ 27.23:3 Transfer of Writ

An officer receiving a writ may transfer the writ to another officer in another precinct or to another law enforcement agency authorized to perform executions within the county of the first officer who received the writ. Tex. Civ. Prac. & Rem. Code § 34.073(a).

§ 27.23:4 Wrongful Levy

Whenever a distress warrant or a writ of execution, sequestration, attachment, or other like writ is levied on personal property and the property, or any part of the property, is claimed by any claimant who is not a party to the writ, the only remedy against a sheriff or constable for wrongful levy on the property is by trial of right of property under part VI, section 9, of the Texas Rules of Civil Procedure. Tex. Civ. Prac. & Rem. Code § 34.075.

§ 27.23:5 Failure to Execute Process Generally

A sheriff who fails to return a process or precept or who makes a false return will be liable to the injured party for all damages sustained, and he can be punished as for contempt by a fine of up to $100 by the court to which the process is returnable. Tex. Loc. Gov't Code § 85.021(b), (c), (d). A constable may be fined $10 to $100 for contempt and costs for failing to execute and return any process lawfully directed and delivered to him, on motion of the injured party with ten days' notice to the constable, although this does not apply to actions brought under chapter 34 of the Texas Civil Practice and Remedies Code. Tex. Loc. Gov't Code § 86.024. An officer also commits an offense if, with intent to obtain a benefit or with intent to harm or defraud another, he intentionally or knowingly violates a law relating to his office or employment. Tex. Penal Code § 39.02(a)(1).

Falsely endorsing the writ renders the officer liable for damages plus 20 percent of the amount of the execution. Tex. Civ. Prac. & Rem. Code § 34.063.

See section 16.15 in this manual for further discussion of the officer's responsibilities and liability for failure to perform them.

§ 27.23:6 Failure to Levy or to Return Writ of Execution

If the officer fails to levy on or sell property subject to execution, if the levy or sale could have

taken place, the officer and the officer's sureties are liable only for actual damages suffered. *See* Tex. Civ. Prac. & Rem. Code § 34.065(a). The judgment creditor seeking relief has the burden of proof. *See* Tex. Civ. Prac. & Rem. Code § 34.065(b)–(d). If an officer receives actual notice of an error on a return or of failure to file a return, the officer must amend or file the return no later than thirty days after receiving the notice or the officer may be subject to contempt under section 7.001(b) of the Texas Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code § 34.064.

§ 27.23:7 When Defendant Files Bankruptcy

Because bankruptcy operates as an automatic stay of any proceeding against the defendant, an officer will not be held liable for failure to hold an execution sale after a bankruptcy is filed. *See* 11 U.S.C. § 362(a)(1), (2), (6); *Ortiz v. M.&M. Sales Co.*, 656 S.W.2d 554, 556 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.) (defendant filed for bankruptcy between time sheriff first could have levied and date sale could have been held; sheriff not liable).

§ 27.23:8 Failure to Deliver Money Collected

The officer must deliver to the plaintiff money collected by execution at the earliest opportunity, and failure to do so is ground for the plaintiff to recover from the officer and the officer's sureties the amount collected, with damages at a rate of 1 percent per month on that amount if proved by the injured party. Tex. Civ. Prac. & Rem. Code §§ 34.047(a), 34.067.

§ 27.23:9 No Indemnity Bond Permitted

An officer may not require that bond be posted for his indemnification before executing a writ. He is not liable for damages resulting from execution of a writ if he executes or attempts to execute the writ in good faith as provided by law. Tex. Civ. Prac. & Rem. Code § 7.003.

§ 27.23:10 Officer's Duty to Keep Seized Property Secure

Once the officer has levied on personal property, he is charged with the duty of keeping it secure unless the defendant has furnished a delivery bond. If an interested party is injured or suffers loss as a result of the officer's negligence toward seized property, the officer and his sureties are liable for the value of the property lost or damaged. The injured party has the burden to prove that the officer took actual possession of the property and the actual value of the lost or damaged property. Tex. Civ. Prac. & Rem. Code § 34.061.

§ 27.23:11 Suit against Officer or Officer's Sureties

Suits must be brought in the form of a lawsuit filed against the officer in the county in which the officer holds office and must be filed no later than the first anniversary of the date on which the injury accrues. Tex. Civ. Prac. & Rem. Code § 34.068(b), (c). An officer or a surety may defend the action by stating and proving any defenses provided by law, including any defense that would mitigate damages. Tex. Civ. Prac. & Rem. Code § 34.068(d).

An officer's surety may be liable only for the penal sum of the surety bond minus any amounts already paid out under the bond. In no event may an officer's surety be liable for more than the penal sum of the officer's surety bond. Tex. Civ. Prac. & Rem. Code § 34.074(a). If the officer and the officer's surety are both defendants, the surety may deposit in the court's registry the amount unpaid under the surety bond, and the court will determine the proper disposition of this sum or order the return of the deposit to the surety in the court's final judgment. Tex.

Civ. Prac. & Rem. Code § 34.074(b). A prevailing party under these provisions may bring a separate action against a surety failing to pay the amount remaining under the bond on a final judgment. This action must be brought on or before 180 days after the date all appeals are exhausted in the underlying action. Tex. Civ. Prac. & Rem. Code § 34.074(c).

§ 27.23:12 Payment of Damages

A county, at the discretion of the commissioners court, may pay any judgment taken against an officer, unless the officer is finally convicted under sections 39.02 or 39.03 of the Texas Penal Code. Tex. Civ. Prac. & Rem. Code § 34.069.

An officer against whom a judgment has been taken or a county that has paid the judgment on behalf of the officer has a right of subrogation against the debtor or person against whom the writ was issued. Tex. Civ. Prac. & Rem. Code § 34.070.

§ 27.23:13 Remedies

Subchapter D, chapter 34, of the Texas Civil Practice and Remedies Code is the exclusive remedy for violations of an officer's duties with regard to the execution and return of writs without regard to the source of the duty prescribed by law. Tex. Civ. Prac. & Rem. Code § 34.076.

§ 27.24 Receipt of Proceeds of Execution

When money has been collected from an execution sale, the common procedure is for the officer to send the proceeds and the completed return to the plaintiff's attorney. The officer may retain from the proceeds reasonable expenses he incurred in making the levy and keeping the property. If more money is received from the sale than is necessary to satisfy the execution, the officer must immediately pay the excess to the defendant or his attorney. Tex. Civ. Prac. & Rem. Code § 34.047.

When the plaintiff's attorney receives the net proceeds, he should send them to the client under their agreement and send the completed return to the clerk. If the judgment is completely satisfied, the defendant will probably request a release; see form 27-3 in this chapter.

§ 27.25 Suspension of Enforcement Pending Appeal

A defendant may suspend execution of the judgment by filing a bond approved by the clerk. The bond is subject to review by the court on hearing. Tex. R. App. P. 24.1; *see also* Tex. R. Civ. P. 634, 635. The bond must be payable to the plaintiff and conditioned as set forth in Tex. R. App. P. 24.1. The trial court may make orders that will adequately protect the plaintiff against any loss or damage caused by appeal. Tex. R. App. P. 24.1.

The security required to appeal money judgments is governed by chapter 52 of the Texas Civil Practice and Remedies Code. To the extent these provisions conflict with the Texas Rules of Appellate Procedure, the procedures set out in the Civil Practice and Remedies Code apply. The amount of the bond must be equal to the sum of the compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment. Tex. Civ. Prac. & Rem. Code § 52.006(a). The amount of security must not exceed the lesser of 50 percent of the judgment debtor's net worth or $25 million. Tex. Civ. Prac. & Rem. Code § 52.006(b). Under certain circumstances, however, the trial court may make an order deviating from this rule if it finds that posting the amount of the bond would cause the judgment debtor to suffer substantial economic harm. *See* Tex. Civ. Prac. & Rem. Code § 52.006(c).

The trial court has continuing jurisdiction during an appeal, even after expiration of its plenary power, to order the amount and type of security and the sufficiency of sureties. It may also modify, in the event of changed circumstances, the amount or the type of security required to continue the suspension of execution. If the security or sufficiency of sureties is ordered or altered by the trial court after the court of appeals obtains jurisdiction, the defendant must notify the court of appeals of the trial court's determination. Tex. R. App. P. 24.3. The trial court's exercise of discretion under this rule is subject to review under Tex. R. App. P. 24.4.

§ 27.26 Entities Protected from Execution

No attachment, injunction, or execution may be issued against a national banking association or its property before a final judgment in any suit, action, or proceeding, in any state, county, or municipal court. 12 U.S.C. § 91. "Final judgment" means a judgment from which no further appeal can be taken. National banks are therefore exempt from execution until all appellate remedies have been exhausted. *United States v. Lemaire*, 826 F.2d 387 (5th Cir. 1987), *cert. denied*, 485 U.S. 960 (1988). Thus a national bank should not have to post a supersedeas bond to prevent execution pending disposition of its appeal. State banks do not enjoy the same protection. *Bank of East Texas v. Jones*, 758 S.W.2d 293 (Tex. App.—Tyler 1988, orig. proceeding [leave denied]).

Public policy exempts political subdivisions of the state performing governmental functions from execution or garnishment proceedings. *Delta County Levee Improvement District No. 2 v. Leonard*, 516 S.W.2d 911, 912 (Tex. 1974); *City of Victoria v. Hoffman*, 809 S.W.2d 603, 604 (Tex. App.—Corpus Christi 1991, writ denied); *see also* Tex. Loc. Gov't Code §§ 101.021, 101.023 (regarding home-rule municipalities). Also, the real property of the state, including real property held in the name of state agencies and funds as well as the real property of a political subdivision of the state, is exempt from attachment, execution, or forced sale. Tex. Prop. Code § 43.002.

The collection of judgments against political subdivisions is not entirely prohibited, however. A political subdivision can be directed through mandamus to levy and collect sufficient taxes to satisfy judgments outstanding against the entity if there are not sufficient funds available. *Delta County Levee Improvement District No. 2*, 516 S.W.2d at 912; *Salvaggio v. Davis*, 727 S.W.2d 329 (Tex. App.—Houston [1st Dist.] 1987, no writ); *Hawthorne v. La-Man Constructors*, 672 S.W.2d 255 (Tex. App.—Beaumont 1984, no writ).

§ 27.27 Wrongful Execution

Damages for wrongful execution are potentially severe, and a plaintiff may be held liable for the conduct of both attorneys and officers who participate in a wrongful execution.

A cause of action for wrongful execution will arise for the benefit of parties injured by the execution in a number of instances including but not limited to a levy—

1. to enforce a judgment that has been satisfied;
2. on exempt property;
3. that is excessive;
4. on property not owned by the defendant; or
5. to enforce a judgment that has been superseded by an appeal.

The action inures to the benefit of the party injured and will lie against those causing the injury. Damages are recoverable from—

1. a plaintiff who directs or participates in the wrongful execution;
2. the plaintiff's attorney who advises and directs the wrongful execution; or
3. the officer conducting the levy if the officer did not act in good faith. See Tex. Civ. Prac. & Rem. Code §§ 7.003(a), 34.061(b) regarding officer liability.

For cases discussing wrongful execution, see *Vackar v. Patterson, Boyd, Lowery, Anderholt & Peterson, P.C.*, 866 S.W.2d 817 (Tex. App.—Beaumont 1993, no writ), and *Southwestern Bell Telephone Co. v. Wilson*, 768 S.W.2d 755 (Tex. App.—Corpus Christi 1988, writ denied). Before attempting to execute on property, the attorney should be familiar with federal and state laws governing debt collection practices. For a discussion of these statutes, see parts II. and III. in chapter 2 of this manual.

§ 27.28 Plaintiff's Purchase at Execution Sale

The purchaser at an execution sale receives only the right, title, interest, and claim that the defendant in execution had in the property. Tex. Civ. Prac. & Rem. Code § 34.045. The purchaser therefore takes subject to any and all liens attaching to the property at sale. If the plaintiff is considering purchasing the property at execution he should run a lien search, including tax liens, to determine exactly what he is getting.

Plaintiffs who purchase at execution sale are not required to pay cash but can merely credit their bid to the judgment. *Blum v. Rogers*, 9 S.W. 595 (Tex. 1888). This allows the plaintiff to obtain what may be the defendant's only property available to satisfy the judgment and also avoid additional out-of-pocket expenses, except for the constable's costs and commissions.

To be eligible to purchase real property at an execution sale, a purchaser must present the officer conducting the sale with a written statement from the county tax assessor-collector that he owes no delinquent taxes or a written registration statement showing the person is a registered bidder. Tex. Civ. Prac. & Rem. Code § 34.0445(a). These provisions apply only in counties of 250,000 or more or in which the commissioners court has adopted the provision. Tex. Civ. Prac. & Rem. Code § 34.0445(g).

[Sections 27.29 and 27.30 are reserved for expansion.]

III. Property Subject to and Exempt from Execution

§ 27.31 Property Subject to Execution

§ 27.31:1 Property Generally

The judgment debtor's property is subject to levy and execution if it is not exempted by constitution, statute, or other rule of law. *See* Tex. Const. art. XVI, §§ 49–51; Tex. Prop. Code §§ 41.001–.006; Tex. R. Civ. P. 637. Categories of exempt property are listed in section 27.32 below and discussed in subsequent sections.

§ 27.31:2 Child Support Obligations

There are a number of exceptions to the general exemption statutes, if the debt being collected is based on a child support obligation. For example, see Tex. Prop. Code § 42.001(b)(1). Attorneys seeking to collect such an obligation should check the applicable exemption statute

before assuming that the property sought is exempt.

§ 27.32 Property Exempt from Execution

Property exempt from execution, whether for a family or for a single adult, includes—

1. the homestead (see section 27.35 below);
2. personal property of various categories specified by statute, up to the aggregate fair market value, exclusive of any charges encumbering the property, of $100,000 for a family or $50,000 for a single adult who is not a member of a family (Tex. Prop. Code §§ 42.001, 42.002; see section 27.41:1 below);
3. current wages for personal services, except for the enforcement of court-ordered child support (Tex. Prop. Code § 42.001(b)(1));
4. professionally prescribed health aids of a debtor or his dependent (Tex. Prop. Code § 42.001(b)(2));
5. certain retirement benefits and funds (see section 27.41:3 below);
6. workers' compensation payments (Tex. Lab. Code § 408.201);
7. cemetery lots held for purposes of sepulchre (Tex. Prop. Code § 41.001);
8. property that the judgment debtor sold, mortgaged, or conveyed in trust if the purchaser, mortgagee, or trustee points out other property of the debtor sufficient to satisfy the execution (see section 27.41:6 below);
9. assets in the hands of the trustee of a spendthrift trust for the benefit of the judgment debtor (Tex. Prop. Code § 112.035; *see also Hines v. Sands*, 312 S.W.2d 275, 278 (Tex. Civ. App.—Fort Worth 1958, no writ));
10. insurance benefits (Tex. Ins. Code §§ 1108.051–.053);
11. alimony, support, or separate maintenance payments received or to be received by the debtor for his support or the support of his dependents (Tex. Prop. Code § 42.001(b)(3));
12. a religious bible or other book containing sacred writings of a religion seized by a creditor other than a lessor of real property who is exercising the lessor's contractual or statutory right to seize personal property after a tenant breaches a lease agreement for or abandons the real property (Tex. Prop. Code § 42.001(b)(4)); and
13. judgments of Texas courts. *See Visage v. Marshall*, 763 S.W.2d 17, 18 (Tex. App.—Tyler 1988, no writ). Turnover may be an effective remedy to reach a judgment owned by the debtor (see part V. in this chapter regarding turnover).

This nonexclusive list of exemptions covers only those most likely to be encountered when levying against an individual.

§ 27.33 Community and Separate Property

§ 27.33:1 Availability of Community and Separate Property to Satisfy Judgment

A spouse's separate property cannot be seized to satisfy a judgment against the other spouse unless both spouses are liable under other rule of law. Tex. Fam. Code § 3.202(a). Community property that is subject to one spouse's sole management, control, and disposition is not sub-

ject to liabilities that the other spouse incurred before marriage or to a nontortious liability that the other spouse incurred during marriage, unless both spouses are personally liable under Code sections 3.201, 3.202, and 3.203. *See* Tex. Fam. Code § 3.202(b). A person is personally liable for the acts of the person's spouse only if the spouse acts as agent for the person or the spouse incurs a debt for necessaries under section 2.501. *See* Tex. Fam. Code § 3.201(a).

Except under Tex. Fam. Code § 3.202, community property is not subject to a liability that arises from an act of a spouse. A marriage relationship does not in and of itself create an agency relationship between spouses. Tex. Fam. Code § 3.201(b), (c). Sole-management community property is subject to liabilities incurred by that spouse before or during marriage, and joint-management community property is subject to the liabilities incurred by either spouse before or during marriage. Tex. Fam. Code § 3.202(b); *Carlton v. Estate of Estes*, 664 S.W.2d 322, 323 (Tex. 1983) (wife's interest in joint-management community property was liable for debts of husband). *But see Nelson v. Citizens Bank & Trust Co.*, 881 S.W.2d 128, 130–31 (Tex. App.—Beaumont 1994, no writ) (nonsigning spouse not personally liable for corporate debt guaranteed by other spouse). The plaintiff with a judgment against one spouse should therefore try to locate, in this order—

1. that spouse's separate property;
2. community property subject to that spouse's sole management, control, and disposition;
3. community property subject to the other spouse's control, if the conditions of Tex. Fam. Code § 3.201(a)(1) or (a)(2) are met; and
4. joint-management community property.

If the judgment is against both spouses for joint liability, all community property and both spouses' separate property can be reached. A specific item of property might be exempt under some other rule of law, such as the general personal property exemption statute. *See* Tex. Prop. Code § 42.002. See section 27.41:1 below. Money and other various assets in the public retirement system accounts of Texas that are community property subject to the participating spouse's sole management, control, and disposition are not subject to any claim for payment of a criminal restitution judgment entered against the nonparticipant spouse (except to the extent of any interest as determined in a qualified domestic relations order). Tex. Fam. Code § 3.202(d). Tex. Fam. Code § 3.203 provides for judicial determination of the order in which property is subject to execution.

§ 27.33:2 "Community Debts"

The rules of marital property liability as set out in the Texas Family Code say nothing about "community debts" or any similar term. Nonetheless, courts and commentators have continued to refer to "community debts." The concept is no longer valid. *See Tedder v. Gardner Aldrich, LLP*, 421 S.W.3d 651, 654–55 (Tex. 2013); *Carr v. Houston Business Forms, Inc.*, 794 S.W.2d 849 (Tex. App.—Houston [14th Dist.] 1990, no writ).

§ 27.33:3 Effect of Divorce on Creditors' Rights

Community property reachable by creditors for debts incurred during marriage remains liable after divorce and partition of the community estate. *Blake v. Amoco Federal Credit Union*, 900 S.W.2d 108, 111 (Tex. App.—Houston [14th Dist.] 1995, no writ); *Wileman v. Wade*, 665 S.W.2d 519, 520 (Tex. App.—Dallas 1983, no writ).

§ 27.33:4 Classification of Property as Community or Separate

Property possessed by either spouse during or on dissolution of marriage is presumed to be community property. Tex. Fam. Code § 3.003(a); *see Panozzo v. Panozzo*, 904 S.W.2d 780, 786 (Tex. App.—Corpus Christi 1995, no writ); *Celso v. Celso*, 864 S.W.2d 652, 654 (Tex. App.—Tyler 1993, no writ); *Brooks v. Sherry Lane National Bank*, 788 S.W.2d 874, 876 (Tex. App.—Dallas 1990, no writ). The degree of proof necessary to establish that property is separate property is clear and convincing evidence. Tex. Fam. Code § 3.003(b). Sole-management community property is that community property that the spouse would have owned if single, including but not limited to—

1. personal earnings;
2. separate-property revenues;
3. personal injury recoveries; and
4. increases of, mutations of, and revenues from his or her sole-management property.

Tex. Fam. Code § 3.102(a). The spouses can agree in writing or by other agreement that other community property will be sole-management community property. Tex. Fam. Code § 3.102(c). An oral agreement falls within this provision. *LeBlanc v. Waller*, 603 S.W.2d 265, 267–68 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ). Unless otherwise provided, mixed community property is joint-management community property. Tex. Fam. Code § 3.102(b). Community property not included in one of these exceptions is joint-management community property. Tex. Fam. Code § 3.102(c).

The Texas Family Code discusses the classification of certain employee benefits and certain insurance proceeds. *See* Tex. Fam. Code §§ 3.007–.008.

§ 27.34 Basis for Debtor's Homestead Exemption

The debtor's homestead is exempt from forced sale to satisfy a debt, except for (1) a purchase-money obligation, (2) taxes due, (3) an owelty of partition imposed against the property either by court order or by written agreement of all the owners of the property, (4) the refinancing of a lien against the homestead, (5) labor and material used to construct improvements under a written contract signed by both spouses if held as a family homestead, (6) certain approved home equity loans, (7) a reverse mortgage, or (8) the conversion and refinance of a personal property lien secured by a manufactured home to a lien on real property. Tex. Const. art. XVI, § 50. Additionally, a lien already existing against the property at the time the homestead claimant took title, such as a homeowners association maintenance lien, will not be defeated by a homestead claim. *Inwood North Homeowners' Ass'n v. Harris*, 736 S.W.2d 632, 635–36 (Tex. 1987).

§ 27.35 Property That Constitutes Homestead

§ 27.35:1 Homestead Generally

The Texas Constitution distinguishes a rural from an urban homestead by describing it as "not in a town or city." *See* Tex. Const. art. XVI, § 51. One cannot simultaneously claim both a rural homestead and an urban one. *Ran v. City National Bank*, 272 S.W. 510, 515 (Tex. Civ. App.—Fort Worth 1925, writ dism'd). The homestead must be used as a home or for the claimant's business; temporarily renting out the homestead does not affect its status if another homestead has not been acquired. Tex. Const. art. XVI, § 51; Tex. Prop. Code § 41.003. The definitions of "homestead" found in Tex. Prop. Code § 41.002 apply to all Texas homesteads,

whenever they were created. Tex. Prop. Code § 41.002(d).

§ 27.35:2 Rural Homestead

The rural homestead includes improvements and may be in one or more parcels. A family's rural homestead cannot exceed two hundred acres; the rural homestead of a single adult who is not a member of a family cannot exceed one hundred acres. Tex. Const. art. XVI, § 51; Tex. Prop. Code § 41.002(b).

Although actual residence on the property is required, one need not reside on all the parcels of the property claimed under the homestead exemption as long as the other tracts are used for the support of the family. *Fajkus v. First National Bank*, 735 S.W.2d 882, 884 (Tex. App.—Austin 1987, writ denied). Whether all rural tracts will be impressed with the homestead character will be determined by whether they are used for the purposes of a home. *PaineWebber, Inc. v. Murray*, 260 B.R. 815, 822–23 (Bankr. E.D. Tex. 2001); *In re Webb*, 263 B.R. 788, 791 (Bankr. W.D. Tex. 2001). Tex. Prop. Code § 41.002, which provides a different acreage limit for family homesteads than for the homesteads of single adults, has withstood a challenge that it impermissibly modifies the requirements of Tex. Const. art. XVI, § 51, that a rural homestead consists of not more than two hundred acres. In response to a challenge that Code section 41.002 is unconstitutional on equal protection grounds, the district court refused to intervene in state legislation without evidence of violations that reach constitutional magnitude. *In re Moody*, 77 B.R. 580 (S.D. Tex. 1987), *aff'd*, 862 F.2d 1194, 1201 (5th Cir. 1989), *cert. denied*, 503 U.S. 960 (1992).

§ 27.35:3 Urban Homestead

The urban homestead consists of one or more contiguous lots amounting to not more than ten acres of land, together with any improvements on the land, regardless of whether it is a family homestead or one of a single adult not a constituent of a family. Tex. Const. art. XVI, § 51; Tex. Prop. Code § 41.002(a). A homestead is considered to be urban if at the time the designation is made the property is located within the limits of a municipality or its extraterritorial jurisdiction or a platted subdivision. Tex. Prop. Code § 41.002(c)(1). The property must also be served by police and fire protection and at least three of the following services provided by a municipality or under contract to a municipality: electric, natural gas, sewer, storm sewer, and water. Tex. Prop. Code § 41.002(c)(2).

§ 27.35:4 Business Homestead

A business homestead is a place in a city, town, or village at which a single adult or the head of a family exercises his calling or business. Tex. Const. art. XVI, § 51; *see also Exall v. Security Mortgage & Trust Co.*, 39 S.W. 959 (Tex. Civ. App. 1897, writ ref'd). A person cannot reside in a rural homestead and also claim a business homestead. *Williams v. Willis*, 19 S.W. 683, 684 (Tex. 1892). The business homestead must be located in a city, town, or village; it cannot be rural. Also, the business homestead must be in the same city, town, or village in which the claimant has his residential homestead. *Clem Lumber Co. v. Elliott Lumber Co.*, 254 S.W. 935 (Tex. Comm'n App. 1923, judgm't adopted). Claiming both an urban residential and an urban business homestead may be difficult because the lots must be contiguous. *See* Tex. Const. art. XVI, § 51; Tex. Prop. Code § 41.002(a).

The extent that one can claim an urban business homestead is limited to that necessary for the operations of the business. *In re Kang*, 243 B.R. 666 (Bankr. N.D. Tex. 1999).

§ 27.35:5 Homestead in Qualifying Trust

Tex. Prop. Code § 41.0021 discusses homesteads in qualifying trusts.

§ 27.36 Designation of Homestead

The statutory provisions for the voluntary designation of homestead are as follows:

1. The designation must be by an instrument "signed and acknowledged or proved in the manner required for the recording of other instruments." Tex. Prop. Code § 41.005(c).
2. The designation must be filed in the county in which all or part of the property is located. There are specific requirements for the instrument's contents. Tex. Prop. Code § 41.005(c).
3. Boundaries set forth in the voluntary designation may be changed by filing and recording an instrument in the manner provided for a voluntary designation. Tex. Prop. Code § 41.005(d).
4. If at the time a writ of execution is issued the defendant has not made a voluntary designation, then any designation must be made in accordance with Tex. Prop. Code §§ 41.021–.024, portions of which are discussed below in this section. Tex. Prop. Code § 41.005(f).
5. If a voluntary designation was made by instrument on file under prior law, it is considered a voluntary designation under Tex. Prop. Code § 41.005. Tex. Prop. Code § 41.005(g).
6. If a person has not made a designation as set out in items 1. through 5. above but receives a homestead exemption for tax purposes on the property in question, that property is considered to be designated as his homestead if it is listed as his residence homestead on the most recent tax appraisal roll. Tex. Prop. Code § 41.005(e).

If an execution is issued against a holder of an interest in land of which a homestead may be a part and the defendant has not made a voluntary designation as discussed above, the plaintiff may give the defendant notice to designate his homestead. Tex. Prop. Code § 41.021. The notice must state that if the defendant fails to make the designation within the time permitted by statute, the court will appoint a commissioner to do so at the defendant's expense. Tex. Prop. Code § 41.021. The defendant has until 10:00 A.M. on the first Monday after the expiration of twenty days from the date he is served with notice to file his written designation with the court. Tex. Prop. Code § 41.022.

If the defendant fails to designate, the plaintiff may, within ninety days after issuance of the writ of execution, move the court to appoint the commissioner to designate the homestead. Tex. Prop. Code § 41.023(a). On such a motion, the court must appoint a commissioner and may appoint a surveyor and others to assist the commissioner. The commissioner must designate the homestead in a written report, with a plat of the designated area, and file it with the court no more than sixty days after the appointment order is signed or within such time as the court may allow. Tex. Prop. Code § 41.023(a). Within ten days after the commissioner files his report, the defendant or the plaintiff may request a hearing to confirm, reject, or modify the report. Exceptions to all or part of the report must be filed before the hearing; otherwise, evidence may not be submitted to contradict the report. After the hearing, or if no hearing is requested, the court must designate the homestead and order sale of the excess. Tex. Prop. Code § 41.023(b).

A homestead claimant is not estopped from asserting homestead rights in residential property on the basis of contrary declarations if, at

the time of the declarations, the claimant was in actual use and possession of the property. *In re Niland*, 825 F.2d 801, 807 (5th Cir. 1987).

§ 27.37 Creation and Abandonment of Homestead

To create the homestead right, there must be both overt acts of homestead occupancy and the intent to dedicate the property to homestead usage. *Gregory v. Sunbelt Savings, F.S.B.*, 835 S.W.2d 155, 158 (Tex. App.—Dallas 1992, writ denied); *Lifemark Corp. v. Merritt*, 655 S.W.2d 310, 314 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.). No specific writing is necessary. *Dodd v. Harper*, 670 S.W.2d 646, 649 (Tex. App.—Houston [1st Dist.] 1983, no writ). *See also Farrington v. First National Bank*, 753 S.W.2d 248, 251 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (summary judgment affidavit stating appellant's intent to occupy rural property and stating certain actions short of actually building home was sufficient to create fact questions on intent to create homestead even though appellant lived on urban property claimed as homestead).

Once the homestead right vests, it is presumed to continue until there is affirmative proof of abandonment. The evidence relied on to establish abandonment must be undeniably clear that there has been a total abandonment with an intention not to return and claim the exemption before a homestead, once occupied as such, can be subjected to a forced sale. *McFarland v. Rousseau*, 667 S.W.2d 929, 931 (Tex. App.—Corpus Christi 1984, no writ) (citing *West v. Austin National Bank*, 427 S.W.2d 906, 912 (Tex. Civ. App.—San Antonio 1968, writ ref'd n.r.e.)). Abandonment is an affirmative defense. *Denmon v. Atlas Leasing*, 285 S.W.3d 591, 596 (Tex. App.—Dallas 2009, no pet.). The burden of proof of abandonment is on the plaintiff. *Exocet, Inc. v. Cordes*, 815 S.W.2d 350, 355 (Tex. App.—Austin 1991, no writ), *abrogated on other grounds by Fairfield Financial Group, Inc. v. Synnott*, 300 S.W.3d 316, 320 (Tex. App.—Austin 2009, no pet.). In order to prove abandonment, the practitioner must prove (1) the debtor discontinued use of the tract by overt acts and (2) the debtor intended to permanently abandon the tract as the homestead. *Driver v. Conley*, 320 S.W.3d 516, 519 (Tex. App.—Texarkana 2010, *cert denied*, 131 S. Ct. 1685 (U.S. 2011)). If a homestead claimant is married, the homestead cannot be abandoned without consent of the claimant's spouse. Tex. Const. art. XVI, § 50(b); Tex. Prop. Code § 41.004.

§ 27.38 Effect of Death on Homestead Rights

Death of a party protected by homestead rights extinguishes those rights. Homestead rights cannot be inherited or transferred by will. The court, however, will set apart the homestead for the use and benefit of the surviving spouse and minor children if no affidavit is filed under Tex. Est. Code § 353.051(a)(1), (b). Exempt property of a decedent's estate other than the homestead will be set apart for the use and benefit of the surviving spouse, minor children, unmarried adult children remaining with the family, and any adult child who is incapacitated. Tex. Est. Code § 353.051(a)(2); *National Union Fire Insurance Co. of Pittsburgh v. Olson*, 920 S.W.2d 458, 461 (Tex. App.—Austin 1996, no writ). See also section 29.10 in this manual regarding exempt property in probate.

§ 27.39 Sale and Leaseback of Homestead

See section 17.48 in this manual regarding the consequences of making a purchase of the debtor's homestead for less than fair market value, followed by a leaseback of the property.

§ 27.40 Fraudulent Transfer of Homestead

The homestead exemption may be lost only by death, abandonment, or alienation. A fraudulent transfer of the homestead by the debtor to his own holding company to avoid creditors will not result in forfeiture of the homestead exemption. Also, because creditors have no right of recovery against a debtor's homestead, such a conveyance of the homestead cannot be in fraud of their rights as creditors. *In re Moody*, 862 F.2d 1194 (5th Cir. 1989), *cert. denied*, 503 U.S. 960 (1992). See section 14.30 in this manual regarding fraudulent transfer generally.

§ 27.41 Exempt Personal Property

§ 27.41:1 List of Exemptions

Except for properly fixed encumbrances, personal property exempt from forced sale up to an aggregate fair market value of $100,000 for a family or $50,000 for a single adult person who is not a member of a family includes—

1. home furnishings, including family heirlooms;
2. provisions for consumption;
3. farming or ranching vehicles and implements;
4. tools, equipment, books, and apparatus, including boats and motor vehicles, used in a trade or profession;
5. wearing apparel;
6. jewelry, not to exceed 25 percent of the $100,000/$50,000 limit;
7. two firearms;
8. athletic and sporting equipment, including bicycles;
9. a two-wheeled, three-wheeled, or four-wheeled motor vehicle for each member of the family who holds a driver's license or who is not licensed but relies on another person to drive the vehicle for him;
10. the following animals and forage on hand for their consumption:
    a. two horses, mules, or donkeys, and a saddle, blanket, and bridle for each;
    b. twelve head of cattle;
    c. sixty head of other livestock;
    d. 120 fowl; and
11. household pets.

Tex. Prop. Code §§ 42.001, 42.002. Also exempt and not included in the aggregate limitations are current wages for personal services; professionally prescribed health aids; alimony, support, or separate maintenance; and certain religious books. Tex. Prop. Code § 42.001(b). Unpaid commissions for personal services not exceeding 25 percent of the aggregate limitation are also exempt. Tex. Prop. Code § 42.001(d).

§ 27.41:2 Tools of Trade

Texas courts have held that, in order to qualify as a tool of the debtor's trade or profession, a tool or apparatus must be peculiarly essential to the practice of that trade. *Segraves v. Weitzel*, 734 S.W.2d 773, 775–76 (Tex. App.—Fort Worth 1987, no writ) (citing *Simmang v. Pennsylvania Fire Insurance Co.*, 112 S.W. 1044 (Tex. 1908), and *McMillan v. Dean*, 174 S.W.2d 737 (Tex. Civ. App.—Austin 1943, writ ref'd w.o.m.)). Holdings of the Texas bankruptcy courts, however, have interpreted the statute differently, holding that the tool must merely be useful in the debtor's trade, not peculiarly adapted to it. *In re Erwin*, 199 B.R. 628 (Bankr. S.D. Tex. 1996); *In re Legg*, 164 B.R. 69 (Bankr. N.D. Tex. 1994).

§ 27.41:3 Certain Savings Plans and Government Benefits

A person's right to the assets held in or to receive payments from a "qualified savings plan" is exempt from attachment, execution, and seizure to the extent the plan is exempt from federal income taxation under the Internal Revenue Code of 1986 or to the extent federal income tax on a person's interest in the plan is deferred until actual payment of benefits to the person. Tex. Prop. Code § 42.0021. Section 42.0021(a) contains a list of the types of pension, retirement, health or education savings, or ABLE accounts included as qualified savings plans. The exemption, however, does not apply to voluntary contributions to the plan by the beneficiary in excess of section 473 of the Internal Revenue Code of 1986 or to the accrued earnings on such excess contributions. Tex. Prop. Code § 42.0021(d). Amounts distributed from a qualified savings plan are exempt from attachment, execution, and seizure for a creditor's claim for sixty days after the date of distribution and will continue to be exempt if the debtor makes a qualified rollover contribution of the distributed amount. Tex. Prop. Code § 42.0021(e).

Federally based retirement or pension benefits are also exempt under various federal statutes. These include—

1. Social Security benefits, 42 U.S.C. § 407(a);
2. veterans benefits, 38 U.S.C. § 5301; and
3. civil service retirement benefits, 5 U.S.C. § 8346.

In addition, a number of federally created pension or retirement benefits are also exempt, such as those for longshoremen and railroad workers.

§ 27.41:4 Insurance Benefits

The cash value and proceeds of an insurance policy or annuity contract issued by a life, health, or accident insurance company, including a mutual company or fraternal benefit society or an annuity or benefit plan used by an employer or individual, are exempt from execution, attachment, garnishment or other seizure. Tex. Ins. Code § 1108.051. The exemption is unlimited and is in addition to the exemptions listed in chapter 42 of the Texas Property Code. Tex. Ins. Code § 1108.001. Exceptions to this exemption are for premium payments made in fraud of creditors, for debt secured by the policy or proceeds, or for child support liens under chapter 157 of the Texas Family Code. Tex. Ins. Code § 1108.053.

§ 27.41:5 Designation of Exempt Property

If the number or amount of a type of personal property exceeds the exemption allowed by Tex. Prop. Code § 42.002 or if the aggregate value of a debtor's personal property exceeds the limitation set out at Tex. Prop. Code § 42.001(a), the defendant may, under certain circumstances, specify the property to be levied on. Under other circumstances, the levying officer or the court may make the designation. Tex. Prop. Code § 42.003.

§ 27.41:6 Property Subject to Security Interest or Mortgage

When the defendant points out property on which the officer is to levy, he cannot point out property that he has sold, mortgaged, or conveyed in trust or that is exempt from forced sale. Tex. R. Civ. P. 638. Property that has been pledged, assigned, or mortgaged as security for a debt or contract, however, can be levied on and sold under execution against the person making the pledge, assignment, or mortgage. Tex. R. Civ. P. 643. If the purchaser, mortgagee, or

trustee of property that the defendant has sold, mortgaged, or conveyed in trust points out other property of the defendant in the county that is sufficient to satisfy the execution, the property sold, mortgaged, or conveyed in trust may not be seized in execution. Tex. Civ. Prac. & Rem. Code § 34.004. Only that interest owned by the defendant can be sold. *See* Tex. Civ. Prac. & Rem. Code § 34.045. Before the revision of chapter 9 of the Texas Business and Commerce Code that took effect in 2001, section 9.311 of the Code provided that the defendant's rights in the collateral could be sold under execution even if the security agreement prohibited transfer by the defendant. Mortgaged property could therefore be sold, but the buyer purchased it subject to the mortgage debt or security interest. *Liquid Carbonic Co. v. Logan*, 79 S.W.2d 632 (Tex. Civ. App.—Austin 1935, no writ). The secured party may try to stop the sale. The value of the defendant's equity, reduced by expenses of sale, may not be worth the trouble of a levy. The sales value will typically be reduced further when the buyer must consider satisfying or continuing to carry the security interest.

Although Tex. R. Civ. P. 643 provides for the execution sale of property subject to a security interest, and former section 9.311 provided for involuntary transfer of the defendant's property through levy, the court in *Grocers Supply v. Intercity Investment Properties, Inc.*, 795 S.W.2d 225 (Tex. App.—Houston [14th Dist.] 1990, no writ), nonetheless held that a prior perfected security interest holder who had a right to possession of the property had superior rights over a "mere" judgment creditor. The security agreement at issue provided that a judgment against the debtor or the levy, seizure, or attachment of the collateral would constitute a default, making the entire obligation immediately due and payable to the secured creditor. The court ordered possession for the secured party and recovery of all of its costs. *Grocers Supply*, 795 S.W.2d at 227. Revised chapter 9 of the Texas Business and Commerce Code, which took effect July 1, 2001, does not have a similar provision to former section 9.311, which provided that collateral could be sold under execution even if a security agreement prohibited transfer by the debtor. Instead, revised chapter 9 simply provides that "whether a debtor's rights in collateral may be voluntarily or involuntarily transferred is governed by law other than this chapter." Tex. Bus. & Com. Code § 9.401(a). The comments explain that—

> [d]ifficult problems may arise with respect to attachment, levy, and other judicial procedures under which a debtor's creditors may reach collateral subject to a security interest. For example, an obligation may be secured by collateral worth many times the amount of the obligation. If a lien creditor has caused all or a portion of the collateral to be seized under judicial process, it may be difficult to determine the amount of the debtor's "equity" in the collateral that has been seized. The section leaves resolution of this problem to the courts. The doctrine of marshaling may be appropriate.

Tex. Bus. & Com. Code § 9.401 cmt. 6. The comments appear to leave open the possibility of seizure of property subject to security interests, with resolution in the courts. Caution should therefore be exercised if seized property is subject to a prior perfected security interest and the secured party demands possession of the property.

§ 27.42 Fraudulent Conveyance to Avoid Judgment Lien or Execution

If the debtor has used nonexempt property to acquire, obtain any interest in, improve, or pay indebtedness on property that would be exempt under Texas Property Code sections 42.001–

.002 with the intent to defraud, delay, or hinder an interested person, the property or interest so acquired and the improvements so made will not be exempt from seizure for the satisfaction of liabilities. Tex. Prop. Code § 42.004(a). If any property, interest, or improvement is acquired by the discharge of an encumbrance held by another, any person who is defrauded, delayed, or hindered by the acquisition is subrogated to the rights of the prior encumbrancer. Tex. Prop. Code § 42.004(a). The plaintiff must assert this claim within two years after the transaction. A person with a claim that is unliquidated or contingent at the time of the transaction must assert a claim under this section within one year after the claim is reduced to judgment. Tex. Prop. Code § 42.004(b). It is a defense to a claim under Tex. Prop. Code § 42.004 that the transfer was made in the ordinary course of business by the person making the transfer. Tex. Prop. Code § 42.004(c).

See section 14.30 in this manual for a discussion of the Texas Uniform Fraudulent Transfer Act, Tex. Bus. & Com. Code §§ 24.001–.013.

[Sections 27.43 through 27.50 are reserved for expansion.]

IV. Postjudgment Garnishment

§ 27.51 Purpose and Use

Garnishment is a remedy allowing a judgment creditor (garnisher) either to recover property of the judgment debtor in the hands of a third party (garnishee) or to collect a debt owed by the garnishee to the debtor. *See* Tex. Civ. Prac. & Rem. Code §§ 63.001–.005; *Orange County v. Ware*, 819 S.W.2d 472, 474 (Tex. 1991).

The creditor should not use garnishment as a discovery device but should proceed in garnishment only if he cannot satisfy his judgment by execution and is confident that the garnishment action will return more than it will cost. If the creditor brings a garnishment action and the garnishee establishes that he neither has the judgment debtor's property nor is indebted to the judgment debtor, the costs of the proceeding, including a reasonable compensation to the garnishee, will be taxed against the creditor. Tex. R. Civ. P. 677. For a discussion of wrongful garnishment, see section 27.71 below.

§ 27.52 Applicable Statutes and Rules

Postjudgment garnishment is governed by Tex. Civ. Prac. & Rem. Code §§ 63.001–.008 and by Tex. R. Civ. P. 657–679. The attorney may find some of the material discussing prejudgment garnishment in sections 8.11 through 8.15 in this manual to be useful when considering postjudgment garnishment.

Caveat: Many of the cases cited in this part of this chapter were decided under former Texas Revised Civil Statutes articles 4076, 4084, 4096, and 4099, which have been codified at Tex. Civ. Prac. & Rem. Code §§ 63.001–.005.

§ 27.53 Strict Compliance Required

Garnishment is a harsh remedy, and strict compliance with all requirements is necessary. *El Periodico, Inc. v. Parks Oil Co.*, 917 S.W.2d 777, 779 (Tex. 1996); *Walnut Equipment Leasing Co. v. J-V Dirt & Loam*, 907 S.W.2d 912, 915 (Tex. App.—Austin 1995, writ denied). Clerical errors in the garnishment documents

may be corrected and amended as the court directs. Tex. R. Civ. P. 679. Certain defects in the garnishment procedure that are neither fundamental nor jurisdictional are waived if the garnishee fails to answer the writ. Failure to substantially comply with the statutes and rules will, however, void the garnishment judgment. *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Allied Bank of Texas*, 704 S.W.2d 919, 920 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

§ 27.54 Availability of Postjudgment Garnishment

§ 27.54:1 Availability Generally

A writ of garnishment is available after judgment only in the following circumstances:

1. The plaintiff has a valid, final, and subsisting judgment against the defendant. Tex. Civ. Prac. & Rem. Code § 63.001(3). The garnisher must establish ownership of the underlying judgment. *See, e.g., Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Allied Bank of Texas*, 704 S.W.2d 919 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.). See section 27.54:2 below regarding when a judgment is final for garnishment purposes.

2. The defendant has not filed an approved supersedeas bond to suspend execution on the judgment. Tex. R. Civ. P. 657.

3. The plaintiff swears that, to his knowledge, the defendant does not possess in Texas sufficient property subject to execution to satisfy the judgment. Tex. Civ. Prac. & Rem. Code § 63.001(3). It is not necessary, however, for the plaintiff to prove that the defendant lacks sufficient property in the state to satisfy the judgment. *Black Coral Investments v. Bank of the Southwest*, 650 S.W.2d 135, 136 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.). See also section 8.12:6 in this manual for a discussion of the corresponding affidavit requirement for prejudgment garnishment. It is not necessary to have had a writ of execution returned *nulla bona* to use garnishment. *Cantwell v. Wilson*, 241 S.W.2d 366, 368 (Tex. Civ. App.—Austin 1951, no writ).

§ 27.54:2 Finality of Judgment

A judgment is final and subsisting for garnishment purposes from and after the date it is signed. Tex. R. Civ. P. 657. Therefore, a postjudgment action is available as soon as the underlying judgment is signed, if all other bases for the garnishment are met.

§ 27.55 Jurisdiction and Parties

Although garnishment is brought as a separate action, it is ancillary to the underlying suit and should be brought in the court that rendered the judgment to be enforced. *King & King v. Porter*, 252 S.W. 1022 (Tex. 1923). A garnishment action is brought against the garnishee as defendant. Tex. R. Civ. P. 659. In some counties the garnishment action will be numbered as an "a" case, such as "97-1010a," whereas in other counties it will be given a new number. The judgment debtor is not a party to the suit but must be served with notice along with a copy of the writ of garnishment, the application and accompanying affidavits, and the orders of the court as soon as practicable after service of the writ on the garnishee. Tex. R. Civ. P. 663a.

The fact that the judgment debtor is not a party to the garnishment action is particularly relevant if the garnisher and garnishee enter into an

agreed judgment. Because the debtor is not a party, his assent is not necessary to the enforceability of the agreed judgment.

§ 27.56 Property Subject to and Exempt from Garnishment

§ 27.56:1 Property and Debts Subject to Garnishment

Generally, all debts and all nonexempt personal property of the defendant held by the garnishee may be reached by the judgment plaintiff through postjudgment garnishment. Nonexempt property is discussed in part III. in this chapter. To be subject to garnishment, a debt must be absolute and not subject to any contingency. *Clapper v. Petrucci*, 497 S.W.2d 120, 122 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.). For a discussion of property subject to garnishment, see George Ann Miller, *The Garnishment Process*, *in* Student Symposium, *Creditor's Post-Judgment Remedies in Texas*, 5 St. Mary's L.J. 719, 722 (1974).

Some commonly sought debts subject to garnishment are as follows:

1. Bank account. A bank account is the most commonly garnished debt. Bank deposits can be reached regardless of the account name if the funds are owed to the judgment debtor. *Frankfurt's Texas Investment Corp. v. Trinity Savings & Loan Ass'n*, 414 S.W.2d 190, 195 (Tex. Civ. App.—Dallas 1967, writ ref'd n.r.e.). Community funds can also be reached. *Tatum State Bank v. Gibson*, 24 S.W.2d 506, 507 (Tex. Civ. App.—Texarkana 1930, no writ); *Brooks v. Sherry Lane National Bank*, 788 S.W.2d 874, 876 (Tex. App.—Dallas 1990, no writ).
2. Safe-deposit box. A bank can be sued in garnishment to reach the contents of a safe-deposit box holding the judgment debtor's property, even if the bank does not know what the box contains. *Blanks v. Radford*, 188 S.W.2d 879, 886 (Tex. Civ. App.—Eastland 1945, writ ref'd w.o.m.).
3. Stock. Stock is expressly subject to garnishment under Tex. R. Civ. P. 669.
4. Promissory note. A past-due note can be garnished. *Thompson v. Gainesville National Bank*, 18 S.W. 350 (Tex. 1886); *Davis v. First National Bank*, 135 S.W.2d 259, 261 (Tex. Civ. App.—Waco 1939, no writ). A nonnegotiable note can also be garnished. *Saenger v. Proske*, 232 S.W.2d 106 (Tex. Civ. App.—Austin 1950, writ ref'd). A negotiable instrument cannot be garnished before its maturity. *Iglehart v. Moore*, 21 Tex. 501 (1858).
5. Trust fund in which debtor is beneficiary. Assets in and revenue from trusts other than spendthrift trusts can be garnished. *Nunn v. Titche-Goettinger Co.*, 245 S.W. 421, 422–23 (Tex. Comm'n App. 1922, judgm't adopted); *Bank of Dallas v. Republic National Bank of Dallas*, 540 S.W.2d 499, 501–02 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.).
6. Judgments. Judgments can be garnished. *Industrial Indemnity Co. v. Texas American Bank—Riverside*, 784 S.W.2d 114, 119–120 (Tex. App.—Fort Worth 1990, no writ).

§ 27.56:2 Property Exempt from Garnishment

Exempt property is discussed generally in part III. in this chapter. Some of the more important exemptions are as follows:

1. Real property. Only effects of the debtor are subject to garnishment; "effects" do not include real property. *See Fitzgerald v. Brown, Smith & Marsh Bros.*, 283 S.W. 576, 578 (Tex. Civ. App.—Texarkana 1926, writ dism'd). Also, the proceeds of a sale of a homestead are exempt from seizure for six months. Tex. Prop. Code § 41.001(c).

2. Wages. Current wages are exempt, except for the enforcement of court-ordered child support payments. Tex. Const. art. XVI, § 28; Tex. Civ. Prac. & Rem. Code § 63.004; Tex. Prop. Code § 42.001(b)(1); *see also* 42 U.S.C. § 659 (garnishment of wages due from or payable by United States, including wages of military, for child support obligations).

3. Workers' compensation benefits. Death and personal injury benefits paid under workers' compensation laws are exempt. Tex. Lab. Code § 408.201.

4. Government employees' retirement benefits. Pensions, annuities, and retirement benefits of government employees are usually exempt; check the applicable statute. *See, e.g.*, 5 U.S.C. § 8346; Tex. Gov't Code § 811.005 (retirement annuities and certain other benefits of state employees), § 821.005 (payments by Teacher Retirement System). *But see Perkins v. Perkins*, 690 S.W.2d 706, 708 (Tex. App.—El Paso 1985, writ ref'd n.r.e.) (military and civil service retirement benefits not exempt in some circumstances).

5. Welfare and Social Security benefits. Most state welfare benefits paid or payable are exempt. *See, e.g.*, Tex. Hum. Res. Code § 31.040 (aid to families with dependent children), § 32.036(b) (medical assistance). Federal Social Security benefits are likewise exempt. 42 U.S.C. § 407(a).

6. Trust or other funds in debtor's name belonging to third party. Neither trust funds nor funds of another deposited in a defendant's name are subject to garnishment by the defendant's creditors. Failure of the garnishee to raise this defense may subject the garnishee to liability to the defendant. *Southwest Bank & Trust Co. v. Calmark Asset Management*, 694 S.W.2d 199, 200–01 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

7. Insurance benefits. Certain life, health, and accident insurance benefits are exempt. Tex. Ins. Code §§ 1108.051–.053.

8. Pensions, profit-sharing, retirement, and similar plans. With some exceptions, property designated under Tex. Prop. Code § 42.0021 is exempt from attachment, execution, and seizure for the satisfaction of debts. Property exempt under this statute is discussed at section 27.41:3 above.

9. Unliquidated demands. Unliquidated demands are exempt from garnishment. *Houston Drywall, Inc. v. Construction Systems, Inc.*, 541 S.W.2d 220, 222 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

10. Property held by state. Property held by the state is exempt from garnishment as a matter of public policy and under the doctrine of sovereign immunity. *Morris v. Texas Department of Corrections*, 762 S.W.2d 667, 669–70 (Tex. App.—Tyler 1988, no writ) (sovereign immunity); *Addison v. Addison*, 530 S.W.2d 920, 921 (Tex. Civ. App.—Houston [1st Dist.] 1975,

no writ) (public policy); *but see* Tex. Civ. Prac. & Rem. Code § 63.007 (waiving sovereign immunity for inmate trust funds). Sovereign immunity should be determined on a case-by-case basis.

11. Property held *in custodia legis*. Property held *in custodia legis* may not be garnished. However, when the court enters a decree of distribution or when nothing more remains for the custodian to do but make delivery of the property or payment of the money, the reason for *custodia legis* is satisfied, and the property becomes subject to levy. *Gonzales v. Daniel*, 854 S.W.2d 253, 256–57 (Tex. App.—Corpus Christi 1993, no writ).

12. Money due original contractors and subcontractors. Creditors of original contractors may not garnish money due the original contractor or the contractor's surety; also, a creditor of a subcontractor may not garnish money due the subcontractor, to the prejudice of the subcontractors, mechanics, laborers, materialmen, or their sureties. Tex. Prop. Code § 53.151.

§ 27.56:3 Alter Ego

A garnishment proceeding may be used to reach the defendant's property when it is found in the possession of another entity that is the alter ego of the defendant. *Valley Mechanical Contractors v. Gonzales*, 894 S.W.2d 832, 834–35 (Tex. App.—Corpus Christi 1995, no writ).

§ 27.56:4 Fraudulent Transfer

If the plaintiff specifically pleads and proves a fraudulent transfer, he can garnish property found to have been transferred improperly from the defendant to the garnishee. *Englert v. Englert*, 881 S.W.2d 517, 519–20 (Tex. App.—Amarillo 1994, no writ); *see* Tex. Bus. & Com. Code § 24.005(a)(1). See section 14.30 in this manual regarding fraudulent transfer.

§ 27.56:5 Debtor's Property Held by Third Party

If the plaintiff wants to challenge title to property held by a third party (for example, if the defendant's funds have been placed in a bank account held by a nominal owner on behalf of the defendant), the plaintiff should seek a writ of garnishment naming the nominal owner, not the true owner. *Bank One Texas, N.A. v. Sunbelt Savings, F.S.B.*, 824 S.W.2d 557, 558 (Tex. 1992). The court did not make it clear how to "name" the third party. If the applicant for the writ of garnishment alleges that the defendant's funds are in a third party's account, the garnishee typically will freeze the account and interplead. *See also Newsome v. Charter Bank Colonial*, 940 S.W.2d 157 (Tex. App.—Houston [14th Dist.] 1996, writ denied); *Overton Bank & Trust, N.A. v. PaineWebber, Inc.*, 922 S.W.2d 311 (Tex. App.—Fort Worth 1996, no writ).

§ 27.57 Application for Writ of Garnishment

Form 27-11 in this chapter is an application for writ of garnishment after judgment. Form 27-12 is the affidavit in support of the application. No hearing is required on a postjudgment application. The clerk will issue a writ when the application is filed. Tex. R. Civ. P. 658.

§ 27.58 No Bond for Postjudgment Garnishment

Unlike prejudgment garnishment, no bond is required for postjudgment garnishment. *See* Tex. R. Civ. P. 658–658a.

§ 27.59 Service of Writ of Garnishment

§ 27.59:1 Service on Garnishee

The writ of garnishment is to be served on the garnishee. Tex. R. Civ. P. 659. Service must be by a sheriff or constable, not by a private process server. *Lawyers Civil Process, Inc. v. State*, 690 S.W.2d 939, 942–43 (Tex. App.—Dallas 1985, no writ).

§ 27.59:2 Service on Financial Institutions

Service of a writ of garnishment on a financial institution is governed by section 59.008 of the Texas Finance Code. Tex. Civ. Prac. & Rem. Code § 63.008. A claim against a customer—defined in Finance Code section 59.001(2) to include writs of garnishment and notices of receivership, among other actions—must be delivered to the address designated as the address of the registered agent of the financial institution in its registration statement filed with the secretary of state pursuant to section 201.102 or 201.103 of the Finance Code. Tex. Fin. Code § 59.008(a). Out-of-state financial institutions must file an application for registration with the secretary of state by complying with the laws of Texas for foreign corporations doing business in Texas, that is, designating an agent for process. Tex. Fin. Code § 201.102. Texas financial institutions may file a statement with the secretary of state appointing an agent for process. Tex. Fin. Code § 201.103. The Texas secretary of state's office may be called at 512-463-5555 to ascertain the name of the agent for process. This information may also be available online through SOSDirect, the secretary of state's web access system, at **www.sos.state.tx.us/corp/sosda/index.shtml**.

If a financial institution complies with section 201.102 or 201.103, a claim against a customer of the financial institution (for example, a writ of garnishment) is not effective if served or delivered to an address other than the address designated. Tex. Fin. Code § 59.008(b). The financial institution's customer bears the burden of preventing or limiting a financial institution's compliance with or response to a claim subject to section 59.008. Tex. Fin. Code § 59.008(c). It appears then that a financial institution complying with the provisions regarding designation of a registered agent can elect to declare the claim against its customer ineffective if the claimant fails to properly serve the financial institution. Further, if the financial institution inadvertently honors a claim against its customer that is incorrectly served, it appears to have no exposure to its customer, who has the burden to prevent or suspend the financial institution's response to the claim.

If the financial institution does not comply with section 201.102 or 201.103, the financial institution is subject to service of claims against its customers as otherwise provided by law. Tex. Fin. Code § 59.008(d).

Citation may be served on a financial institution (as defined in section 201.101 of the Texas Finance Code) by serving the registered agent of the financial institution or, if there is no registered agent, serving the president or a branch manager at any office located in Texas. Tex. Civ. Prac. & Rem. Code § 17.028(a), (b). If citation has not been properly served, a financial institution may maintain an action to set aside the default judgment or any sanctions entered against it. Tex. Civ. Prac. & Rem. Code § 17.028(d).

For credit unions, citation may be served by serving the registered agent of the credit union or, if the credit union does not have a registered agent, serving the president or vice president. Tex. Civ. Prac. & Rem. Code § 17.028(c). However, a citation served on a credit union that is located in a place of worship may not be served

during a worship service. Tex. Civ. Prac. & Rem. Code § 17.028(e).

Most financial institutions will tell who their designated agent for service of process is, especially if it is explained that the institution is being sued only as garnishee.

§ 27.59:3 Service on Defendant

The judgment defendant must be served with copies of the writ of garnishment, the application, the accompanying affidavits, and the orders of the court as soon as practical after service of the writ on the garnishee. This service can be in any manner prescribed for service of citation or as provided in Tex. R. Civ. P. 21a. Tex. R. Civ. P. 663a. It is recommended that, instead of serving the defendant personally, his copy of the application and affidavit be served by certified mail, return receipt requested, and by regular mail. The copy of the writ served on the defendant must include, in ten-point type and in a manner calculated to advise a reasonably attentive person of its contents, the following statement:

> To _____, Defendant:
>
> You are hereby notified that certain properties alleged to be owned by you have been garnished. If you claim any rights in such property, you are advised:
>
> YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT.

Tex. R. Civ. P. 663a. Some court clerks provide additional copies of the writs with the notice language. Others do not; in that case, it is necessary to photocopy the writ and type the notice language on the face of the copy before serving it on the defendant.

Failure of the garnisher to properly serve the defendant is fatal to the plaintiff's garnishment action, even though the defendant may have actual notice of the garnishment action. *Walnut Equipment Leasing Co. v. J-V Dirt & Loam*, 907 S.W.2d 912, 915 (Tex. App.—Austin 1995, writ denied); *Hering v. Norbanco Austin I, Ltd.*, 735 S.W.2d 638, 641–42 (Tex. App.—Austin 1987, writ denied); *Small Business Investment Co. of Houston v. Champion International Corp.*, 619 S.W.2d 28, 30 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ); *but see Del-Phi Engineering Associates v. Texas Commerce Bank-Conroe, N.A.*, 771 S.W.2d 589, 591 (Tex. App.—Beaumont 1989, no writ) (defendant waived lack of service by setting agreed hearing).

Although the defendant must be served with notice of the garnishment proceedings, the garnishee does not have standing to sue or appeal based on failure to serve the defendant. *Sherry Lane National Bank v. Bank of Evergreen*, 715 S.W.2d 148, 151–52 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); *see also* Tex. R. Civ. P. 663a.

The forms of the writ and notice are prescribed in Tex. R. Civ. P. 661, 663a. For a writ to be served on the garnishee, see form 8-5 in this manual; for a notice to the defendant, see form 27-13 in this chapter. The notice at form 27-13 is to be used as a cover sheet only and not as a substitute for the writ with notice language included on it. The writ of garnishment is usually prepared by the clerk of the court.

§ 27.60 Officer's Return

The officer who executes a writ of garnishment must make his return as with any other citation. Tex. R. Civ. P. 663. Texas Civil Practices and Remedies Code section 17.030 requires the Supreme Court of Texas to adopt rules of civil procedure requiring a person who serves process to complete a return of service. *See* Tex. Civ. Prac. & Rem. Code § 17.030(a). The officer or authorized person executing the citation must

complete a return of service, and the return may be endorsed on or attached to the citation. Tex. R. Civ. P. 107(a). The return, along with any document to which it is attached, must be filed with the court. Tex. R. Civ. P. 107(g).

The attorney should inspect the return before obtaining a garnishment judgment, especially a default judgment. Returns in garnishment proceedings are governed by the rules for citations generally. *Curry Motor Freight v. Ralston Purina Co.*, 565 S.W.2d 105, 106 (Tex. Civ. App.—Amarillo 1978, no writ). Returns have been held fatally defective for failing to show the manner of service on a corporate garnishee and for failing to show the place of service. *See Jacksboro National Bank v. Signal Oil & Gas Co.*, 482 S.W.2d 339, 341–42 (Tex. Civ. App.—Tyler 1972, no writ). *But see Hudler-Tye Construction, Inc. v. Pettijohn & Pettijohn Plumbing, Inc.*, 632 S.W.2d 219, 221 (Tex. App.—Fort Worth 1982, no writ) (return that does not show place of service presumed served in county in which officer is authorized to act "until the contrary appears"). For a discussion of service of process, see chapter 16 in this manual, especially section 16.8 (list for officer's return). See form 27-14 in this chapter for the officer's return.

§ 27.61 Garnishee's Answer

§ 27.61:1 Form of Garnishee's Answer

The garnishee's answer must be under oath, in writing, and signed by him. Tex. R. Civ. P. 665.

§ 27.61:2 Garnishee Indebted to Defendant or Possesses Defendant's Property

If the garnishee answers that he is now indebted to the judgment debtor (or was so indebted when served) or now has effects of the debtor (or had the debtor's effects when served), the court will enter a judgment for the plaintiff in the amount so admitted. Tex. R. Civ. P. 668, 669. For a discussion of the steps the plaintiff can take if dissatisfied with the garnishee's answer, see section 27.63 below.

§ 27.61:3 Garnishee Not Indebted to Defendant

If the garnishee answers that (1) he is not now indebted to the debtor and was not when served (or, as applicable, does not have any of the debtor's effects and did not have them when served) and (2) does not know of anyone who does have the debtor's effects, and the plaintiff does not dispute these allegations, the garnishee will be discharged. Tex. R. Civ. P. 666. The plaintiff may controvert the garnishee's answer; see section 27.63 below.

§ 27.61:4 No Answer

If the garnishee does not file an answer to the writ of garnishment by the answer date stated in the writ, the court can render a default judgment for the plaintiff against the garnishee. For garnishees that are not financial institutions, the default judgment is for the full amount of the judgment in the original cause plus all interest and costs in both the original cause and the garnishment action. Tex. R. Civ. P. 667. Before obtaining the default judgment, the attorney should make certain that the officer's return will support a default judgment if later attacked. *See United National Bank v. Travel Music of San Antonio*, 737 S.W.2d 30 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.); see also section 27.60 above.

A default judgment against a financial institution can be rendered "solely as to the existence of liability and not as to the amount of damages." Tex. Fin. Code § 276.002(a). The garnisher has the burden to prove "the amount of actual damages proximately caused by the financial institution's default." Tex. Fin. Code § 276.002(c). For good cause shown, the gar-

nisher can also recover reasonable attorney's fees incurred in establishing damages. Tex. Fin. Code § 276.002(d).

§ 27.62 Funds Trapped by Writ

The writ, once served on the garnishee, impounds or "traps" funds owed or held by the garnishee on the date of service, as well as funds owed or held from the time the garnishee is served through the date of answer. *Newsome v. Charter Bank Colonial*, 940 S.W.2d 157, 162–63 (Tex. App.—Houston [14th Dist.] 1996, writ denied); *First National Bank in Dallas v. Banco Longoria, S.A.*, 356 S.W.2d 192, 195–96 (Tex. Civ. App.—San Antonio 1962, writ ref'd n.r.e.); *Cooper v. Cocke*, 145 S.W.2d 275, 279 (Tex. Civ. App.—Amarillo 1940, no writ); *Consolidated Gasoline Co. v. Jarecki Manufacturing Co.*, 72 S.W.2d 351, 352 (Tex. Civ. App.—Eastland 1934), *aff'd*, 105 S.W.2d 663 (Tex. 1937). The garnishee pays trapped monies to the debtor at his peril. *Westridge Villa Apartments v. Lakewood Bank & Trust Co.*, 438 S.W.2d 891, 894 (Tex. Civ. App.—Fort Worth 1969, writ ref'd n.r.e.).

The garnishee may file an answer before answer day, but the garnisher may controvert the garnishee's answer, requesting that the court require the garnishee to disclose what funds were held or owed on answer day. *Banco Longoria*, 356 S.W.2d at 196. If the garnishee files an answer after answer day but before the garnisher obtains a default judgment, the garnishee need only disclose what monies were held or owed from date of service through answer day; the writ does not trap funds held or owed after that day. *Jarecki Manufacturing Co.*, 72 S.W.2d at 353.

§ 27.63 Plaintiff's Controverting Plea to Garnishee's Answer

A plaintiff or defendant who is dissatisfied with the garnishee's answer can file an affidavit stating why he believes for good reason that the answer is incorrect. Tex. R. Civ. P. 673. The issues raised will be tried as in other cases. Tex. Civ. Prac. & Rem. Code § 63.005(a); Tex. R. Civ. P. 674, 676. If the plaintiff controverts the answer of a garnishee who does not reside in the county in which the garnishment action is pending, jurisdiction is removed from the court in which the action is pending, and that court cannot proceed further except to transfer the garnishment proceeding to the county of the garnishee's residence. *First National Bank v. Steves Sash & Door Co.*, 468 S.W.2d 133, 138 (Tex. Civ. App.—San Antonio 1971, writ ref'd n.r.e.); *see* Tex. Civ. Prac. & Rem. Code § 63.005.

If the garnishee's answer raises doubt about the ownership of the funds, the garnisher must then affirmatively establish that the debtor owns the funds. Any other person claiming ownership of or an interest in the funds must intervene and overcome the presumption that the funds belong to the debtor. The fact that a garnisher may have failed to establish that the debtor is the owner of the funds will not benefit the intervening party. It will simply show that ownership of the funds is in doubt. The intervenor must himself affirmatively prove his ownership of the funds in order to recover. *Putman & Putman, Inc. v. Capitol Warehouse, Inc.*, 775 S.W.2d 460, 463 (Tex. App.—Austin 1989, writ denied). See also section 27.70 below regarding the garnishee's right of offset.

§ 27.64 Defendant's Right to Replevy

A defendant may replevy garnished property if it has not yet been sold. If it has been sold, he may replevy the proceeds of the sale. The defen-

dant will be required to post bond in order to replevy. Tex. R. Civ. P. 664.

§ 27.65 Dissolution or Modification of Writ of Garnishment

A defendant may also seek dissolution or modification of the writ of garnishment. Tex. R. Civ. P. 664a. At the hearing on a motion to dissolve or modify, the plaintiff must prove the grounds relied on for the writ's issuance. These grounds are set forth in Tex. Civ. Prac. & Rem. Code § 63.001(3) and are discussed at section 27.54:1 above. Otherwise, the party seeking to modify or dissolve the writ bears the burden of proof. *Walnut Equipment Leasing Co. v. J-V Dirt & Loam*, 907 S.W.2d 912, 915 (Tex. App.—Austin 1995, writ denied). The plaintiff need not prove that the garnishee is indebted to the defendant. *Swiderski v. Victoria Bank & Trust Co.*, 706 S.W.2d 676, 678 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

§ 27.66 Costs and Attorney's Fees

If the garnishee's answer is not controverted and the plaintiff obtains a garnishment judgment against him, costs will be taxed against the judgment debtor and included in the execution in garnishment. Tex. R. Civ. P. 677. The garnishee's costs will be taken from the amount the garnishee owes the defendant, and the remainder will be applied to the plaintiff's judgment. *Pan American National Bank v. Ridgway*, 475 S.W.2d 808 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.). If the answer is contested, "the costs shall abide the issue." Tex. R. Civ. P. 677. If the garnishee is discharged on his answer, costs of the garnishment proceeding, including a reasonable compensation to the garnishee, will be taxed against the plaintiff. Tex. R. Civ. P. 677.

The successful plaintiff is not entitled to recover attorney's fees for prosecuting a postjudgment garnishment action. *Henry v. Insurance Co. of North America*, 879 S.W.2d 366, 368–69 (Tex. App.—Houston [14th Dist.] 1994, no writ). The garnishee, however, can recover costs, which include attorney's fees. If the garnishee answers that he is indebted to the judgment debtor, the garnishee's costs, including attorney's fees, will be deducted from the amount paid the garnisher and charged to the defendant. *Pan American National Bank*, 475 S.W.2d at 809. If the garnishee is discharged on his answer, his costs will be taxed against the plaintiff. Tex. R. Civ. P. 677. Those costs include attorney's fees. *J.C. Hadsell & Co. v. Allstate Insurance Co.*, 516 S.W.2d 211, 213 (Tex. Civ. App.—Texarkana 1974, writ dism'd).

§ 27.67 Garnishment Judgment

If the garnishee answers that he is indebted to the defendant in any amount or was so indebted when the writ of garnishment was served on him, or if the court so finds, the garnishment judgment will be for the amount the garnishee admits he owes the defendant or the amount found by the court to be due the defendant from the garnishee. The garnishment judgment may not, however, exceed the amount of the plaintiff's judgment in the original suit against the defendant with interest and costs in both the original suit and in the garnishment proceedings. Tex. R. Civ. P. 668. If the answer or verdict was that the garnishee has in his possession, or had when the writ was served, any of the defendant's effects liable to execution, the decree will order the sale of the effects under execution to satisfy the plaintiff's original judgment and will direct the garnishee to deliver to the officer for sale as much of the effects as necessary to satisfy the judgment. Tex. R. Civ. P. 669. The garnishee will probably want the garnishment judgment to order his debt to the defendant discharged. See form 27-15 in this chapter for a garnishment judgment.

The officer making a sale of personal property must execute a transfer of the property to the purchaser, with a brief recital of the judgment of the court under which the property was sold. Tex. R. Civ. P. 672.

§ 27.68 Enforcement of Garnishment Judgment

The garnishee adjudged to be indebted to the defendant will usually pay the garnishment judgment on request. If the garnishee will not pay the judgment, execution can be used as in the case of other judgments. Tex. R. Civ. P. 668. If the garnishee has any of the defendant's effects, the judgment should order them sold under execution and should order the garnishee to deliver the appropriate amount of effects to the officer to be sold in satisfaction of the judgment. Tex. R. Civ. P. 669, 672. If the garnishee does not deliver the effects to the officer on demand, the garnishee can be cited to show cause why he should not be attached for contempt of court and, failing to show cause, can be fined for contempt and imprisoned until he delivers the property. Tex. R. Civ. P. 670.

Because this default situation rarely occurs, forms for contempt proceedings in a garnishment action are not included in this chapter. For a general discussion of contempt of court, see section 26.7 in this manual.

§ 27.69 Garnishee as Stakeholder

If the garnishee is served with a writ and is unsure whether the funds sought are owned by the defendant or a third party, he can file a bill of interpleader and place the funds into the registry of the court. If this action is justified, the garnishee avoids liability to the garnisher for releasing the funds and avoids liability to the account holder for wrongfully freezing the funds. *See Thompson v. Fulton Bag & Cotton Mills*, 286 S.W.2d 411, 414 (Tex. 1956) (scope of inquiry in writ of garnishment is broad enough to impound funds of defendant held by garnishee even though title thereto stands in name of third party); *First Realty Bank v. Ehrle*, 521 S.W.2d 295, 298–99 (Tex. Civ. App.—Dallas 1975, no writ) (bank's fear of exposure to multiple liability was reasonable and bank was entitled to protect itself by interpleader). If the garnishee's answer puts into doubt the defendant's ownership of the funds, the garnisher then has the burden of proof to show that the defendant owns the funds. *Putman & Putman, Inc. v. Capitol Warehouse, Inc.*, 775 S.W.2d 460, 463 (Tex. App.—Austin 1989, writ denied).

§ 27.70 Garnishee's Offset Rights

Locating a defendant's account for garnishment may be only half the plaintiff's battle. In addition to the timing of withdrawals by the defendant, the plaintiff is faced with the prospect of offset by the defendant's bank if the defendant is indebted to his bank, both before and in some instances after service of the writ of garnishment.

Accounts can be offset after service of a writ of garnishment if the debt is matured or the debtor is insolvent. But what if the debt has not been matured at the time of service? *See* Susan Soussan & Jane Cooper-Hill, *A Bank's Right to Offset after Service of Writ of Garnishment*, 48 Tex. B.J. 638 (1985), discussing *San Felipe National Bank v. Caton*, 668 S.W.2d 804 (Tex. Civ. App.—Houston [14th Dist.] 1984, no writ). In *Caton* the court approved an offset after garnishment when the obligation was not in default, based on a contractual provision giving the bank a lien on the depositor's account. *Contra* Andrew Messer, *A Bank's Right to Offset after Service of Writ of Garnishment—A Reconciliation of* San Felipe National Bank v. Caton, 54 Tex. B.J. 368 (1991).

If the bank has a right to mature the indebtedness at the time the writ is served, it may take

steps to accelerate and offset after service of the writ. This right may be due to a default in the installment payment, events of default defined in the note separate from nonpayment (for example, attachment of the account), or even an insecurity clause. The attorney should use discovery before garnishment to learn whether the debtor is indebted to the garnishee and, if indebted, the terms of the indebtedness. *See also Holt's Sporting Goods Co. of Lubbock v. American National Bank*, 400 S.W.2d 943 (Tex. Civ. App.—Amarillo 1966, writ dism'd); *Home National Bank v. Barnes-Piazzek Co.*, 278 S.W. 299 (Tex. Civ. App.—Fort Worth 1925, writ ref'd).

§ 27.71 Liability for Wrongful Postjudgment Garnishment

The plaintiff can be liable for wrongful garnishment if in his affidavit he makes an untrue allegation of a statutory ground for garnishment, possibly even though he had probable cause to believe the ground was true and he did not act maliciously. *Peerless Oil & Gas Co. v. Teas*, 138 S.W.2d 637, 640 (Tex. Civ. App.—San Antonio 1940), *aff'd*, 158 S.W.2d 758 (Tex. 1942). If the plaintiff knows that the defendant actually has property within the state subject to execution sufficient to satisfy the debt, wrongful garnishment can occur if the plaintiff alleges otherwise in his affidavit. *See King v. Tom*, 352 S.W.2d 910, 913 (Tex. Civ. App.—El Paso 1961, no writ); *Griffin v. Cawthon*, 77 S.W.2d 700, 702 (Tex. Civ. App.—Fort Worth 1934, writ ref'd). The plaintiff has a duty to make a reasonable inquiry whether any such property exists. *Massachusetts v. Davis*, 160 S.W.2d 543, 554 (Tex. Civ. App.—Austin), *aff'd in part and rev'd in part on other grounds*, 168 S.W.2d 216 (Tex. 1942), *cert. denied*, 320 U.S. 210 (1943).

A valid, subsisting judgment that is not suspended supports a garnishment. The fact that it is later set aside does not in itself support an action for wrongful garnishment. *Biering v. First National Bank*, 7 S.W. 90 (Tex. 1888); *Hobson & Associates v. First Print, Inc.*, 798 S.W.2d 617 (Tex. App.—Amarillo 1990, no writ). Failure of the plaintiff to state in his application that he was not aware of property owned by the defendant subject to execution sufficient to satisfy the judgment did not support a wrongful garnishment action. *Canyon Lake Bank v. Townsend*, 649 S.W.2d 809, 810–11 (Tex. App.—Austin 1983, writ ref'd n.r.e.). *See generally* Glenn Jarvis, Comment, *Creditor's Liability in Texas for Wrongful Attachment, Garnishment, or Execution*, 41 Texas L. Rev. 692, 704–07, 711–16 (1963).

§ 27.72 Locating Bank Accounts

Bank account location services should be utilized with extreme caution. If the information has been gained by false pretenses, criminal penalties apply pursuant to subchapter II of the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6821–6827. See generally chapter 3 in this manual for further information on locating a debtor's assets.

[Sections 27.73 through 27.80 are reserved for expansion.]

V. Turnover

§ 27.81 Origin of Turnover Statutes

The Texas turnover statutes are found at Tex. Civ. Prac. & Rem. Code §§ 31.002–.0025, 31.010. These statutes, with the postjudgment discovery devices under Tex. R. Civ. P. 621a,

give creditors the statutory equivalent of what was previously known in equity as a creditor's bill. *Ex parte Johnson*, 654 S.W.2d 415, 417 (Tex. 1983). Section 31.002(a) was amended effective 2017, eliminating the need to show that the debtor owns property that cannot be readily levied upon by ordinary legal process. Acts 2017, 85th Leg., R.S., ch. 996, § 1 (H.B. 1066), eff. Sept. 1, 2017.

§ 27.82 Purpose, Function, and Effect of Turnover

Turnover is a procedural device by which judgment creditors may reach nonexempt assets of a debtor. *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 224 (Tex. 1991). The purpose of the turnover statutes is to aid the diligent judgment creditor in reaching the judgment debtor's property. *Cross, Kieschnick & Co. v. Johnston*, 892 S.W.2d 435, 438 (Tex. App.—San Antonio 1994, no writ). See section 27.89 below regarding property subject to and exempt from turnover.

The turnover statutes place the burden on the defendant to produce documents or property used to satisfy a judgment. They are deliberately open-ended to aid the diligent plaintiff. *See* House Comm. on Judicial Affairs, Bill Analysis, Tex. S.B. 965, 66th Leg., R.S. (1979).

§ 27.83 When to Seek Turnover Relief

Seeking turnover relief is appropriate if the judgment debtor owns nonexempt property or property rights. Tex. Civ. Prac. & Rem. Code § 31.002(a). The court may order the judgment debtor to turn over realty located outside the state of Texas. *Reeves v. Federal Savings & Loan Insurance Corp.*, 732 S.W.2d 380 (Tex. App.—Dallas 1987, no writ). By extension, personal property outside the state may also be subject to turnover.

There is no requirement that a judgment creditor first exhaust other legal remedies, such as attachment, execution, or garnishment, before seeking turnover relief. *Universe Life Insurance Co. v. Giles*, 982 S.W.2d 488, 492–93 (Tex. App.—Texarkana 1998, pet. denied); *Hennigan*, 666 S.W.2d at 323; *see also Childre v. Great Southwest Life Insurance Co.*, 700 S.W.2d 284, 288 (Tex. App.—Dallas 1985, no writ) (no requirement for return of writ of execution before turnover relief granted).

Turnover is cumulative of other lawful remedies available to a judgment creditor for collection of a judgment. *Matrix, Inc. v. Provident American Insurance Co.*, 658 S.W.2d 665, 668 (Tex. App.—Dallas 1983, no writ). Because Tex. Civ. Prac. & Rem. Code § 31.002(b) states that the court *may* grant the relief stated in section 31.002(b)(1), (2), or (3), the statute is viewed as discretionary. Therefore, a court may set additional requirements before granting turnover relief, such as showing that discovery has been ignored or that the creditor obtain a writ of execution and have it returned *nulla bona* before granting turnover relief.

A waiting period of thirty days after entry of judgment or overruling of a motion for new trial is not required as it is before levy and execution. *Childre*, 700 S.W.2d at 286–87. Also, the court can consider a turnover application even if the judgment is on appeal, as long as a supersedeas bond has not been filed. *Anderson v. Lykes*, 761 S.W.2d 831, 833–34 (Tex. App.—Dallas 1988, no writ), *overruled on other grounds as recognized in In re Crow-Billingsley Air Park, Ltd.*, 98 S.W.3d 178, 180 (Tex. 2003).

§ 27.84 Jurisdiction and Choice of Forum

A judgment creditor may bring a turnover action in a court of competent jurisdiction, including a justice court, either in the same suit in which the judgment against the debtor is rendered or in a

new and independent proceeding. Tex. Civ. Prac. & Rem. Code § 31.002(a), (d). If the creditor moves for turnover relief in the same suit in which the judgment was rendered, the trial court must conduct a hearing on the application, even if an appeal is pending. *Anderson v. Lykes*, 761 S.W.2d 831 (Tex. App.—Dallas 1988, no writ), *overruled on other grounds as recognized in In re Crow-Billingsley Air Park, Ltd.*, 98 S.W.3d 178, 180 (Tex. 2003). See section 27.94 below for a discussion of the trial court's discretion to grant or deny turnover relief.

If the creditor brings a turnover action as a new and independent proceeding, the creditor may choose any court of competent jurisdiction that is best able to handle the particular relief sought, such as the appointment of a receiver or the issuance of an injunction. For more extensive discussions of jurisdiction and venue in collections cases, see chapter 15 in this manual.

Practice Note: Since turnover orders are enforceable by contempt, an independent action filed in the debtor's county of residence may facilitate enforcement if attachment of the debtor becomes necessary. Transferring debtors in custody across county lines can be problematic, and law enforcement is not readily cooperative in transferring civil contemners.

§ 27.85 Pleadings

§ 27.85:1 Creditor's Pleadings

The application should generally—

1. recite that the judgment remains unsatisfied;
2. state that the defendant owns property (or property rights) that is not exempt;
3. if injunctive relief is requested, follow the requirements for obtaining an injunction or temporary restraining order (pleadings such as no adequate remedy at law, and verifying petition);
4. request that the property, along with related documents and records, be turned over to the sheriff or constable for execution or to a receiver or provide that it otherwise be applied to the satisfaction of the judgment;
5. request the appointment of a receiver, if one is being sought; and
6. request attorney's fees.

Tex. Civ. Prac. & Rem. Code § 31.002.

See form 27-16 in this chapter for an application for turnover relief.

§ 27.85:2 Debtor's Pleadings

The defendant may challenge an order for turnover by motion or on appeal. *See Ex parte Johnson*, 654 S.W.2d 415, 418 (Tex. 1983) (orig. proceeding) (motion to modify); *Scheel v. Alfaro*, 406 S.W.3d 216, 222 (Tex. App.—San Antonio 2013, pet. denied) (motion to set aside); *Lozano v. Lozano*, 975 S.W.2d 63, 69 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (appeal). An affirmative defense such as payment must be pleaded and proved by the defendant. If the defendant has neither responded to an application for turnover nor pleaded payment as an affirmative defense, he is precluded on appeal from contending that the plaintiff failed to prove that the judgment was unsatisfied. *Ross v. 3D Tower Ltd.*, 824 S.W.2d 270, 273 (Tex. App.—Houston [14th Dist.] 1992, writ denied); *Matrix, Inc. v. Provident American Insurance Co.*, 658 S.W.2d 665, 667 (Tex. App.—Dallas 1983, no writ); Tex. R. Civ. P. 94.

§ 27.86 Notice and Hearing

§ 27.86:1 Notice

Notice to the defendant and opportunity to be heard are not required by the turnover statute. *Ross v. 3D Tower Ltd.*, 824 S.W.2d 270 (Tex. App.—Houston [14th Dist.] 1992, writ denied). Courts routinely grant ex parte orders for turnover but, in the court's discretion, may first require that notice be given to the defendant. One factor the court may consider in proceeding ex parte is the likelihood that the debtor will dispose of nonexempt property, or convert nonexempt property to exempt property, if notice is given.

An ex parte turnover order does not unfairly surprise a judgment debtor because the judgment puts the debtor on notice that postjudgment collection proceedings will follow. *See Ex parte Johnson*, 654 S.W.2d 415, 418 n.1 (Tex. 1983) (orig. proceeding); *Thomas v. Thomas*, 917 S.W.2d 425, 433–34 (Tex. App.—Waco 1996, no writ); *Scheel v. Alfaro*, 406 S.W.3d 216, 223–24 (Tex. App.—San Antonio 2013, pet. denied). A good review of the constitutional issues is found in *Sivley v. Sivley & Sivley*, 972 S.W.2d 850, 861–62 (Tex. App.—Tyler 1998, no pet.).

§ 27.86:2 Hearing

A judgment creditor is entitled to a hearing for turnover relief. *Anderson v. Lykes*, 761 S.W.2d 831, 834 (Tex. App.—Dallas 1988, no writ), *overruled on other grounds as recognized in In re Crow-Billingsley Air Park, Ltd.*, 98 S.W.3d 178, 180 (Tex. 2003). The statute requires a factual showing that the judgment debtor has nonexempt property. *Schultz v. Fifth Judicial District Court of Appeals at Dallas*, 810 S.W.2d 738, 740 (Tex. 1991) (orig. proceeding), *abrogated on other grounds by In re Sheshtawy*, 154 S.W.3d 114 (Tex. 2004) (examining whether contempt motion based on turnover order was appealable; turnover statute (Tex. Civ. Prac. & Rem. Code § 31.002) no longer requires showing that property is not readily subject to ordinary execution). It is reversible error for a court to grant turnover relief without the showing required by the statute. *Tanner v. McCarthy*, 274 S.W.3d 311 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *Clayton v. Wisener*, 169 S.W.3d 682, 683–84 (Tex. App.—Tyler 2005, no pet.); *Sivley v. Sivley & Sivley*, 972 S.W.2d 850 (Tex. App.—Tyler 1998, no pet.). A record of the hearing should be made to preserve issues if an appeal is taken. *Tanner*, 274 S.W.3d 311.

There is a split in authority over whether the defendant has the burden to prove that particular property is exempt from turnover. *Burns v. Miller, Hiersche, Martens & Hayward, P.C.*, 948 S.W.2d 317, 324 (Tex. App.—Dallas 1997, writ denied) (noting that Tex. Civ. Prac. & Rem. Code § 31.002 does not specify who has burden and that courts were split, but citing *Roosth v. Roosth*, 889 S.W.2d 445, 459 (Tex. App.—Houston [14th Dist.] 1994, writ denied), to place burden on beneficiary of spendthrift trust to prove distributions were exempt); *Jacobs v. Adams*, 874 S.W.2d 166, 167–68 (Tex. App.—Houston [14th Dist.] 1994, no writ) (burden on party claiming property is exempt); *Rucker v. Rucker*, 810 S.W.2d 793, 795–96 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (burden on party claiming property is exempt); *Sloan v. Douglass*, 713 S.W.2d 436, 441 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.) (burden on party seeking turnover).

§ 27.87 Turnover Orders Generally

Texas Civil Practice and Remedies Code section 31.002(b) provides for the three types of turnover orders available under the statute. While the provision for appointment of a receiver is often used, the practitioner should not overlook the provisions for turnover of property to a sheriff or constable or for otherwise applying the property to the satisfaction of the judgment.

A turnover proceeding can and should be used to determine whether the defendant's particular property is subject to turnover. *See, e.g., Owen v. Porter*, 796 S.W.2d 265 (Tex. App.—San Antonio 1990, no writ) (whether community property was joint management or sole management); *Sloan v. Douglass*, 713 S.W.2d 436 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.); *Pace v. McEwen*, 617 S.W.2d 816, 819 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ) (homestead); *but see Republic Insurance Co. v. Millard*, 825 S.W.2d 780 (Tex. App.—Houston [14th Dist.] 1992, no writ); *Steenland v. Texas Commerce Bank, N.A.*, 648 S.W.2d 387 (Tex. App.—Tyler 1983, writ ref'd n.r.e.) (court could not determine excess nonexempt value of homestead; creditor must seek separate trial and finding).

A turnover order should not provide for delivery of the debtor's property directly into the hands of the judgment creditor or his attorney. *Ex parte Johnson*, 654 S.W.2d 415, 418 (Tex. 1983) (orig. proceeding). The same rule applies for cash as for tangible personal property. *Copher v. First State Bank of Pittsburg*, 852 S.W.2d 738, 739 (Tex. App.—Fort Worth 1993, no writ) (relying on *Ex parte Johnson* and legislative history).

The Code allows a court to enter or enforce an order without identifying specifically the property subject to turnover. *See* Tex. Civ. Prac. & Rem. Code § 31.001(h). This keeps the attorney from having to give the defendant notice of which assets to hide, and it allows the attorney to avoid the problem of having to identify specific assets to be turned over to the receiver. The property to be turned over may be stated in the form of a category, for example, "all accounts receivable."

The court may appoint a receiver to "take possession of" nonexempt property belonging to the judgment debtor, "sell it and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment." Tex. Civ. Prac. & Rem. Code § 31.002(b)(3).

Practice Note: An order to turn over specific property by itself does not enable a constable or sheriff's deputy to take possession of the property or to sell it; a writ of execution should therefore accompany the turnover order. The writ also provides a way for the officer to report to the court the outcome of serving the order. Providing the officer with both documents should not result in being charged two fees, as each document assists the officer in handling the other. See forms 27-5 through 27-7 regarding writs of execution. See form 27-17 in this chapter for an order for turnover relief.

§ 27.88 Receiverships in Turnover Actions

§ 27.88:1 Authority of Receiver under Turnover Statutes

The court may appoint a receiver of the judgment debtor's property with the authority to take possession of and sell the nonexempt property and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment. Tex. Civ. Prac. & Rem. Code § 31.002(b)(3). Chapter 64 of the Civil Practice and Remedies Code does not apply to a receivership under section 31.002.

§ 27.88:2 Appointment of Receiver

The requirements for the appointment of a receiver under Tex. Civ. Prac. & Rem. Code § 64.001 are inapplicable to turnover proceedings. *Schultz v. Cadle Co.*, 825 S.W.2d 151, 154–55 (Tex. App.—Dallas 1992), *writ denied per curiam*, 852 S.W.2d 499 (Tex. 1993); *Childre v. Great Southwest Life Insurance Co.*, 700 S.W.2d 284, 288 (Tex. App.—Dallas 1985, no writ). The decision to appoint a receiver is within the discretion of the court. *Schultz*, 825

S.W.2d at 155. The court is not required to appoint a receiver. *Ross v. 3D Tower Ltd.*, 824 S.W.2d 270, 272 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

§ 27.88:3 Qualifications of Receiver

Although neither the turnover statute nor the case law interpreting the statute establishes requirements for who can serve as a receiver, it is suggested that the receiver (1) be a citizen and qualified voter of the state of Texas at the time of appointment; (2) maintain actual residence in the state during the receivership; and (3) not be a party, attorney, or other person interested in the underlying cause of action; *Swate v. Johnston*, 981 S.W.2d 923, 925 (Tex. App.—Houston [1st Dist.] 1998, orig. proceeding). Earning fees payable from the estate of the receivership does not disqualify the receiver as an interested person. *Swate*, 981 S.W.2d at 926 n.1. If the applicant seeks to give the receiver the powers of a master, the person to be appointed should also not be related to any party. Tex. R. Civ. P. 171.

§ 27.88:4 Application of Appointment of Receiver

In addition to requesting that a receiver be appointed as discussed herein, the attorney should make sure the application is pleaded in accordance with section 31.002(a) of the Texas Civil Practices and Remedies Code. The court may appoint a receiver only if the judgment creditor meets the requirements of section 31.002(a) of the Code. For a discussion of what the pleadings should contain, see section 27.85:1 above. See form 27-18 in this chapter for a motion for postjudgment receivership.

§ 27.88:5 Receivership Provision in Turnover Order

The order appointing a receiver determines what powers are available to a receiver. *Ex parte Hodges*, 625 S.W.2d 304, 306 (Tex. 1981). The order should be "definite, clear and concise in order to give the person to whom it is directed sufficient information as to his duties and should not be such as would call on him for interpretations, inferences or conclusions." *Thomas v. Thomas*, 917 S.W.2d 425, 434 (Tex. App.—Waco 1996, no writ). Great care should be taken in drafting the order appointing the receiver to ensure that all the powers necessary for the receiver to perform his duties are included.

A comprehensive order not only turns over property belonging to the judgment debtor to the receiver but also empowers the receiver to take possession of the property and sell it to be applied for satisfaction of the judgment. The order should be specific enough to support a contempt action against the judgment debtor in case the debtor fails to comply with the order.

The order appointing a receiver should tax the receiver's fees and reasonable expenses against the judgment debtor as a cost. Furthermore, the court must approve payment of a receiver's fee by separate written order. Texas Supreme Court, *Second Amended Order Regarding Mandatory Reports of Judicial Appointments and Fees*, Misc. Docket No. 07-9188 (Oct. 30, 2007); *Moyer v. Moyer*, 183 S.W.3d 48 (Tex. App.—Austin 2005, no pet.).

In drafting the order, consider that third parties will look to the order in determining whether the receiver is authorized to make demand on them.

See form 27-19 in this chapter for an order appointing a receiver.

§ 27.88:6 Bond and Oath for Appointment of Receiver

The turnover statute does not require a bond. Although Tex. R. Civ. P. 695a provides that a bond must be filed before a receiver can be appointed, rule 695a did not envision a turnover receiver. Courts have held that no receiver's

bond is required in a turnover receivership. *Schultz v. Cadle Co.*, 825 S.W.2d 151 (Tex. App.—Dallas 1992), *writ denied per curiam*, 852 S.W.2d 499 (Tex. 1993) (bond requirements of rule 695a do not apply to postjudgment receiver appointed under turnover statute, and decision whether to require bond is in court's discretion); *In re Estate of Herring*, 983 S.W.2d 61, 64 (Tex. App.—Corpus Christi 1998, no pet.); *Childre v. Great Southwest Life Insurance Co.*, 700 S.W.2d 284, 285 (Tex. App.—Dallas 1985, no writ). "Any bond which may be required should be carefully framed so as not to indemnify the judgment debtor in the traditional sense, as the righteousness of the appointment should have been fully litigated in any hearing pursuant to the new statutes." *Childre*, 700 S.W.2d at 289 (citing David Hittner, *Texas Post-Judgment Turnover and Receivership Statutes*, 45 Tex. B.J. 417 (1982)). The judgment debtor bears the burden of showing any extraordinary circumstances requiring the bond to be increased. *Childre*, 700 S.W.2d at 289. If the application for turnover seeks both a receiver and an injunction, one bond may serve both purposes. *Childre*, 700 S.W.2d at 288–89. See form 27-20 for a bond.

The turnover statute does not provide that an oath be taken or filed by a receiver. However, practice has evolved to include the taking of an oath. See form 27-21 for an oath.

§ 27.88:7 Effect of Order Appointing Receiver on Prior Existing Liens

Receivership property is held *in custodia legis* as of the date the turnover order is signed. Any transfer or encumbrance after the turnover order is signed, including a trustee's sale under a deed of trust, is void. *First Southern Properties, Inc. v. Vallone*, 533 S.W.2d 339, 341 (Tex. 1976) (citing *Ellis v. Vernon Ice, Light & Water Co.*, 23 S.W. 858 (Tex. 1893), and *Texas Trunk Railway Co. v. Lewis*, 16 S.W. 647 (Tex. 1891)); *Pratt v. Amrex, Inc.*, 354 S.W.3d 502, 506 (Tex. App.—San Antonio 2011, pet. denied). However, *custodia legis* does not destroy any prior vested rights. *First Southern Properties*, 533 S.W.2d at 343.

§ 27.88:8 Receiver's Fees and Expenses

Tex. Civ. Prac. & Rem. Code § 31.002(e) provides that the judgment creditor is entitled to costs. The receiver's fee is typically taxed against the judgment debtor as a cost in the order appointing the receiver. *See, e.g., Sheikh v. Sheikh*, 248 S.W.3d 381, 386 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

Practice Note: For receivers serving on a contingent fee basis, the order appointing the receiver should state the fee calculation (typically 25 percent of recovery) and that the rate is usual and customary. A finding that the fee is reasonable would be made in a later order. *See Evans v. Frost National Bank*, No. 05-12-01491-CV, 2015 WL 4736543, at *4–5 (Tex. App.—Dallas Aug. 11, 2015 (mem. op.) (no pet.). The court must approve payment of an hourly receiver's fee by separate written order because it is not proper to approve an hourly fee before any work has been done.

A problem occurs with an hourly fee receivership when the receivership estate does not possess any assets or has insufficient assets to satisfy a judgment or the receiver's fees and expenses. In such cases, a conflict may occur between the receiver and the judgment creditor. The attorney should make it very clear to the judgment creditor that if the receiver is unable to locate any assets or sufficient assets to satisfy the judgment, the judgment creditor may be responsible for the receiver's fees and expenses. The practitioner is encouraged to reach an agreement with the proposed receiver before the receiver is appointed. If the order is silent about fees and expenses, the court may be petitioned

to make a ruling through the use of an application.

See form 27-22 in this chapter for an order approving the receiver's fees.

§ 27.88:9 Immunity of Receiver

Texas uses the "functional approach." "Once an individual is cloaked with derived judicial immunity because of a particular function being performed for a court, every action taken with regard to that function—whether good or bad, honest or dishonest, well-intentioned or not—is immune from suit. Once applied to the function, the cloak of immunity covers all acts, both good and bad." *Davis v. West*, 317 S.W.3d 301, 307 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (quoting *Spigener v. Wallis*, 80 S.W.3d 174, 183 (Tex. App.—Waco 2002, no pet.)).

Some cases hold that judicial immunity is an immunity from suit, not just from the ultimate assessment of damages. *Bradt v. West*, 892 S.W.2d 56, 71 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

Practice Note: The receiver's immunity does not extend to the creditor or the creditor's attorney. The practitioner should let the receiver make his own decision about taking a particular course of action.

§ 27.89 Property Subject to and Exempt from Turnover

§ 27.89:1 Property Generally

The turnover statutes apply to nonexempt property owned by the judgment debtor, including present or future rights to property. Tex. Civ. Prac. & Rem. Code § 31.002(a); *see Hennigan v. Hennigan*, 666 S.W.2d 322, 323 (Tex. App.—Houston [14th Dist.]), *writ ref'd n.r.e. per curiam*, 677 S.W.2d 495 (Tex. 1984); *Matrix, Inc. v. Provident American Insurance Co.*, 658 S.W.2d 665, 668 (Tex. App.—Dallas 1983, no writ). It is proper to determine whether property is exempt in a turnover proceeding. *Stanley v. Reef Securities, Inc.*, 314 S.W.3d 659, 667 n.4 (Tex. App.—Dallas 2010, no pet.); *Pace v. McEwen*, 617 S.W.2d 816, 819 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

Proceeds of exempt property are exempt under the turnover statute, except when collecting child support. Tex. Civ. Prac. & Rem. Code § 31.002(f). *But see Schultz v. Cadle Co.*, 825 S.W.2d 151, 153–54 (Tex. App.—Dallas 1992), *writ denied per curiam*, 852 S.W.2d 499 (Tex. 1993) (wages were no longer exempt when paid to company owned by debtor).

The burden is on the defendant to show that property is exempt. *Goodman v. Compass Bank*, No. 05-15-00812-CV, 2016 WL 4142243, at *5 (Tex. App.—Dallas Aug. 3, 2016, no pet.) (mem. op.); *Stanley*, 314 S.W.3d at 667; *Burns v. Miller, Hiersche, Martens & Hayward, P.C.*, 948 S.W.2d 317, 324 (Tex. App.—Dallas 1997, writ denied); *Jacobs v. Adams*, 874 S.W.2d 166, 167–68 (Tex. App.—Houston [14th Dist.] 1994, no writ); *Rucker v. Rucker*, 810 S.W.2d 793, 795–96 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

For a discussion of property subject to and exempt from execution, see part III. in this chapter.

§ 27.89:2 Property Subject to Turnover

Tex. Civ. Prac. & Rem. Code § 31.002(b)(1) provides for the turnover of the debtor's nonexempt property to either a constable or sheriff; Tex. Civ. Prac. & Rem. Code § 31.002(b)(3) provides for a receiver to take possession of it.

Practice Note: The practitioner should not confuse what has to be proved up in order to obtain relief (that the debtor has at least one

piece of nonexempt property) with what property may be ordered to be turned over (any nonexempt property). *See* Tex. Civ. Prac. & Rem. Code § 31.002(h).

The following list of property subject to turnover is illustrative, not exclusive. The court may also order that all documents or records related to the property be delivered. Tex. Civ. Prac. & Rem. Code § 31.002(b)(1).

1. Income from business. Nonexempt income from the judgment debtor's business (for example, income from a sole proprietorship or funds due an independent contractor) is subject to turnover. *Thomas v. Thomas*, 917 S.W.2d 425, 434–35 (Tex. App.—Waco 1996, no writ) (law practice income); *DeVore v. Central Bank & Trust*, 908 S.W.2d 605, 610 (Tex. App.—Fort Worth 1995, no writ) (attorney's nonwage income); *Brink v. Ayre*, 855 S.W.2d 44, 45 (Tex. App.—Houston [14th Dist.] 1993, no writ) (attorney's fees earned); *Ross v. 3D Tower Ltd.*, 824 S.W.2d 270, 272 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (attorney's accounts receivable).
2. Commissions earned by an independent contractor. *Campbell v. Stucki*, 220 S.W.3d 562 (Tex. App.—Tyler 2007, no pet.).
3. Property located outside Texas. *Reeves v. Federal Savings & Loan Insurance Corp.*, 732 S.W.2d 380, 381–82 (Tex. App.—Dallas 1987, no writ).
4. Causes of action. *Renger Memorial Hospital v. State*, 674 S.W.2d 828, 830 (Tex. App.—Austin 1984, no writ); but see section 27.89:3 below.
5. Promissory notes. *Matrix, Inc. v. Provident American Insurance Co.*, 658 S.W.2d 665, 668 (Tex. App.—Dallas 1983, no writ).
6. Nonexempt property held by a third party, but subject to the debtor's control. Tex. Civ. Prac. & Rem. Code § 31.002(b)(1); *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 227 (Tex. 1991); *Norsul Oil & Mining Ltd. v. Commercial Equipment Leasing Co.*, 703 S.W.2d 345, 349 (Tex. App.—San Antonio 1985, no writ). See section 27.91 below.
7. Accounts receivable. *Ross*, 824 S.W.2d at 272; *Arndt v. National Supply Co.*, 650 S.W.2d 547, 549 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.).
8. Shares of stock. *Newman v. Toy*, 926 S.W.2d 629 (Tex. App.—Austin 1996, writ denied); *Childre v. Great Southwest Life Insurance Co.*, 700 S.W.2d 284, 289 (Tex. App.—Dallas 1985, no writ).

§ 27.89:3 Property Not Subject to Turnover

The following property is not subject to turnover.

1. Current wages. Tex. Civ. Prac. & Rem. Code § 31.0025; Tex. Prop. Code § 42.001(b)(1); *GE Capital v. ICO*, 230 S.W.3d 702, 705 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *Brink v. Ayre*, 855 S.W.2d 44, 45 (Tex. App.—Houston [14th Dist.] 1993, no writ); *see also Caulley v. Caulley*, 806 S.W.2d 795, 797–98 (Tex. 1991). The exemption may be lost when the employee voluntarily leaves the wages with the employer or deposits the wages with someone else. *GE Capital v. ICO*, 230 S.W.3d 702, 707 (Tex. App.—Houston [14th Dist.]

2007, pet. denied). *Caveat:* A number of cases decided before *Caulley* discussed, and some approved, turnover of paychecks or proceeds of them, reasoning that the funds were no longer "current wages" once received by the debtor. *See, e.g., Barlow v. Lane*, 745 S.W.2d 451, 453 (Tex. App.—Waco 1988, writ denied); *Salem v. American Bank of Commerce*, 717 S.W.2d 948 (Tex. App.—El Paso 1986, no writ).

Practice Note: The practitioner should bear in mind the "current" in the "current wages" exemption. "Current" has been interpreted as wages for the current pay period. Courts focus on whether the debtor controls when the wages are paid. Money that was paid to a bankruptcy trustee by the debtor's employer pursuant to a wage order remained exempt when the Chapter 13 bankruptcy was dismissed, because the debtor never had control of the money. *See Marrs v. Marrs*, 401 S.W.3d 122, 127 (Tex. App.—Houston [14th Dist.] no pet.).

2. Homestead. *Pace v. McEwen*, 617 S.W.2d 816 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

3. Retirement plan funds, unless they do not qualify under applicable provisions of the Internal Revenue Code. The defendant has the burden to prove that they qualify. *Rucker v. Rucker*, 810 S.W.2d 793, 795–96 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

4. Periodic payments unless there is a finding that payments are from a nonexempt source, such as business income. *Ex parte Prado*, 911 S.W.2d 849, 850 (Tex. App.—Austin 1995, orig. proceeding) (defendant ordered to turn over $500 per month, without court's first identifying specific source of nonexempt property or right); *see Ross v. 3D Tower Ltd.*, 824 S.W.2d 270, 272–73 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (turnover order mandating monthly payments upheld).

5. Cause of action of judgment debtor against plaintiff. *Associated Ready Mix, Inc. v. Douglas*, 843 S.W.2d 758, 762 (Tex. App.—Waco 1992, no writ); *Criswell v. Ginsberg & Foreman*, 843 S.W.2d 304, 306–07 (Tex. App.—Dallas 1992, no writ); *Commerce Savings Ass'n v. Welch*, 783 S.W.2d 668, 669–71 (Tex. App.—San Antonio 1989, no writ). *See also In re Great Northern Energy, Inc.*, 493 S.W.3d 283, 290 (Tex. App.—Texarkana 2016, orig. proceeding) (against public policy to allow a creditor to use turnover to extinguish the debtor's claim against the creditor) (citing *Criswell*, 843 S.W.2d at 306–07).

6. Malpractice claims. *Charles v. Tamez*, 878 S.W.2d 201, 207 (Tex. App.—Corpus Christi 1994, writ denied) (quoting *Goodley v. Wank & Wank, Inc.*, 62 Cal. App. 3d 389, 397 (1976)).

7. Unasserted denied causes of action for legal malpractice for failure to settle under the *Stowers* doctrine. *Charles*, 878 S.W.2d at 208.

8. Unpaid commissions for personal services not exceeding 25 percent of the aggregate limitation. Tex. Prop. Code § 42.001(d).

9. Proceeds of exempt property. Tex. Civ. Prac. & Rem. Code § 31.002(f). Exempt property is discussed generally in part III. in this chapter.

§ 27.89:4 Property Held by Financial Institution

With respect to turnover of property held by a financial institution in the name of or on behalf of the judgment debtor as a customer of the financial institution, the rights of a receiver appointed under Texas Civil Practice and Remedies Code section 31.002(b)(3) do not attach until the financial institution receives service of a certified copy of the order of receivership in the manner specified by Texas Finance Code section 59.008. *See* Tex. Civ. Prac. & Rem. Code § 31.002(g). The service provisions of section 59.008 also apply to service of writs of garnishment, discussed at section 27.59:2 above.

A financial institution that receives a request to turn over assets or financial information of a judgment debtor to a judgment creditor or a receiver under a turnover order or receivership under section 31.002 shall be provided and may rely on a certified copy of the order or injunction of the court. Tex. Civ. Prac. & Rem. Code § 31.010(a)(1).

§ 27.90 Disposition of Property

Rather than appoint a receiver, the court may order the defendant's property and related documents and records to be turned over to a designated sheriff or constable for sale by execution or may otherwise apply the property to the satisfaction of the judgment. Tex. Civ. Prac. & Rem. Code § 31.002(b)(1), (2).

In addition, the court may apply the property to the satisfaction of the judgment by turning it over to the registry of the court. *Brecheisen v. Johnson*, 665 S.W.2d 191, 192 (Tex. App.—Dallas 1984, writ ref'd n.r.e.); *Arndt v. National Supply Co.*, 650 S.W.2d 547, 549 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.). The court, however, may not order turnover directly to a judgment creditor. *Ex parte Johnson*, 654 S.W.2d 415, 418–19 (Tex. 1983) (orig. proceeding).

If a receiver has been appointed, the receiver can sell the nonexempt property and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment. Tex. Civ. Prac. & Rem. Code § 31.002(b)(3). Citing preturnover case law, the court in *Salaymeh* held that the sale of property by a receiver is generally not effective until the sale is reported by the receiver and confirmed by the court after notice to the parties. *Salaymeh v. Plaza Centro, LLC*, 258 S.W.3d 236, 240 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (referring to a sale of real property). The turnover statute itself, however, does not contain specific procedures for the sale of property by the receiver.

§ 27.91 Who May Be Ordered to Turn Over Property

The statute is a procedural remedy not to be applied against someone who is not the judgment debtor. *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 227 (Tex. 1991). Courts differ on whether it may be used to compel a third party in possession of the debtor's assets to turn them over, if the property is subject to the debtor's control. Those in favor include *Schultz v. Fifth Judicial District Court of Appeals at Dallas*, 810 S.W.2d 738, 740 (Tex. 1991) (orig. proceeding), *abrogated on other grounds by In re Sheshtawy*, 154 S.W.3d 114 (Tex. 2004); *Beaumont Bank*, 806 S.W.2d at 227.

Those against it reason that it is enough that the judgment debtor can be held in contempt for failure to turn over property that he controls but that is in the hands of a third party. *Parks v. Parker*, 957 S.W.2d 666, 668–69 (Tex. App.—Austin 1997, no pet.).

Third parties who have been ordered to turn over property include—

1. corporations holding the debtor's stock, *Norsul Oil & Mining Ltd. v. Commercial Equipment Leasing Co.*, 703 S.W.2d 345, 348–49 (Tex. App.—San Antonio 1985, no writ);

2. representatives of the debtor's estate, *Buller*, 806 S.W.2d at 227; *First City National Bank of Beaumont v. Phelan*, 718 S.W.2d 402 (Tex. App.—Beaumont 1986, writ ref'd n.r.e.); and

3. sureties on the debtor's supersedeas bond, *Schliemann v. Garcia*, 685 S.W.2d 690 (Tex. App.—San Antonio 1984, no writ).

If the third party claims an interest in the property, turnover should not be used. *See, e.g., Plaza Court, Ltd. v. West*, 879 S.W.2d 271 (Tex. App.—Houston [14th Dist.] 1994, no writ) (turnover order improperly placed third parties into receivership); *Republic Insurance Co. v. Millard*, 825 S.W.2d 780 (Tex. App.—Houston [14th Dist.] 1992, no writ) (third party may not be included as party defendant for first time in postjudgment turnover petition); *Cravens, Dargan & Co. v. Peyton L. Travers Co.*, 770 S.W.2d 573 (Tex. App.—Houston [1st Dist.] 1989, writ denied) (defendant's bond held by State Board of Insurance); *United Bank Metro v. Plains Overseas Group, Inc.*, 670 S.W.2d 281 (Tex. App.—Houston [1st Dist.] 1983, no writ) (creditor sought to establish that corporation wholly owned by defendant was defendant's alter ego).

Other creative but unsuccessful attempts to reach property in the hands of third parties include *Detox Industries, Inc. v. Gullett*, 770 S.W.2d 954 (Tex. App.—Houston [1st Dist.] 1989, no writ) (creditor sought order compelling corporation to cancel defendant's stock certificates and reissue stock in creditor's name); *Cross, Kieschnick & Co. v. Johnston*, 892 S.W.2d 435 (Tex. App.—San Antonio 1994, no writ) (creditor obtained judgment against misnamed party, then sought turnover order against correctly named party); and *Burns v. Miller, Hiersche, Martens & Hayward, P.C.*, 948 S.W.2d 317 (Tex. App.—Dallas 1997, writ denied) (debtor ordered to turn over distributions from spendthrift trust paid by the trustee to third parties).

The court may order the judgment creditor to turn over property to a sheriff or constable, otherwise apply the property to satisfaction of the judgment, or appoint a receiver. *See* Tex. Civ. Prac. & Rem. Code § 31.002(b)(1)–(3). The property should not be turned over directly to the creditor. *See Ex parte Johnson*, 654 S.W.2d 415, 419 (Tex. 1983) (orig. proceeding) (debtor may be denied opportunity to assert defenses if creditor promptly or improperly disposes of property); *Lozano v. Lozano*, 975 S.W.2d 63, 69 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (turnover statute allows ex parte entry of turnover orders without notice and hearing; direct turnover could deny debtor opportunity to assert defenses).

If turnover relief is sought against a third party, jurisdiction over the third party should be obtained by proper service of citation. *See generally Ex parte Swate*, 922 S.W.2d 122, 125 (Tex. 1996) (noting potential due-process problems in ordering third parties to turn over assets without notice and hearing to them).

§ 27.92 Costs and Attorney's Fees

A successful judgment creditor is entitled to recover reasonable costs, including attorney's fees, in a turnover proceeding. Tex. Civ. Prac. & Rem. Code § 31.002(e). The creditor must prove the reasonableness of the fees. *See Haden v. David J. Sacks, P.C.*, 332 S.W.3d 523, 526 (Tex. App.—Houston [1st Dist.] 2009, pet. denied); *Great Global Assurance Co. v. Keltex Properties, Inc.*, 904 S.W.2d 771, 776 (Tex. App.—Corpus Christi 1995, no writ).

The court may refuse to grant attorney's fees to an unsuccessful turnover applicant. *See Great*

Global Assurance Co., 904 S.W.2d at 776; *Boudreaux Civic Ass'n v. Cox*, 882 S.W.2d 543 (Tex. App.—Houston [14th Dist.] 1994, no writ); *Dallas Power & Light Co. v. Loomis*, 672 S.W.2d 309, 312 (Tex. App.—Dallas 1984, writ ref'd n.r.e.); *see also* Tex. R. Civ. P. 131, 141.

While a judgment creditor's failure to make sufficient attempts to collect a judgment through other legal process can be considered in determining the reasonableness of the amount of attorney's fees and costs, it is not a basis to deny such a request under section 31.002. *Great Global Assurance Co.*, 904 S.W.2d at 776.

§ 27.93 Enforcement of Turnover Order

The court may enforce its orders under the turnover statutes by contempt or by other means in case of refusal or disobedience. Tex. Civ. Prac. & Rem. Code § 31.002(c); *Ex parte Buller*, 834 S.W.2d 622, 626–27 (Tex. App.—Beaumont 1992, no writ) (contemner may be imprisoned to coerce compliance with turnover order if she possesses means to satisfy judgment). A motion for contempt brought during an appeal may be filed in either the trial court or the court of appeals. *In re Sheshtawy*, 154 S.W.3d 114 (Tex. 2004) (abrogating *Schultz v. Fifth Judicial District Court of Appeals at Dallas*, 810 S.W.2d 738 (Tex. 1991) (orig. proceeding)). For a general discussion of contempt of court, see section 26.7 in this manual. When using the discovery contempt forms as a starting point for holding a judgment debtor in contempt for violating a turnover order, the practitioner should take care to change the grounds paragraph to refer to Texas Civil Practice and Remedies Code section 31.002 and not Texas Rule of Civil Procedure 215.

§ 27.94 Court's Discretion

The standard of review of a turnover order is whether the trial court abused its discretion. *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991). It is unclear, however, if the trial court's discretion applies to the determination of whether to grant relief under the entire turnover statute or merely applies to the determination of the manner of the turnover. *Compare Buttles v. Navarro*, 766 S.W.2d 893, 894 (Tex. App.—San Antonio 1989, no writ), *and Barlow v. Lane*, 745 S.W.2d 451, 453–54 (Tex. App.—Waco 1988, writ denied) (statute's use of "may" gives court discretion to grant or deny turnover relief), *with Anderson v. Lykes*, 761 S.W.2d 831, 834 (Tex. App.—Dallas 1988, no writ) (statute's use of "entitled" gives creditor right to hearing on application for turnover relief), *overruled on other grounds as recognized in In re Crow-Billingsley Air Park, Ltd.*, 98 S.W.3d 178, 180 (Tex. 2003). *See also Charles v. Tamez*, 878 S.W.2d 201, 205 (Tex. App.—Corpus Christi 1994, no writ).

§ 27.95 Appeal of Turnover Order

A turnover order is in the nature of a mandatory injunction. Therefore, an appeal can be taken from a final turnover order. *Schultz v. Fifth Judicial District Court of Appeals at Dallas*, 810 S.W.2d 738 (Tex. 1991) (orig. proceeding), *abrogated on other grounds by In re Sheshtawy*, 154 S.W.3d 114 (Tex. 2004)); *Burns v. Miller, Hiersche, Martens & Hayward, P.C.*, 909 S.W.2d 505, 506 (Tex. 1995). If, however, certain requests for relief are left undecided by the order, such as an award or denial of attorney's fees, or the turnover order requires further orders of the court, the order may be merely interlocutory and therefore nonappealable. *See Brecheisen v. Johnson*, 665 S.W.2d 191, 192 (Tex. App.—Dallas 1984, writ ref'd n.r.e.) (defendant ordered to turn over property to registry of court; further order releasing funds to creditor required). A turnover order that is con-

trary to statute or contains errors is only voidable, not void. It must be attacked directly. *In re Wiese*, 1 S.W.3d 246 (Tex. App.—Corpus Christi 1999) (orig. proceeding). The appellate timetable for a final judgment applies. *Burns*, 909 S.W.2d 505.

A motion for contempt brought during an appeal may be filed in either the trial court or the court of appeals. *In re Sheshtawy*, 154 S.W.3d 114.

If the turnover order requires further orders of the court, the order is interlocutory and not appealable. The remedy is mandamus. *See Brecheisen*, 665 S.W.2d at 192. Otherwise, the order is a final order subject to appeal. *See International Paper Co. v. Garza*, 872 S.W.2d 18, 19 (Tex. App.—Corpus Christi 1994, no writ).

§ 27.96 Serial Receiverships

The turnover order places the debtor's nonexempt assets described in the order *in custodia legis*. *First Southern Properties, Inc. v. Vallone*, 533 S.W.2d 339, 341 (Tex. 1976). If a turnover order is entered in another action, there are no assets available to that action because the property is in control of the first court. The receiver in the second case could demand documents and perform discovery, but the assets are in control of the court that issued the first order.

§ 27.97 Practice Tips

The practitioner should draft the order so that it both compels the judgment debtor to turn over its nonexempt property to the receiver and empowers the receiver to take possession. The attorney should consider a receivership order as a road map for third parties. It is helpful to third parties to see in the order that the receiver has been authorized to make a particular request of them. If the order compels the debtor to make periodic payments, include a finding of fact stating the source of the money and that it is nonexempt. *See Ex parte Prado*, 911 S.W.2d 849, 850 (Tex. App.—Austin 1995, orig. proceeding) (order that debtor pay $500 per month without identifying specific nonexempt asset held unconstitutional).

The attorney should not include in the order appointing a receiver a finding that the receiver's fee is reasonable. Obtain a finding that the fee is reasonable later, as part of a separate application and order. *See Moyer v. Moyer*, 183 S.W.3d 48, 57–58 (Tex. App.—Austin 2005, no pet.). *See Evans v. Frost National Bank*, No. 05-12-01491-CV, 2015 WL 4736543, at *4–5 (Tex. App.—Dallas Aug. 11, 2015) (mem. op.) (no pet.) (initial order setting receiver's fee was not improper because there was an evidentiary hearing held after sale of property to determine whether receiver's fee as set forth in order appointing receiver was fair, reasonable, and necessary).

The attorney should provide the receiver with a copy of the judgment and any other postjudgment orders that award fees and let the receiver know of any postjudgment credits that are due and of recoverable costs of court. This allows the receiver to properly calculate the judgment amount.

The attorney also should provide the receiver with whatever documentation and information he has that identifies leviable assets and provide the receiver with the debtor's and the debtor's counsel's contact information.

Once a receiver is appointed, the creditor's counsel should instruct the plaintiff that the debtor might reach out to the plaintiff but that the debtor should be instructed to contact the receiver instead.

[Sections 27.98 through 27.100 are reserved for expansion.]

VI. Other Postjudgment Collection Devices

§ 27.101 Partnership Charging Order

§ 27.101:1 Purpose and Effect of Charging Order

A charging order allows a judgment creditor to reach a debtor's interest in a partnership to satisfy the judgment. In this situation, the judgment creditor has the right only to receive any distribution to which the debtor would otherwise have been entitled in the partnership interest. A charging order constitutes a lien on the debtor's partnership interest and is the exclusive remedy by which a judgment creditor of a partner or any other owner of a partnership interest may satisfy a judgment out of the debtor's partnership interest. Tex. Bus. Orgs. Code §§ 152.308(a)–(d), 153.256(a)–(d). Note that sections 152.308 and 153.256 of the Texas Business Organizations Code do not deprive a partner or other owner of a partnership interest of a right under exemption laws with respect to the judgment debtor's partnership interest. Tex. Bus. Orgs. Code §§ 152.308(e), 153.256(e). Also, a creditor of a partner or of any other owner of a partnership interest does not have the right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the partnership. Tex. Bus. Orgs. Code §§ 152.308(f), 153.256(f).

The court's grant of a charging order is discretionary. *Commerce Savings Ass'n v. Welch*, 783 S.W.2d 668, 671 (Tex. App.—San Antonio 1989, no writ).

§ 27.101:2 Procedure

The attorney should file the application for a charging order in the court that rendered the underlying judgment unless jurisdictional or venue considerations force filing in another court.

It is the better practice to serve the partnership with citation, although there is no express requirement to do so. If the application is filed in a court other than the one rendering the underlying judgment, the attorney should serve citation on the judgment debtor as well. Service of citation brings the party served within the court's jurisdiction, allowing a judgment ordering the partnership to obey the charging order. Tex. R. Civ. P. 124.

For an application and charging order, see forms 27-23 and 27-24 in this chapter.

§ 27.102 Temporary Restraining Orders and Injunctions

A judgment creditor may use injunctions or other means to reach property to satisfy a judgment. Tex. Civ. Prac. & Rem. Code § 31.002(a). Injunctive relief is appropriately used as part of a turnover action to preserve the status quo pending final action. For example, the judgment debtor could be enjoined from disposing of or secreting the property in question pending final orders. See sections 8.33 through 8.40 in this manual for further discussion of injunctions.

If the judgment creditor seeks any form of injunctive relief, care should be taken to comply with all applicable requirements including equitable pleading, verification, bond, filing, citation, and writ requirements. *See* David Hittner, *Texas Post-Judgment Turnover and Receivership Statutes*, 45 Tex. B.J. 417, 418 (1982). *But see Roosth v. Roosth*, 889 S.W.2d 445, 460 (Tex.

App.—Houston [14th Dist.] 1994, writ denied); *Childre v. Great Southwest Life Insurance Co.*, 700 S.W.2d 284, 288 (Tex. App.—Dallas 1985, no writ) (traditional requirements for appointing receiver or granting injunction do not apply when relief is granted under turnover statute).

If the application for turnover seeks both a receiver and an injunction, one bond may serve both purposes. *See Childre*, 700 S.W.2d at 288–89.

§ 27.103 Receivership under Texas Deceptive Trade Practices–Consumer Protection Act

The Texas Deceptive Trade Practices–Consumer Protection Act (DTPA) authorizes the appointment of a receiver if a money judgment entered under the Act remains unsatisfied thirty days after it becomes final. The DTPA creates a set of presumptions entitling the judgment creditor to the appointment of a receiver over the defendant's business unless the defendant proves that all the presumptions do not apply. Tex. Bus. & Com. Code § 17.59. If the conditions for the appointment are met, the court must appoint a receiver. *Dudley v. E.W. Hable & Sons*, 683 S.W.2d 102, 103–04 (Tex. App.—Tyler 1984, no writ).

§ 27.104 Investment Securities

A creditor whose debtor is the owner of an investment security may obtain aid from the courts, by injunction or otherwise, in reaching the security. Tex. Bus. & Com. Code § 8.112(e).

§ 27.105 Assignment of Judgment

The judgment creditor may sell its interest in a judgment in lieu of collecting the judgment. The formal requirements for transfers of judgments (or transfers of a cause of action) are found in Tex. Prop. Code § 12.014. The assignment must be in writing, acknowledged or sworn to in the form and manner required by law for acknowledgment or swearing of deeds, and filed among the papers of the suit. Tex. Prop. Code § 12.014(a), (b). Additionally, the assignment may be filed in the real property records where the abstract of judgment is filed so that the real property records reflect the owner of the judgment and any liens related thereto. *See* Tex. Prop. Code § 12.014(c). See form 27-25 in this chapter.

Form 27-1

If multiple parties are named in the judgment, they all must be listed and their addresses shown. Tex. Prop. Code § 52.0041. If anyone besides the court clerk prepares the abstract, it must be verified. Tex. Prop. Code § 52.002. The attorney should be careful not to exclude any of the required contents of Tex. Prop. Code §§ 52.003 and 52.0041. See the discussion at section 27.5 in this chapter.

Abstract of Judgment

STATE OF TEXAS)

COUNTY OF)

I, [**name of attorney**], attorney of record for [**name of plaintiff**], Judgment Plaintiff, certify that in Cause No. [**number**] in [**designation and location of court**], wherein [**name of plaintiff**] is Plaintiff and [**name of defendant**] is Defendant, Judgment Plaintiff recovered a judgment against [**name of defendant**], Judgment Defendant. Judgment Plaintiff's mailing address is [**address, city, state**].

Select one of the following. Select the first paragraph if the defendant's address is shown in the suit. Select the second paragraph if the defendant's address is not shown in the suit.

Judgment Defendant's address is [**address, city, state**].

Or

Judgment Defendant was served with citation by [**nature of citation, e.g.,** substituted service on Don Davis] on [**date**], at [**place where citation was served**].

Continue with the following.

Judgment Defendant's birthdate is [**birthdate, if available**].

The last three numbers of Judgment Defendant's driver's license number are [**last three numbers of driver's license number, if available**].

The last three numbers of Judgment Defendant's Social Security number are [**last three numbers of Social Security number, if available**].

Judgment was rendered on [**date**], in the amount of $[**amount in figures, e.g.,** $10,000.00] ([**amount spelled out, e.g.,** Ten Thousand and NO/100 Dollars]), attorney's fees in the amount of $[**amount**], and costs in the amount of $[**amount**].

The interest rate on the judgment is [**percent**] percent per year, from date of judgment until paid.

The judgment is entitled to the following credits: [**list each credit**].

There is now still due on this judgment the amounts set out above.

_____

[**Name**]
Attorney for Judgment Plaintiff
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

BEFORE ME, the undersigned authority, on this _____ day of _____ personally appeared [**name of attorney**], who swore on oath that the information in this abstract of judgment is true and correct.

_____

Notary Public, State of Texas

After recording, return to: [**name and address of attorney for judgment plaintiff**]

Form 27-2

Letter to Client Explaining Judgment Lien

[Date]

[Name and address of creditor-client]

Re: Defendant: [name of debtor]
Amount of claim: $[amount]
[style of case]
Cause No. [number]
[designation and location of court]

[Salutation]

Enclosed is a copy of the abstract of judgment that has been filed in [name of each county in which abstract was filed] County[ies], which created a judgment lien on any nonexempt real property in which the debtor owns an interest in [that/those] county[ies]. The lien is effective for ten years from the date of signing of the judgment, but it can be extended by renewal of the judgment and filing of subsequent abstracts. If you want to renew the judgment, please contact my office at least six months before the judgment expires.

The lien attaches only to nonexempt real property in the county in which an abstract was filed. Please notify me if you know of any other Texas county in which the debtor owns an interest in realty or may acquire one in the future, and I will file an abstract in each such county to obtain a lien on that property.

Sincerely yours,

_____

[Name of attorney]

Enc.

Form 27-3

When the judgment has been satisfied, the defendant should be sent a release of the judgment for filing wherever an abstract of the judgment was filed. The release must be signed by the party entitled to receive payment of the judgment or his agent or attorney of record, and it must be acknowledged or proved for record as required for deeds. Tex. Prop. Code § 52.005.

Release of Judgment Lien

On [**date**], in Cause No. [**number**] in [**designation and location of court**], [**name of plaintiff**] was awarded judgment for $[**amount**], plus interest and costs, from [**name of defendant**]. The judgment has been satisfied. THEREFORE, as authorized attorney of record for [**name of plaintiff**], who is the party entitled to receive payment of the judgment, I hereby release [**name of defendant**] from the judgment and any lien existing because of the judgment.

SIGNED on _____.

_____
[**Name**]
Attorney for Judgment Plaintiff
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

This instrument was acknowledged before me on _____ by [**name of attorney**].

_____
Notary Public, State of Texas

Send the original document(s) to the defendant, advising him to record the release in every county in which the abstract was filed.

Form 27-4

If the judgment cannot be satisfied at this time, the attorney should not promise to follow up ten years later to extend the life of the judgment lien but should place that responsibility with the creditor; see section 27.8:3 in this chapter.

Letter to Client Reporting That Judgment Cannot Be Collected

[Date]

[Name and address of creditor-client]

Re: Defendant: **[name of debtor]**
Amount of claim: $**[amount]**
[style of case]
Cause No. **[number]**
[designation and location of court]

[Salutation]

Judgment was rendered in the referenced case on **[date]**, and an abstract of judgment has been filed in **[name of each county in which abstract was filed]** County[ies]. I have not been able to completely collect the judgment and believe that at this time additional efforts would be fruitless.

Filing the abstract of judgment created a judgment lien on the debtor's nonexempt real property in that county. To keep the judgment lien alive under present Texas law, within ten years of the date of judgment a new writ of execution must be issued and levied and a new abstract of judgment must be recorded.

I suggest that you periodically have the law checked to determine whether it has changed and that you calendar this matter for nine years from the date of judgment so that you can make sure at that time that the judgment lien is not allowed to expire. I will not act further

on this matter unless you direct me to do so. If you wish me to renew the judgment you must let me know at least six months before the judgment is to expire.

Sincerely yours,

_____

[Name of attorney]

Form 27-5

This letter asks the clerk to send the writ to the plaintiff's attorney for forwarding to the officer, which is recommended so that the attorney can check the writ and its return for accuracy; see section 27.13 in this chapter. The clerk should be contacted to ascertain the correct fee.

The attorney should request an order of sale if the judgment orders foreclosure on specific property; see section 27.13:4. The writ can issue before thirty days after judgment if the defendant is about to remove or hide his property; see section 27.12:1. In such a situation, the attorney will probably want to request the writ in person to avoid delay. For an affidavit, see form 27-6.

See section 27.13:7 for situations in which a thirty-day or sixty-day return may be advisable.

Letter to Clerk Requesting Writ of Execution or Order of Sale

[**Date**]

[**Name or identification and address of clerk**]

Re: [**style of case**]
Cause No. [**number**]
[**designation and location of court**]

[**Salutation**]

Please issue [a writ of execution/an order of sale] in the referenced cause. [**Include if seeking the writ before the thirtieth day after rendition of judgment:** Execution can issue based on the enclosed affidavit.] The judgment debtor's last known address is [**address, city, state**]. [**Include if applicable:** Please show the following credits to the judgment: [**amounts and dates of credits**].]

Please mark the writ to be returned within [thirty/sixty/ninety] days and send it to me for forwarding to the appropriate officer. My check for your fee is enclosed.

Thank you for your service.

Sincerely yours,

_____

[Name of attorney]

Enc.

Include an affidavit (form 27-6) if applicable.

Form 27-6

This affidavit is to be made by the plaintiff or his agent or attorney and can be submitted in person or by letter (see form 27-5 in this chapter). Immediate execution on the affidavit under Tex. R. Civ. P. 628 is discussed at section 27.12:1.

The manual committee recommends that the attorney not execute any affidavit for a client; see section 19.17:3.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Affidavit for Immediate Issuance of Writ of Execution

BEFORE ME, the undersigned authority, on this day personally appeared [**name of affiant**], who swore on oath that the following facts are true:

"I am [Plaintiff/[**other capacity, e.g.,** credit manager of Plaintiff]] in this cause. [**Include if affiant is agent:** I am authorized to make this affidavit and to apply for immediate issuance of a writ of execution in this cause.]

"In this Court on [**date**], judgment was rendered for [**name of plaintiff**], Plaintiff, against [**name of defendant**], Defendant.

"[**State specific facts relied on to warrant immediate execution, e.g.,** Defendant has stated to me that 'within a few days' he is going to move to another county, taking all his personal property with him.]

"Execution should issue immediately because Defendant

Select one of the following.

is about to remove his personal property subject to execution by law out of the county."

Or

is about to [transfer/secrete] his personal property subject to execution by law for the purpose of defrauding Defendant's creditors."

Continue with the following.

_____

[Name of affiant]
Affiant

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

Form 27-7

The attorney should inspect the writ of execution and send it to the sheriff or constable rather than having the clerk do so; see section 27.13:1 in this chapter. The officer should be contacted to ascertain the correct fee. Local practices vary; in some counties, the clerk collects the officer's fee when the writ is issued. In such a case, it is unnecessary to send payment with this letter, and the letter should be modified accordingly.

The attorney may want to attend the sale to make sure it is conducted properly and to assist the officer if needed. The plaintiff may also want to attend to bid on the property.

Letter to Officer Transmitting Writ of Execution or Order of Sale

[Date]

[Name, title, and address of officer]

Re: Defendant in execution: **[name of defendant]**
[style of case]
Cause No. **[number]**
[designation and location of court]

[Salutation]

Enclosed is [a writ of execution/an order of sale] in the referenced cause.

Please endorse the [writ/order] with the hour and date you received it and try to obtain from the defendant immediate payment of the total judgment, interest, court costs, and your costs. If the defendant will not pay the judgment and costs, please immediately levy on the defendant's property subject to the writ, remove the property to a place of safekeeping unless impossible to do so without large expense and effort, post your notice, and conduct a sale according to law.

Please send me a copy of the notice of sale.

The last known address in your county of the defendant in execution is **[address, city, state]**.

Include additional special instructions if desired.

If a problem arises, or if you need additional information, please telephone me (collect if long distance).

Please do not give the defendant notice of your intent to levy. Please do not negotiate a payment agreement. If the defendant wishes to make payment arrangements, have the defendant contact me immediately. Please let me know the date and time of the intended levy so that I can be available by phone to respond to any offers by the defendant or to any questions regarding the levy.

My check for your fee is enclosed. Please mail your completed return to me. For your convenience I am enclosing two addressed, stamped envelopes, and I will appreciate hearing from you promptly.

Thank you for your immediate attention to this matter.

Sincerely yours,

_____

[Name of attorney]
Attorney for Plaintiff in Execution

Certified Mail No. **[number]**
Return Receipt Requested

Enc.

c: **[name of client]**

Form 27-8

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Plaintiff's Original Petition to Revive Judgment

Plaintiff, [**name of plaintiff**], makes this Original Petition to Revive Judgment. Defendant[s] [is/are] [**name[s] of defendant[s]**]. Plaintiff shows as follows:

1. *Discovery Control Plan.* This suit is governed by [**describe discovery control plan as required by rule 190 of the Texas Rules of Civil Procedure**].

2. *Parties.* Plaintiff is [a [**state**] corporation and has its principal place of business in [**city**], [**county**] County, [**state**]/Plaintiff is an individual residing in [**county**] County, [**state**], and may be served with citation at [**address**]/[**describe plaintiff**]]. Defendant is [a [**state**] corporation and has its principal place of business in [**city**], [**county**] County, [**state**]/an individual residing in [**county**] County, [**state**], and may be served with citation at [**address**]/[**describe defendant**]].

Repeat as necessary for multiple defendants.

3. *Facts.* This is an action brought pursuant to section 31.006 of the Texas Civil Practice and Remedies Code. Plaintiff is the current owner and holder of a judgment [**include if applicable:** , by virtue of the Assignment of Judgment attached as Exhibit [**exhibit number/letter**],] against Defendant[s], which was taken [**date**] in the [**name of court**], [**county**] County, Texas, in Cause No. [**cause number**], styled "[**style of case**]." A true copy of the Abstract of Judgment is attached as Exhibit [**exhibit number/letter**] and incorporated herein.

This action is brought before the second anniversary of the date that the judgment became dormant.

4. *Credits Due on Judgment.* [There are no credits due on this judgment/[**describe any credits due on judgment**]].

5. *Dormancy.* The judgment is dormant but is otherwise valid and unpaid to the extent set forth in this petition. Plaintiff is entitled to a writ of scire facias reviving the judgment and an order from this Court that this action for debt revives the judgment for a period of ten years from the date the judgment became dormant.

6. *Prayer.* Plaintiff prays that the judgment be revived by writ of scire facias or an order reviving judgment pursuant to section 31.006 of the Texas Civil Practice and Remedies Code and for all further relief to which Plaintiff may be entitled.

Respectfully submitted,

_____

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach exhibit(s).

Form 27-9

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Judgment Reviving Dormant Judgment

On [**date**] the Court heard the Original Petition to Revive Judgment of [**name of plaintiff**], Plaintiff, requesting scire facias to revive judgment against Defendant[s], [**name[s] of defendant[s]**], pursuant to Texas Civil Practice and Remedies Code section 31.006.

Recite appearances of counsel and parties as appropriate.

The Court takes judicial notice that the judgment was entered on [**date**] in [this/[**name of court**]] Court against Defendant[s] in the amount of $[**amount**], with postjudgment interest at the rate of [**percent**] percent per annum from the date of judgment until paid, plus costs of court.

The Court further finds that the judgment is dormant and that this action was brought before the second anniversary of the date that the judgment became dormant.

In light of the findings, the Court is of the opinion that the Original Petition to Revive Judgment is well taken and that this judgment reviving dormant judgment should issue.

It is therefore ORDERED that Plaintiff's judgment is hereby revived for ten years from the date the judgment became dormant, and the clerk of this Court shall treat the judgment as revived and shall hereafter issue such executions or other writs and processes in this cause as needed or requested to enforce Plaintiff's judgment.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Name]
Attorney for Defendant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Form 27-10

For discussion of the sale of real property under a writ of execution, see section 27.21:1 in this chapter.

Venditioni Exponas

VENDITIONI EXPONAS	§	
	§	TO ANY SHERIFF OR CONSTABLE
	§	IN THE STATE OF TEXAS
THE STATE OF TEXAS	§	

WHEREAS, in Cause No. [**number**], styled "[**style of case**]," in the [**designation**] Court of [**county**] County, Texas, on [**date**], Plaintiff recovered judgment against Defendant in the sum of [**number**] dollars ($[**amount**]), with interest at the rate of [**percent**] percent ([**percent**]%) per year from [**date**] and all costs of suit as per the bill of costs attached to the writ of execution;

AND WHEREAS, [**name of constable or sheriff**], [Constable, Precinct [**number**],/ Sheriff of] [**county**] County, Texas, has by virtue of an execution issued on that judgment levied on the property of Defendant described in the attached list and incorporated herein by reference, and that execution will expire before the sale of the property can occur, and levy on the real property having been made on [**date**], at [**time**] [A.M./P.M.];

AND WHEREAS, no part of that judgment, interest, or costs has been paid except as has been heretofore set out,

Therefore, you are hereby commanded to proceed according to law to sell the above-described property under execution and apply the proceeds thereof to the payment and satisfaction of the aforesaid sum of $[**amount**] with interest due thereon from [**date**] and all costs of court in this behalf expended, together with the further costs of executing this writ.

Herein fail not, and have you said money, together with this writ showing how you have executed same, before said Court at the courthouse of said county in the city of [**city**], Texas, within sixty days.

Witness [**name of court clerk**], [**designation of court**] clerk of [**county**] County, Texas.

Given under my hand and seal of office at [**city**], Texas, this the [**day**] day of [**month**], [**year**].

_____

[**Name of court clerk**]
[**Designation of court**] Clerk
[**County**] County, Texas

By:_____
Deputy

Attach list of property to be sold.

Form 27-11

The application must be accompanied with one or more affidavits and served on the garnishee. Copies of the application, affidavit(s), and writ must also be served on the defendant in the original suit, but they can be served in any manner allowed by Tex. R. Civ. P. 21a. Tex. R. Civ. P. 663a. See form 27-12 in this chapter for a sample affidavit.

This form contains an allegation that the garnishment is not sought to injure either the judgment debtor or the garnishee. Although this allegation and finding is not specifically required by statute for post-judgment garnishment cases, at least one court has required it in a case involving more than one defendant. *See Kisro v. Heard*, 547 S.W.2d 322 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Leave a blank for the cause number. Style the pleading "[**name of plaintiff**], plaintiff, v. [**name of garnishee**], garnishee."

Application for Writ of Garnishment after Judgment

1. *Parties.* [**Name of plaintiff**], Plaintiff in garnishment, whose address is [**address, city, state**], makes this Application for Writ of Garnishment after Judgment. Garnishee is [**name of garnishee**], who may be served with citation at [**address, city, state**].

2. *Facts.* Plaintiff has a valid, subsisting judgment against Defendant, [**name of defendant**], whose address is [**address, city, state**], in Cause No. [**number**] in this Court. Within Plaintiff's knowledge, Defendant does not possess property in Texas subject to execution sufficient to satisfy the judgment. This garnishment is not sought to injure Defendant or Garnishee.

3. *Affidavit.* Plaintiff is entitled to the issuance of a writ of garnishment on the grounds stated in the attached affidavit. The affidavit is incorporated in this application by reference.

4. *Prayer.* Plaintiff prays that—

   a. a writ of garnishment be issued directed to Garnishee;

b. Plaintiff be granted judgment against Garnishee for the amount now due on Plaintiff's judgment already rendered against Defendant, together with interest and costs of the suit in the original case and in this garnishment proceeding;

c. Plaintiff be granted judgment for prejudgment and postjudgment interest at the highest rate allowed by law; and

d. Plaintiff be granted all further relief to which Plaintiff may be entitled.

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach affidavit(s) (form 27-12). Prepare the garnishment judgment (form 27-15).

Form 27-12

The affidavit is to be executed by the plaintiff, his agent, his attorney, or someone having knowledge of relevant facts. Tex. R. Civ. P. 658; *see also* Tex. Civ. Prac. & Rem. Code § 63.001. The affidavit is to be attached to the application for writ of garnishment (form 27-11). The manual committee recommends that the attorney not execute any affidavit for a client; see section 19.17:3 in this manual.

This form contains language not specifically required by rule or statute but that the manual committee finds prudent to include. This language includes (1) a statement that the garnishment is not sought to injure either the judgment debtor or the garnishee; (2) the statement "I have reason to believe and do believe that Garnishee has property belonging to Defendant or is indebted to Defendant"; and (3) the affiant's statement of the specific grounds for any belief he may have that is stated in the affidavit. *See El Periodico, Inc. v. Parks Oil Co.*, 917 S.W.2d 777, 779 (Tex. 1996); Tex. R. Civ. P. 658.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for writ of garnishment at form 27-11.

Affidavit for Writ of Garnishment after Judgment

BEFORE ME, the undersigned authority, on this day personally appeared [**name of affiant**], who swore on oath that the following facts are true:

"I am [Plaintiff/[**other capacity, e.g.,** credit manager of Plaintiff]] in this cause. [**Include if affiant is agent:** "I am authorized to make this affidavit and application for a writ of garnishment in this cause.]

"I have personal knowledge of the facts stated in this affidavit, and they are true and correct.

"Plaintiff owns a judgment against [**name of defendant**], Defendant, which was rendered on [**date**] by this Court. The judgment is valid and subsisting, and a supersedeas bond has not been approved and filed to suspend execution of the judgment. The amount now due and unpaid on the judgment is $[**amount**].

"Within my knowledge, Defendant does not possess property in Texas subject to execution sufficient to satisfy the judgment. This garnishment is not sought to injure Defendant or Garnishee.

"I have reason to believe and do believe that Garnishee has property belonging to Defendant or is indebted to Defendant. This belief is based on [**state facts supporting belief, which may include specific bank account numbers acquired through discovery or from previous payments made by the defendant**]."

_____

[Name of affiant]
Affiant

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

Form 27-13

Proof of service of the writ of garnishment in accordance with Tex. R. Civ. P. 663a may be documented with this form. Note, however, that this form is not a substitute for service of the writ of garnishment on the defendant but is in addition thereto and for purposes of documentation. This notice is to be used as a cover sheet for the writ (form 8-5 in this manual); see section 27.59:3.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for writ of garnishment at form 27-11.

Notice of Garnishment

To [**name of defendant**], Defendant:

You are hereby notified that certain properties alleged to be owned by you have been garnished. If you claim any rights in such property, you are advised:

YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT.

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach a copy of the writ (form 8-5). Include a certificate of service (form 19-1).

Form 27-14

The officer receiving the writ "shall make return thereof as of other citations." Tex. R. Civ. P. 663. Texas Civil Practices and Remedies Code section 17.030 and Tex. R. Civ. P. 107 generally discuss the requirements for a return of service. The return and any document to which it is attached must be filed with the court and may be filed electronically or by facsimile, if available. Tex. R. Civ. P. 107(g). See the discussions of the officer's return at sections 16.8 and 27.60 in this manual.

For a writ of garnishment before judgment to be served on the garnishee, see form 8-5. For a notice of garnishment to be served on the defendant, see form 27-13.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for writ of garnishment at form 27-11.

Officer's Return for Postjudgment Writ of Garnishment

CAME TO HAND at _____ __.M. on the _____ day of _____ and executed at _____ __.M. on the _____ day of _____ at _____, _____ County, Texas, by delivering to [**name of person or entity**], at [**address, city, state**], [**describe manner of service or attempted service**], a true copy of this Writ of Garnishment.

The distance actually traveled by me in execution of this process was _____ miles, and my fees are $_____.

_____

[**Name**]

SHERIFF OR CONSTABLE

Form 27-15

For a discussion of the judgment and its enforcement, see sections 27.67 and 27.68 in this chapter. Chapter 20 should provide helpful information, particularly section 20.11 regarding determining the rate of postjudgment interest to be earned.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for writ of garnishment at form 27-11 unless the garnishment proceeding has been transferred.

Judgment in Garnishment

At the hearing on Plaintiff's action for postjudgment garnishment in this cause,

Select the following if the garnishee's answer admits debt.

it appeared that Garnishee had filed an uncontroverted answer admitting that Garnishee [is indebted to Defendant/possesses effects of Defendant liable to execution/is indebted to Defendant and possesses effects of Defendant liable to execution]. The Court considered the pleadings and official records on file in this cause and the evidence and believes that judgment should be rendered for Plaintiff.

Or

Select the following if this is an agreed judgment.

the attorneys for Plaintiff and Garnishee announced to the Court that Plaintiff and Garnishee have agreed that judgment should be rendered for Plaintiff. The Court considered the pleadings and official records on file in this cause and the evidence and believes that judgment should be rendered for Plaintiff as agreed.

Or

Select the following if there is default by the garnishee; before seeking a default judgment, be sure the record will support it. See part II. in chapter 20 (requisites for default judgment) and sections 27.60 (officer's return) and 27.61:4 (no answer).

Plaintiff appeared through his attorney of record. Garnishee, although duly cited to appear and answer, failed to file an answer within the time allowed by law and did not appear. The Court considered the pleadings and official records on file in this cause and the evidence and believes that judgment should be rendered for Plaintiff.

Or

Select the following if there is trial to the court.

all parties appeared through their attorneys of record and announced ready for trial. Because a jury was not requested, the Court decided all fact questions. The Court considered the pleadings and official records on file in this cause, the evidence, and the arguments of counsel and believes that judgment should be rendered for Plaintiff.

Or

Select the following if there is trial by jury.

all parties appeared through their attorneys of record and announced ready for trial. A jury was duly accepted, impaneled, and sworn. The jury returned its verdict after hearing the evidence, the arguments of counsel, and the Court's instructions and after receiving questions to be answered. This judgment is based on the jury's verdict.

Continue with the following.

Select one or both of the following. Select the first paragraph if the garnishee is indebted to the judgment debtor. Select the second paragraph if the garnishee has the judgment debtor's effects. See sections 20.11 and 27.67.

It is ADJUDGED that [**name of plaintiff**], Plaintiff, recover from [**name of garnishee**], Garnishee, judgment for $_____ plus interest at the rate of _____ percent per year on this garnishment judgment from the date of judgment until paid.

And/Or

It is ORDERED that Garnishee deliver to the sheriff or constable on demand the following effects of Defendant or as much of them as necessary to satisfy this judgment: [**specify nonexempt property to be delivered for sale**]. The officer is ORDERED to sell the effects under execution and to apply the proceeds toward satisfaction of this judgment.

If costs are awarded to the garnishee, include the following paragraph; this paragraph should be included if the judgment is on an uncontroverted answer or by agreement. If the answer is contested, the court might award costs differently. The garnishee will not be awarded costs if he does not answer. See section 27.66.

It is [further] ADJUDGED that Garnishee recover Garnishee's costs of this proceeding and $_____ as attorney's fees from Defendant, [for which execution may issue/to be paid from the property of Defendant in Garnishee's possession].

Continue with the following.

It is [further] ADJUDGED that Garnishee be discharged from liability to Defendant for payment of debt or delivery of effects to the extent of the amount consumed in satisfying this judgment.

This judgment finally disposes of all parties and all claims and is appealable.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Name]
Attorney for Garnishee
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

File the proposed judgment with the application (form 27-11) and affidavit (form 27-12) with the court.

Form 27-16

This application should be accompanied with an order for turnover relief. See form 27-17 in this chapter for an order.

A certificate of service may be included, although Tex. Civ. Prac. & Rem. Code § 31.002 permits ex parte entry of a turnover order. See sections 27.86 and 27.87 for discussion.

An application for turnover relief can be filed separately or as an original action. If this application is filed as an original action, it should contain all allegations required for every new lawsuit filed. See part I. in chapter 14 and section 27.85 in this manual.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

> Use the same caption as in the judgment. Alternatively, a new, independent suit can be brought. See section 27.84.

Application for Turnover Relief

1. *Parties.* Applicant [**name of plaintiff**], Plaintiff and judgment creditor in this cause, requests that the Court grant this Application for Turnover Relief against [**name of defendant**], Defendant and judgment debtor.

2. *Judgment.* Plaintiff recovered judgment against Defendant on [**date**] in this cause. The judgment remains unsatisfied.

3. *Property Subject to Turnover.* Defendant owns property that is not exempt under any statute from attachment, execution, or seizure for the satisfaction of liabilities.

> If a receiver or an injunction is sought, modify the application accordingly; see section 27.88 concerning receivership and sections 27.102 and 8.33 through 8.36 concerning injunctions.

4. *Motion for Turnover.* Plaintiff moves the Court to order Defendant to turn over its nonexempt property, with all documents and records related to that property, to [**name or title of sheriff or constable**] at [**officer's address, city, state**], on or before [**date**].

5. *Attorney's Fees.* Plaintiff is entitled to recover reasonable attorney's fees and costs. Reasonable fees for the attorney's services rendered and to be rendered are at least $[**amount**].

6. *Prayer.* Plaintiff prays that the Court—

a. set this matter for hearing;

b. issue the orders requested in this application;

c. grant Plaintiff at least $[**amount**] as reasonable attorney's fees;

d. grant Plaintiff reasonable expenses incurred in obtaining these orders; and

e. grant all further relief to which Plaintiff may be entitled.

[**Name**]
Attorney for Plaintiff
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Include a notice of hearing (form 19-2). Include a certificate of service (form 19-1) unless ex parte relief is sought. Attach a supporting affidavit of the judgment creditor if an injunction is sought. Prepare the turnover order (form 27-17). Send a copy of the application, order, and notice of hearing to the opposing party unless ex parte relief is sought.

Form 27-17

For an application for turnover relief to accompany this order, see form 27-16 in this chapter. If the property is to be turned over to a sheriff or constable for execution sale, the attorney should make certain that the court clerk issues a writ of execution, that the writ is delivered to the sheriff or constable, and that the officer is informed that the judgment debtor will be turning property over to him for levy of execution. See part II. in this chapter.

This order assumes that the plaintiff has given notice to the defendant of his intention to seek turnover relief. See sections 27.86 and 27.87 regarding ex parte relief.

[Caption. See 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for turnover relief at form 27-16.

Order for Turnover Relief

On [**date**] the Court considered Plaintiff's Application for Turnover Relief.

Recite appearances of counsel and parties as appropriate.

The Court considered the pleadings, the evidence, and the argument of counsel and finds that Defendant is the owner of property that is not exempt under any statute from attachment, execution, or seizure.

It is therefore ORDERED that Defendant, [**name of defendant**], turn over for levy to [**name or title of levying officer**] at [**address, city, state**] on or before [**date property is to be turned over**], the following: [**describe property**], with all documents and records related to the property.

Include other appropriate orders, such as issuance of an injunction, with orders concerning any required bond. See section 8.39 regarding injunction orders, forms 8-11 through 8-16, and sections 27.88 and 27.102 regarding receivership and injunctions in turnover actions.

It is further ORDERED that Plaintiff recover from Defendant reasonable and necessary attorney's fees in the amount of $_____ and all costs of this proceeding.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

_____
[Name]
Attorney for Defendant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Form 27-18

Tex. Civ. Prac. & Rem. Code § 31.002 discusses the collection of judgments through a court proceeding, allowing the court to appoint a receiver to take the proceeds from the sale of nonexempt property to satisfy the judgment. *See* Tex. Civ. Prac. & Rem. Code § 31.002(b)(3). See section 27.88 in this chapter for a discussion of receiverships. The following is merely a sample form for seeking the appointment of a receiver, and the practitioner should be careful to tailor it as needed for each set of facts.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Motion for Postjudgment Receivership

Movant is [**name of plaintiff**], Plaintiff and judgment creditor, who moves the Court to appoint a receiver to collect the judgment in this cause.

1. *Facts.* Plaintiff obtained a final judgment against [**name of defendant**], Defendant, in this cause on [**date**] in the amount of $[**amount**]. The judgment is final, has not been superseded, and remains fully payable. [**Include if applicable:** A copy of the judgment is attached as Exhibit [**exhibit number/letter**].]

2. *Grounds.* Pursuant to Texas Civil Practice and Remedies Code section 31.002, Plaintiff requests the Court to appoint [**name of receiver**], a resident of Texas, as a receiver to collect the judgment. Defendant owns property, including present or future rights to property, that cannot readily be attached or levied on by ordinary legal process and that is not exempt from attachment, execution, or seizure for the satisfaction of liabilities, to wit [**describe nonexempt property**] (the "Property").

Include the following if applicable.

3. *Extended Notice.* This motion is being filed with extended notice to Defendant to allow Defendant time to make arrangements to pay the judgment. Defendant is notified of Plaintiff's willingness to consider an installment payment plan. If this matter is heard by the

Court, the parties were unable to reach an agreement and Plaintiff respectfully submits that it is entitled to aid from the Court to collect the judgment.

Continue with the following.

4. *Receivership.* Plaintiff requests that the Court appoint a receiver over the Property and authorize broad powers but require the receiver to obtain further court order, or approval of Defendant, before any disbursement of funds. The Court will continue to monitor the receivership, and no funds will be paid without either Defendant's written agreement or further court order. [**Include if applicable:** Attached as Exhibit [**exhibit number/letter**] is information on [**name of receiver requested**].]

5. *Prayer.* Movant prays that—

a. the Court set this matter for hearing;

b. the Court appoint a receiver to collect the judgment in this cause, subject to further supervision of the Court;

c. Movant be awarded attorney's fees of $[**amount**];

d. the Court provide for payment of fees and costs to the receiver; and

e. Movant be granted all further relief to which Movant may be entitled.

[**Name**]
Attorney for Plaintiff
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Include the following if applicable.

Certificate of Conference

I certify that I contacted [**name of defendant or of attorney for defendant**], [Defendant/Counsel for Defendant], on [**date[s]**] and that [Defendant/Counsel for Defendant] was unavailable. Further attempts will be made to discuss this motion with [Defendant/Counsel for Defendant] before the hearing, although it is believed [Defendant/Counsel for Defendant] will oppose the receivership, and this motion should be scheduled for hearing.

_____

[**Name**]
Attorney for [**name of movant**]

Include a notice of hearing (form 19-2) and a certificate of service (form 19-1). Attach exhibit(s).

Form 27-19

For a motion for postjudgment receivership to accompany the order, see form 27-18 in this chapter. See Tex. Civ. Prac. & Rem. Code § 31.002 regarding the collection of judgments through a court proceeding and section 27.88 for a discussion of receiverships.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the motion for postjudgment receivership at form 27-18.

Order Appointing Receiver [and Compelling Discovery]

On [**date**] the Court considered Plaintiff's Motion for Postjudgment Receivership. The Court, after hearing pleadings, evidence, and argument of counsel, finds that the motion should be granted and a receiver should be appointed to take possession of and sell the leviable assets of [**name of defendant**], Defendant. The Court also finds that Defendant owns nonexempt property that cannot readily be attached or levied on by ordinary legal process, to wit [**describe nonexempt property**]. [**Include if applicable:** Notwithstanding any contrary language, this order does not compel turnover of Defendant's homestead, checks for current wages, or other exempt property.]

It is therefore ORDERED that [**name of receiver**], whose address is [**address, city, state**], [**telephone and fax numbers of receiver**], is hereby appointed Receiver in this cause pursuant to Texas Civil Practice and Remedies Code section 31.002 with the power and authority to take possession of all leviable property of Defendant, including, but not limited to, the following nonexempt property:

1. all documents and records, including financial records, related to such property that is in actual or constructive possession or control of Defendant;

2. all financial accounts, certificates of deposit, money-market accounts, and accounts held by any third party;

3. all securities;

4. all real property, equipment, vehicles, boats, and planes;

5. all safe-deposit boxes or vaults;

6. all cash;

7. all negotiable instruments, including promissory notes, drafts, and checks;

8. all causes of action or choses in action;

9. all contract rights, whether present or future; and

10. all accounts receivable.

It is further ORDERED that all such property shall be held in custodia legis of Receiver as of the date of this order.

It is further ORDERED that, in addition to the powers of Receiver set forth herein, Receiver shall have the following right, authority, and power with respect to Defendant's property, to—

1. collect all accounts receivable of Defendant and all rents due Defendant from any tenant;

2. change locks to all premises at which any property is situated;

3. direct the delivery of Defendant's mail and the mail of any business of Defendant to Receiver's address and open all mail directed to Defendant and any business of Defendant;

4. endorse and cash all checks and negotiable instruments payable to Defendant, except paychecks for current wages;

5. hire a real estate broker to sell any real property and mineral interest belonging to Defendant;

6. hire any person or company to move and store the property of Defendant;

7. insure, but without the obligation to insure, any property belonging to Defendant;

8. obtain from any financial institution, bank, credit union, credit bureau, savings and loan, title company, or any other third party any financial records belonging to or pertaining to Defendant;

9. obtain from any landlord, building owner, or building manager where Defendant or Defendant's business is a tenant, copies of Defendant's lease, lease application, credit application, and payment history and copies of Defendant's checks for rent or other payments;

10. hire any person or company necessary to accomplish any right or power under this order; and

11. take all action necessary to gain access to all storage facilities, safe-deposit boxes, real property, and leased premises wherein any property of Defendant may be situated and to review and obtain copies of all documents related to the property.

Include the following if applicable.

It is further ORDERED that, in addition to the powers of Receiver set forth herein, Receiver shall have the right, authority, and power to request and obtain from all providers of utilities, telecommunications, telephone, cell phone, cable, Internet, database, Internet Web site hosting, satellite television, and all similar services, including Internet blogs and chat

rooms, discovery compelling the production of any information regarding Defendant's payments, payment history, and financial information, including account information, telephone numbers, names, service addresses, telephone numbers, IP addresses, call detail records, payment records, and bank and credit card information. This order specifically serves as the court order required by 47 U.S.C. § 551 and satisfies all obligations of the responding party to obtain or receive a court order before disclosing material containing personally identifiable information of the subscriber or customer.

Continue with the following.

It is further ORDERED that any sheriff or constable of any county of this state and their deputies and any other peace officer of this state are hereby directed and ordered to assist Receiver in carrying out his duties and exercising his powers hereunder and to prevent any person from interfering with Receiver in taking control and possession of the property of Defendant, without the necessity of a writ of execution. Receiver is authorized to direct any constable or sheriff to seize and sell property under a writ of execution.

It is further ORDERED that Defendant immediately turn over to Receiver within five (5) days of Defendant's receipt of a copy of this order (1) the documents contained in Exhibit **[exhibit number/letter]** attached hereto, (2) all documents and financial records that may be requested by Receiver, and (3) all checks, cash, securities, promissory notes, documents of title, and contracts owned by or in the name of Defendant.

It is further ORDERED that Defendant identify and turn over to Receiver all interests of Defendant in any business or venture and all agreements, stock certificates, and other documents pertaining to Defendant's ownership in the business or venture.

It is further ORDERED that Defendant continue, until the judgment in this cause is fully paid, to turn over to Receiver at Receiver's address all checks, cash, securities, promissory notes, documents of title, and contracts within three days of Defendant's receipt and pos-

session of such property if, as, and when Defendant comes into receipt and possession of any such property. Paychecks for current wages are exempt from this order.

Include the following if discovery was served and was unanswered.

It is further ORDERED that Defendant shall fully answer, within thirty days, postjudgment interrogatories previously served.

Continue with the following.

It is further ORDERED that Plaintiff recover against Defendant judgment in the sum of $[**amount**] as additional attorney's fees for the presentation of this motion.

It is further ORDERED that Receiver post bond in the amount of $[**amount**] payable to this Court and conditioned on the faithful discharge of Receiver's duties in accordance with this order. Receiver's fee is taxed as costs against Defendant. Receiver is FURTHER ORDERED to take the oath of his office.

It is further ORDERED that Receiver shall not disburse to Plaintiff funds or proceeds from property sold by Receiver without Defendant's written consent or order of this Court.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

_____

[Name]
Attorney for Defendant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach exhibit.

Form 27-20

For discussion of a bond of a receiver, see section 27.88:6 in this chapter.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Bond of Receiver

[**Name of receiver**] has been appointed Receiver in this cause. The order appointing [**name of receiver**] requires that [he/she] execute a bond in the amount of $[**amount**].

Select the following if a cash bond.

Therefore, I, [**name of receiver**], Receiver, as principal, acknowledge myself bound to pay to the Judge of the Court the sum of $[**amount**], which has been tendered in cash, conditioned that I will faithfully discharge the duties of Receiver in this cause and obey the orders of the Court.

Or

Select the following if a surety bond.

I have enclosed an original and a copy of Receiver's oath, bond, and order and the original bond in the amount of $[**amount**].

Therefore, I, [**name of receiver**], Receiver, as principal, acknowledge myself bound to pay to the Judge of the Court the sum of $[**amount**], which bond has been tendered herewith, conditioned that I will faithfully discharge the duties of Receiver in this cause and obey the orders of the Court.

Continue with the following.

SIGNED on _____.

_____

[**Name of receiver**]
Receiver

Select the following if a cash bond.

Filed and approved on _____.

_____

[**Name of clerk**], Clerk
[**Designation of court**]

Or

Select the following if a surety bond.

Order

It is ORDERED that Receiver's Bond is hereby approved.

SIGNED on _____.

_____

JUDGE PRESIDING

Attach exhibits if applicable.

Form 27-21

For discussion of an oath of a receiver, see section 27.88:6 in this chapter.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Oath of Receiver

I, [**name of receiver**], swear that I will faithfully perform and discharge the duties of Receiver in this cause and will obey the orders of the Court. I am a citizen and qualified voter of the State of Texas and am registered to vote. My actual residence is within the State of Texas. I am not a party, attorney, or other person interested in the action giving rise to the judgment that forms the basis of the receivership.

_____
[**Name of receiver**]
Receiver

SIGNED under oath before me on _____.

_____
Notary Public, State of Texas

Filed with the Court on _____.

_____
[**Name of clerk**], Clerk
[**Designation of court**]

Form 27-22

In Texas Supreme Court, *Second Amended Order Regarding Mandatory Reports of Judicial Appointments and Fees*, Misc. Docket No. 07-9188 (Oct. 30, 2007), as discussed in sections 27.88:5 and 27.88:8 in this chapter, the court requires approval of a receiver's fees to be accomplished by separate written order. This form provides an example of such an order. Note that the order customarily accompanies a request for approval of a receiver's fees, whether in a separate application or as part of an application, such as one that also requests the authority to disburse funds. An affidavit from the receiver regarding his fees may also be included in an application.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Order Approving Receiver's Fees

On [**date**] the Court considered [**describe document requesting approval of receiver's fees, e.g.,** Receiver's Application for Approval of Receiver's Fees]. The Court, after hearing pleadings, evidence, and argument of counsel, finds that the time and expenses spent by Receiver and the fees charged as shown in the application are reasonable and were necessary in the performance of Receiver's duties, and they are approved.

It is therefore ORDERED that $[**amount**] is approved as reasonable and necessary Receiver's fees for the period reflected in the application. Receiver is authorized to pay [himself/his firm] $[**amount**] from the funds currently on hand.

SIGNED on _____.

_____
JUDGE PRESIDING

Form 27-23

The application for charging order may be used to reach a debtor's interest in a limited partnership. See section 27.101 in this chapter for discussion of the charging order and form 27-24 for the order.

This form assumes that the application will be filed in the court that rendered the underlying judgment. See section 27.101:2 regarding the proper court in which to file and section 16.10 for alternative methods for serving a partnership. If the application is filed in a different court, the judgment debtor as well as the partnership should be served with citation and an address should be included for the judgment debtor where he may be served.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Application for Charging Order

1. *Parties.* Applicant [**name of plaintiff**], Plaintiff and judgment creditor in this cause, requests that the Court grant this Application for Charging Order against the nonexempt interest of [**name of defendant**], Defendant and judgment debtor, a partner in the limited partnership of [**name of limited partnership**], which has its principal place of business in [**county**] County, Texas. Service on [**name of limited partnership**] can be made by delivering citation to [**name of general partner**], a general partner, at [**address, city, state**].

2. *Judgment.* Plaintiff obtained a judgment against Defendant on [**date**] in this cause. A true and correct copy of the judgment is attached to this application as Exhibit [**exhibit number/letter**] and included by reference. The judgment remains unsatisfied.

3. *Grounds.* Plaintiff has reason to believe that Defendant is a partner with [**name of limited partnership**]. Plaintiff is entitled by reason of its judgment against Defendant to a charging order against the nonexempt interest of Defendant in [**name of limited partnership**].

4. *Prayer.* Plaintiff prays that the Court—

   a. set this matter for hearing;

b. order Defendant to produce in court and to turn over to Plaintiff true copies of the partnership agreement and true copies of any other agreements or documents evidencing the interest of Defendant in [**name of limited partnership**] and any amounts due or to become due to Defendant by reason of Defendant's interest in [**name of limited partnership**];

c. enter its order charging Defendant's interest in [**name of limited partnership**], as requested in this application, in the amount of the unsatisfied judgment;

d. grant Plaintiff reasonable expenses incurred in obtaining the orders; and

e. grant Plaintiff all further relief to which Plaintiff may be entitled.

_____

[**Name**]
Attorney for Plaintiff
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Include a notice of hearing (form 19-2) and a certificate of service (form 19-1). Prepare the charging order (form 27-24). File the original of this application, with order attached, with the court clerk. Arrange for service of citation on all parties required to be served; see section 27.101:2.

Form 27-24

For an application for a charging order, see form 27-23 in this chapter. This order assumes that the debtor and any other adverse parties have been given notice of the creditor's application for a charging order and that a hearing will be held.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for charging order found at form 27-23.

Charging Order

On [**date**] the Court considered Plaintiff's Application for Charging Order.

Recite appearances of counsel and parties as appropriate.

The Court considered the pleadings, the evidence, and the argument of counsel and finds that—

1. Defendant is a partner in [**name of limited partnership**]; and

2. Plaintiff is entitled to a charging order against Defendant's interest in [**name of limited partnership**].

It is therefore ORDERED that—

1. the interest of Defendant in [**name of limited partnership**] is subjected to a charging order in favor of and for the benefit of Plaintiff;

2. distributions owed or payable to Defendant by [**name of limited partnership**] be paid directly to Plaintiff; and

3. [**name of limited partnership**] will be discharged from its obligations to Defendant to the extent of any amounts so paid to Plaintiff, until the judgment against [**name of defendant**] entered in this cause is paid in full.

It is further ORDERED that Defendant deliver to Plaintiff true copies of the partnership agreement and true copies of any other agreements or documents evidencing the interest of Defendant in [**name of limited partnership**] and any distributions due or to become due to Defendant by reason of Defendant's interest in [**name of limited partnership**].

SIGNED on _____.

_____
JUDGE PRESIDING

When the order is entered, send a copy to the general partner of the limited partnership.

Form 27-25

For a discussion of assignment of judgments, see section 27.105 in this chapter.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Assignment of Judgment and Judgment Lien

For valuable consideration, the receipt and adequacy of which are hereby acknowledged, [**name of assignor**], Assignor, transfers and assigns to [**name of assignee**], Assignee, all of Assignor's right, title, and interest in the hereinafter described judgment and any judgment liens created thereby:

Court and county: [**designation and location of court**]

Cause No. [**number**], "[**style of case**]"

Date and amount of judgment: [**date**], in the amount of $[**amount**]

Assignor makes no representation, warranty, or guaranty as to the collectibility or validity of the judgment assigned, and in the case of nonpayment or noncollectibility of the assigned judgment, no recourse shall be had against Assignor, except, however, that Assignor expressly warrants that it is the owner and holder of the judgment and judgment lien assigned herein.

Executed on [**date**].

_____
[**Name of assignor**]

By:_____
[**Title**]

The assignment must be acknowledged or sworn to in the form required for acknowledgment or swearing of deeds. Tex. Prop. Code § 12.014. A short-form certificate of acknowledgment for a corporation follows as an example. See Tex. Civ. Prac. & Rem. Code § 121.007 for a form of ordinary certificate of acknowledgment and § 121.008 for additional short-form certificates of acknowledgment.

ACKNOWLEDGMENT

STATE OF TEXAS)

COUNTY OF)

This instrument was acknowledged before me on _____ by [**name of officer**], [**title of officer**] of [**name of assignor**] corporation, on behalf of said corporation.

_____

Notary Public, State of Texas

Form 27-26

A judgment debtor may file an affidavit in the real property records of the county in which the judgment debtor's homestead is located that must be in substantially the following form. Tex. Prop. Code § 52.0012(b). Before execution of the affidavit, the affiant must send a letter and a copy of the affidavit by registered or certified mail, return receipt requested, thirty or more days before the affidavit is filed, notifying the judgment creditor of the affidavit and the affiant's intent to file for record the affidavit. Tex. Prop. Code § 52.0012(f).

Homestead Affidavit as Release of Judgment Lien

BEFORE ME, the undersigned authority, on this day personally appeared [**name[s] of affiant[s]**] ("Affiant[s]"), who, being first duly sworn, upon oath state[s]:

Select one of the following.

1. My name is [**name of affiant**]. I own the following described land ("Land"): [**describe property claimed as homestead**].

Or

1. Our names are [**names of affiants**]. We own the following described land ("Land"): [**describe property claimed as homestead**].

Continue with the following.

2. This affidavit is made for the purpose of effecting a release of that judgment lien recorded in [**describe judgment lien as described in recording information**] ("Judgment Lien") as to the Land.

3. The Land includes as its purpose use for a home for Affiant[s] and is the homestead of Affiant[s], as "homestead" is defined in section 41.002 of the Texas Property Code. The Land does not exceed—

a. ten acres of land, if used for the purposes of an urban home or as both an urban home and a place to exercise a calling or business; or

b. two hundred acres for a family or one hundred acres for a single, adult person not otherwise entitled to a homestead, if used for the purposes of a rural home.

4. Attached to this affidavit is evidence that—

a. Affiant[s] sent a letter and a copy of this affidavit, without attachments and before execution of the affidavit, notifying the judgment creditor in the Judgment Lien of this affidavit and the Affiant['s/s'] intent to file for record this affidavit; and

b. the letter and this affidavit were sent by registered or certified mail, return receipt requested, thirty or more days before this affidavit was filed, to—

i. the judgment creditor's last known address;

ii. the address appearing in the judgment creditor's pleadings in the action in which the judgment was rendered or another court record, if that address is different from the judgment creditor's last known address;

iii. the address of the judgment creditor's last known attorney as shown in those pleadings or another court record; and

iv. the address of the judgment creditor's last known attorney as shown in the records of the State Bar of Texas, if that address is different from the address of the attorney as shown in those pleadings or another court record.

5. This affidavit serves as a release of the Judgment Lien as to the Land in accordance with section 52.0012 of the Texas Property Code.

_____

[**Name of affiant**]
Affiant

Repeat signature block as necessary.

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

Attach evidence of notice to judgment creditor as described in statement 4. above and in Tex. Prop. Code § 52.0012(f).

Form 27-27

Sheriff's Deed

THE STATE OF TEXAS)

COUNTY OF)

By virtue of execution issued by the clerk of the [**designation**] Court of [**county**] County, Texas, which was delivered to me as [Sheriff/Constable] of [**county**] County, Texas, I was commanded to seize and sell the property of Defendant, [**name of defendant**].

The real property hereinafter described was pointed out to me as being subject to sale under execution.

On [**date**], at [**time**] [A.M./P.M.], I levied on all the estate, right, title, claim, and interest that Defendant had in the premises hereafter described. On the first Tuesday of [**month**], [**date**], between the hours of 10:00 A.M. and 4:00 P.M., as prescribed by law, I did sell the property at the [**designation**] courthouse in [**city**], Texas, having first given public notice of the authority under which the sale was to be made, the time of levy, the time and place of sale, and a description of the property that was to be sold.

At the sale, the property was sold to the highest bidder, [**name of buyer**], for the sum of [**amount**] dollars ($[**amount**]) subject, however, to the superior lien indebtedness on the property.

[**Name of buyer**] has paid to me the sum of [**amount**] dollars ($[**amount**]), the receipt of which is hereby acknowledged.

Therefore, in consideration of the property in the judgment and execution and of the payment of the sum of [**amount**] dollars ($[**amount**]), I, [**name**], [Sheriff/Constable] of

[**county**] County, Texas, do grant, sell, and convey to [**name of buyer**] all the estate, right, title, interest, and claim that Defendant had on [**date**], or at any time afterwards, in and to the property described in the execution, and further described as follows: [**legal description**].

To have and to hold the above-described property unto [**name of buyer**], [his/her/its] heirs and assigns, forever, as fully and absolutely as I can convey.

In testimony whereof, I hereunto set my hand this [**date**].

_____

[**Name**], [Sheriff/Constable]
[**County**] County, Texas

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

Form 27-28

Some clerks do not have forms for orders of sale, and you may be required to draft one yourself. The order of sale is needed when a judgment provides for judicial foreclosure of a lien on certain property described therein. The order of sale also provides for seizure of additional nonexempt property if the property foreclosed on is not sufficient to satisfy the judgment.

Order of Sale

STATE OF TEXAS)

COUNTY OF [**county**])

TO ANY SHERIFF OR CONSTABLE WITHIN THE STATE OF TEXAS:

[**Name(s) of plaintiff(s)**], Plaintiff(s), on [**date**], in the [County Court at Law No. [**number**]/[**number**] Judicial District Court] of [**county**] County, Texas, recovered judgment against [**name(s) of defendant(s)**], Defendant(s), for the sum of $[**amount**] with interest from that date at the rate of [**percent**] percent per year, until paid, and the further sum of $[**amount**] as costs of suit, as shown in the itemized bill of costs attached and made a part hereof and for the foreclosure of Plaintiff's lien on [**describe personal property**] as the lien existed on the judgment day; that property should be sold as under execution in satisfaction of judgment.

You are hereby ORDERED to proceed to levy on, seize, and sell the above-described property in satisfaction of judgment, interest, costs, and the added cost of executing this writ. If the property cannot be found or if the proceeds derived from the sale are insufficient to satisfy the judgment, interest, and costs together with your fees and commissions for executing this writ, you are hereby commanded to make the money or any balance remaining unpaid out of any other property of Defendant(s) as in ordinary execution. If more money is received from the sale than is sufficient to pay off the judgment, interest, and above costs, as directed by law, you shall pay the surplus to Defendant(s). You are further directed to execute and

deliver to the purchaser(s) of the property the proper deed of conveyance of all the right, title, interest, and claim that Defendant(s) had in the property at the time of the execution of this writ and at the time of the sale and to apply the proceeds to the payment and satisfaction of the judgment, and costs of suit, together with your legal fees and commissions for executing this writ. You will execute this writ, according to law.

The judgment is entitled to the following credits: [**list credits**].

Herein fail not and have you this writ showing how you have executed it, together with the money collected as herein directed, before the above Court at the courthouse in [**county**], Texas, within ninety days from the date of the issuance of this writ.

Issued and given under my hand and seal of the Court at my office in [**county**], Texas on [**date**].

ATTEST:

_____

[**Name**]
[**County**] County Clerk

Or

_____

[**Name**]
[**County**] County District Clerk

By:_____
[**Name**]
Deputy

Sheriff's/Constable's Fee		Clerk's Fee	
Levy	_____	Clerk's fees	_____
Ads	_____	Library fee	_____
Service	_____	Dispute fund	_____
Commission	_____	Judge's fee	_____
Deeds	_____	Sheriff's fee	_____
Executing	_____	Abstract fee	_____
Return	_____	Attorney's fee	_____
Mileage	_____	Venire fee	_____
Printer's	_____	Execution fee	_____
Total:	_____	Other	_____
Clerk's fee	_____		
TOTAL:	$ _____	**TOTAL:**	$ _____

STATE OF TEXAS)

COUNTY OF **[county]**)

I, **[name]**, clerk of the [[**county**] County/[**county**] County District] Court, do certify that the above is a true and correct bill of costs in the above entitled cause up to this date.

WITNESS MY HAND AND OFFICIAL SEAL, on **[date]**.

_____

[Name]
[County] County Clerk

Or

_____

[Name]
[County] County District Clerk

By:_____
[Name]
Deputy

OFFICER'S RETURN

Came to hand on the ____ day of _____, at __.M. and executed on the ____ day of _____ at __.M.

_____

SHERIFF OR CONSTABLE
[County] County, Texas

Chapter 28

Landlord-Tenant Law

I. Landlord-Tenant Law Generally

II. Nonjudicial (Self-Help) Remedies

III. Judicial Remedies

IV. Trial Procedure

V. Remedies and Damages After Tenant Abandons Premises

Forms

Chapter 28

Landlord-Tenant Law

I. Landlord-Tenant Law Generally

§ 28.1 Scope of Chapter

This chapter focuses on the landlord's judicial and nonjudicial remedies for a tenant's default under a lease for real property; this chapter does not cover personal property leases.

Practice Note: The Texas Supreme Court has appointed a task force to promulgate plain-language forms for pro se individuals to use in landlord-tenant matters. Courts will be required to accept these forms once they become available to the public. *See* Tex. Gov't Code § 22.019; Acts 2015, 84th Leg., R.S., ch. 600, § 1 (S.B. 478), eff. Sept. 1, 2015; Texas Supreme Court, *Order Creating Landlord-Tenant Forms Task Force*, Misc. Docket No. 17-9046 (May 2, 2017).

§ 28.2 Typical Fact Scenario

A tenant fails to pay rent or other sums due under a lease, fails to comply with a nonmonetary obligation under a lease, or abandons the leased premises; each of these scenarios potentially creates an event of default for which the landlord may exercise judicial or nonjudicial remedies. Before exercising a remedy, the landlord must establish that an event of default has occurred.

§ 28.3 Events of Default

An event of default may be monetary or nonmonetary. The type of default and the manner in which it is addressed in the lease will determine the contractual, statutory, prejudgment, or judicial remedies the landlord may seek. Additionally, the type of default may be subject to a grace period or right of the tenant to cure the default. What constitutes an event of default regarding the violation of the payment and nonmonetary obligations of the tenant is governed by the parties' agreement.

§ 28.3:1 Monetary Defaults

Rent: The lease should have an unequivocal covenant to timely pay rent on or in advance of a specific date. A review of the lease should be conducted to confirm that the tenant's failure to timely pay rent by a date certain is an unconditional event of default and not subject to demand, notice, and right to cure or other action required of the landlord.

Other Monetary Obligations: Insufficient funds fees and late fees are examples of monetary obligations that are not within the classic definition of rent but are usually subject to a covenant to pay by a date certain, after notice, or after a specified time period.

§ 28.3:2 Nonmonetary Defaults

There are numerous bases on which a landlord may assert a default under the lease that do not arise from the payment of a sum of money. Nonmonetary defaults may or may not be subject to a right of the tenant to cure the default. Examples of typical nonmonetary defaults that may be contractually required of the tenant may include failure to maintain the premises; conduct of resi-

dents, occupants, or guests that is in violation of the lease; or criminal conduct.

[Sections 28.4 through 28.10 are reserved for expansion.]

II. Nonjudicial (Self-Help) Remedies

§ 28.11 Contractual Landlord's Liens in Commercial Tenancies

Most commercial leases provide boilerplate language for the imposition of a landlord's lien. This contractual lien, as opposed to the commercial statutory lien provided in the Texas Property Code, gives the landlord much more latitude. *See Bank of North America v. Kruger*, 551 S.W.2d 63, 65 (Tex. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.) (holding that contractual landlord's liens are subject to provisions of the Uniform Commercial Code but that statutory landlord's liens are not). Perfection under UCC article 9 may cut off any subsequent creditor's security interest. *See* Tex. Bus. & Com. Code §§ 9.301–.343. Once a financing statement is filed, subsequent annual filings are subject to Tex. Bus. & Com. Code § 9.515(a), providing that the filing of a financial statement is good for five years. The landlord's lien is not satisfied until the landlord's claim for rent advances and furnishings has been paid. *Green v. Scales*, 219 S.W. 274, 275 (Tex. App.—Fort Worth 1919, no writ). A tenant cannot free himself or the products of the leased premises unless this is done by contract with the landlord for payment of rent. *Forrest v. Durnell*, 26 S.W. 481, 482 (Tex. 1894); *Granville v. Rauch*, 335 S.W.2d 799, 803 (Tex. App.—Austin 1960, no writ). The landlord's lien is not affected by subletting or assignment of the lease. *Forrest*, 26 S.W. at 482–83; *Mauritz v. Markloff*, 268 S.W. 230, 231 (Tex. App.—Galveston 1925, no writ); *Green*, 219 S.W. at 275; *Edwards v. Anderson*, 82 S.W. 659, 659–60 (Tex. App.—Austin 1904, no writ). One who has seized property from the leased premises may be held liable by the landlord for the full value thereof or for the amount of debt owed by the tenant and for exemplary damages if he acted with knowledge of the circumstances. *Guaranty Bond State Bank of Timpson v. Redding*, 24 S.W.2d 457, 461 (Tex. App.—Beaumont 1929, no writ); *Ward v. Gibbs*, 30 S.W. 1125, 1128 (Tex. App.—Galveston 1895, no writ). To give effect to the landlord's lien, the landlord is afforded the remedy of foreclosure. *Anderson v. Owen*, 269 S.W. 454, 455 (Tex. App.—Galveston 1924, no writ). The lien, however, does not attach to property belonging to others that is located on the leased premises. *West Development Co. v. Crown Bottling Co.*, 90 S.W.2d 887, 890 (Tex. App.—Waco 1936, writ dism'd).

In addition to a contractual landlord's lien in a commercial tenancy, a commercial landlord also has a statutory lien; similarly, an agricultural landlord has a statutory lien. Statutory liens of commercial landlords and agricultural landlords are addressed in section 28.32 below, as enforcement of a statutory lien requires the filing of an application for a distress warrant.

§ 28.11:1 Contractual Landlord's Lien Must Be in Lease

A security interest attaches to the tenant's personal property pursuant to a landlord's lien provision in a commercial lease and is subject to article 9 of the Uniform Commercial Code. *See* Tex. Bus. & Com. Code §§ 1.201(b)(35), 9.109. The lien provision in a commercial lease must expressly convey to the landlord a security interest in the tenant's personal property. *See Bank of*

North America v. Kruger, 551 S.W.2d 63, 65 (Tex. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.) (holding that contractual landlord's liens are subject to provisions of the Uniform Commercial Code but that statutory landlord's liens are not).

§ 28.11:2 Perfection of Commercial Landlord's Security Interest

A commercial landlord may perfect its contractual security interest in the tenant's personal property only by either (1) taking possession of the tenant's personal property described in the lease, without breaching the peace, or (2) filing a financing statement with the Texas Secretary of State. Tex. Bus. & Com. Code §§ 9.313(a), 9.501, 9.609. See Tex. Bus. & Com. Code § 9.502 for financing statement requirements.

§ 28.11:3 Foreclosure of Contractual Landlord's Liens

A landlord may foreclose a contractual landlord's lien judicially or nonjudicially. A judicial foreclosure is required when the landlord cannot obtain possession of the tenant's personal property through either self-help or the tenant's voluntary delivery of the personal property to the landlord.

An agreement to subordinate a landlord's lien is enforceable; consequently, the practitioner must confirm that the landlord has not executed a subordination agreement in favor of another secured party of the tenant. *See, e.g., In re Doctors Hospital 1997, L.P.*, 351 B.R. 813, 832 n.14 (Bankr. S.D. Tex 2006).

The tenant has a right to redeem the personal property at any time before the landlord has disposed of the property by foreclosure sale by tendering to the landlord payment of all obligations secured by the personal property and the reasonable expenses and attorney's fees of the landlord authorized under Tex. Bus. & Com. Code § 9.615(a)(1). Tex. Bus. & Com. Code § 9.623.

After the tenant's default, the landlord may sell the tenant's personal property subject to the landlord's lien. Tex. Bus. & Com. Code § 9.610(a). Notification of the sale must be delivered to the tenant unless the tenant has waived the right to notification. Tex. Bus. & Com. Code § 9.611(a). Every aspect of the disposition of the personal property, including the method, manner, time, place, and other terms, must be commercially reasonable. If the disposition is commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms. Tex. Bus. & Com. Code § 9.610(b).

After payment of the rent arrearage, the landlord must deliver any balance of the sale proceeds to the tenant. *Myers v. Ginsburg*, 735 S.W.2d 600, 605 (Tex. App.—Dallas 1987, no writ).

§ 28.12 Contractual Landlord's Liens in Residential Tenancies

A landlord of a single or multifamily residence has a lien on nonexempt property of the tenant for rent due, but not for other charges. Tex. Prop. Code § 54.041. Note that a lease may provide a formula for allocation of payments received that may result in "rent" remaining unpaid. For instance, many standardized leases contain a provision that all payments received by the landlord are applied first to non-rent obligations, then to the rent obligation.

For a residential landlord's lien to be effective, the lease must have the lien provision underlined or printed in conspicuous bold print and a provision authorizing the sale or disposition of the property subject to the lien. Tex. Prop. Code §§ 54.043(a), 54.045(a).

A residential landlord may seize only nonexempt property subject to the lien and must do so without a breach of the peace. Tex. Prop. Code § 54.044(a). The residential landlord's sale of unredeemed property must be for cash to the highest bidder after a minimum thirty-day written notice to the tenant. Tex. Prop. Code § 54.045. A residential landlord's lien may not be exercised against a tenant of a property financed with tax credits without a court order. Tex. Gov't Code § 2306.6738(a).

§ 28.13 Exclusion (Lockout) of Commercial Tenant

The "exclusion of a commercial tenant," or "lockout," is a creature of statute and is governed by Tex. Prop. Code § 93.002. It is primarily used by a landlord as a tool for collection of rent. A lease supersedes Tex. Prop. Code § 93.002 to the extent of any conflict. Tex. Prop. Code § 93.002(h).

§ 28.13:1 Bases for Lockout

A commercial landlord may not intentionally prevent a commercial tenant from entering leased premises except by judicial process unless the exclusion results from (1) bona fide repairs, construction, or an emergency; (2) removing the contents of premises abandoned by a commercial tenant; or (3) changing the door locks of a commercial tenant who is delinquent in paying at least part of the rent. Tex. Prop. Code § 93.002(c).

§ 28.13:2 Procedure

If a commercial tenant is delinquent in paying at least part of the rent, the landlord may change the door locks and must place a written notice on the tenant's front door stating the name and address or telephone number of the individual or company from which the new key may be obtained. If the tenant pays the delinquent rent, the landlord must provide a key to the tenant during the tenant's regular business hours. Tex. Prop. Code § 93.002(f).

§ 28.13:3 Wrongful Lockout

If a commercial landlord or a landlord's agent violates the Texas Property Code and improperly locks out a tenant, the tenant may (1) either recover possession of the premises or terminate the lease and (2) recover from the commercial landlord an amount equal to the sum of the tenant's actual damages, one month's rent, or $500, whichever is greater, reasonable attorney's fees, and court costs, less any delinquent rents or other sums for which the tenant is liable to the landlord. Tex. Prop. Code § 93.002(g).

§ 28.13:4 Writ of Reentry

If the tenant has been locked out of the leased premises illegally, the tenant may recover possession of the premises. *See* Tex. Prop. Code § 93.003. To regain possession, the tenant must file a sworn complaint seeking reentry with the justice court in the precinct in which the premises are located. The complaint must specify the facts of the unlawful lockout, and the tenant or its representative must also state orally under oath to the justice the facts of the unlawful lockout. Tex. Prop. Code § 93.003(b). If the tenant has complied with subsection (b) of section 93.003, and the court believes the tenant, the court may issue, ex parte, a writ of reentry that entitles the tenant to immediate and temporary possession of the premises. Tex. Prop. Code § 93.003(c). The writ of reentry must be served on the landlord or the landlord's management company. Tex. Prop. Code § 93.003(d). The landlord is entitled to a hearing, and the writ of reentry must notify the landlord of its right to a hearing. The hearing is required to be held between the first and not later than the seventh day after the landlord requests a hearing. Tex. Prop. Code § 93.003(e). To avoid a judgment for costs against the landlord, the landlord must request a hearing before the eighth day after ser-

vice of the writ of reentry. Tex. Prop. Code § 93.003(f). Any party may appeal from the court's judgment in the same manner as an appeal in a forcible detainer suit. Tex. Prop. Code § 93.003(g). If the court rules that possession should remain with the tenant, a writ of possession is issued superseding the writ of reentry. Tex. Prop. Code § 93.003(h). If the landlord fails to comply with the writ of reentry, the landlord may be held in contempt of court. Tex. Prop. Code § 93.003(i). Upon the landlord's disobedience of the writ, the tenant may file an affidavit stating the name of the person who is disobedient and describing the act or omission. Upon receipt of the affidavit, the court shall issue a show-cause order. If the court finds disobedience to the writ, it may commit the person to jail without bail until the person purges himself of the contempt in a manner and form as the court may direct. If the landlord obeys the writ before a show-cause order is served, the court may nevertheless still find the person in contempt and assess further punishment. Tex. Prop. Code § 93.003(i).

§ 28.14 Exclusion (Lockout) of Residential Tenant

The "exclusion of a residential tenant," or "lockout," is solely a creature of statute and is governed by Tex. Prop. Code § 92.0081. It is primarily used by a landlord as a tool for collection of rent; however, the effectiveness of the remedy is limited, as the landlord must provide a key on two hours' notice, twenty-four hours a day, without the requirement of any rent being tendered.

§ 28.14:1 Bases for Lockout

A residential landlord may not intentionally prevent a tenant from entering leased premises except by judicial process unless the lockout results from (1) bona fide repairs, construction, or an emergency; (2) removing the contents of premises abandoned by a tenant; or (3) changing the door locks on the door to the tenant's individual unit of a tenant who is delinquent in paying at least part of the rent. Tex. Prop. Code § 92.0081(b).

§ 28.14:2 Prerequisites to Exercise of Remedy

The residential landlord's right to change locks must be included in a written lease. Tex. Prop. Code § 92.0081(d)(1). A residential lease may not waive or exempt a residential landlord from liability or the landlord's duties under the lockout statute. Tex. Prop. Code § 92.0081(j).

Lockout is available only against tenants; the lockout statute addresses the lockout of a tenant. *See* Tex. Prop. Code § 92.0081(b). "Tenant" is defined as a person who is authorized by a residential lease to occupy a dwelling to the exclusion of others. Tex. Prop. Code § 92.001(6).

§ 28.14:3 Advance Notice Required

The residential landlord must deliver, in advance, written notice of the intent to change the locks. If notice is delivered by mail, delivery must be at least five days before the day the locks are changed. If notice is hand-delivered, delivery must be at least three days before the day on which locks are changed. Tex. Prop. Code § 92.0081(d)(3).

The notice must state—

1. the earliest date that the landlord proposes to change the door locks;
2. the amount of rent the tenant must pay to prevent changing of the door locks;
3. the name and street address of the individual to whom, or the location of the on-site management office at which, the delinquent rent may be discussed or paid during the landlord's normal business hours; and

4. in underlined or bold print, the tenant's right to receive a key to the new lock at any hour, regardless of whether the tenant pays the delinquent rent.

Tex. Prop. Code § 92.0081(d)(3).

§ 28.14:4 Limitations on Lockout

A residential lockout may not be performed on a day, or a day immediately before a day, the landlord or designated individual is not available or the management office is not open. Tex. Prop. Code § 92.0081(e).

A landlord who performs a lockout on an individual rental unit may not change the locks or otherwise prevent a tenant from entering a common area of residential real property. Tex. Prop. Code § 92.0081(e–1).

Lockouts may not be performed on a dwelling unit when the tenant or any other legal occupant is in the dwelling, more than once during a rental payment period, or on a property financed with tax credits without a court order. Tex. Prop. Code § 92.0081(k); Tex. Gov't Code § 2306.6738(a).

§ 28.14:5 Performing Lockout; Written Notice of Change of Locks

If after delivery of the advance written notice the residential tenant remains delinquent in paying part of the rent, the residential landlord may change the door locks and must place a written notice on the tenant's front door stating—

1. an on-site location where the tenant may go twenty-four hours a day to obtain the new key or a telephone number that is answered twenty-four hours a day that the tenant may call to have a key delivered within two hours after calling the number;

2. the fact that the residential landlord must provide the new key to the tenant at any hour, regardless of whether the tenant pays any of the delinquent rent; and

3. the amount of rent and other charges for which the tenant is delinquent.

Tex. Prop. Code § 92.0081(c).

§ 28.14:6 Return of Key

The residential landlord must provide a key within two hours after request of the tenant, twenty-four hours a day, without regard to whether the tenant pays the delinquent rent. Tex. Prop. Code § 92.008(c)(1), (f). If the residential landlord responds to a tenant's telephone call and the tenant is not present when the landlord arrives with the key, the residential landlord must leave a notice on the front door of the dwelling stating the time the residential landlord arrived with the key and the street address to which the tenant may go to obtain the key during the landlord's normal office hours. Tex. Prop. Code § 92.0081(g).

§ 28.14:7 Tenant's Remedy; Writ of Reentry

A residential tenant may apply to the justice court to obtain a writ of reentry for wrongful lockout. Tex. Prop. Code § 92.009.

[Sections 28.15 through 28.20 are reserved for expansion.]

III. Judicial Remedies

§ 28.21 Evictions (Suits for Possession)

The forcible detainer and forcible entry and detainer proceedings ("eviction") are summary, speedy, and inexpensive remedies for the determination of who is entitled to immediate *possession* of the premises. *McGlothlin v. Kliebert*, 672 S.W.2d 231, 232 (Tex. 1984) (citing *Scott v. Hewitt*, 90 S.W.2d 816, 818–19 (Tex. 1936)). The action is not exclusive but is cumulative of any other remedy that a party may have in Texas courts. *McGlothlin*, 672 S.W.2d at 233; *Scott*, 90 S.W.2d at 819. An eviction suit does not bar a suit for trespass, damages, waste, rent, or mesne profits. Tex. Prop. Code § 24.008.

§ 28.21:1 Right to Possession

For the purposes of considering suits for possession, the right to possession of real property occurs in the following scenarios.

Fee Simple: The owner holds the title in fee simple.

Foreclosure: The owner holds title pursuant to a trustee's deed.

Contracts for Deed: The owner holds title after default by the purchaser under a contract for deed.

Landlord-Tenant Relationships: Landlord-tenant relationships giving rise to a party's right to possession are defined b the particular tenancy.

Specific Term: The lease has a primary term with a specific ending date and no reversion to a periodic tenancy. Example: the primary term is from January 1, 2020, to June 30, 2021; the tenancy and right to possession end as a matter of law at midnight, June 30, 2021.

Specific Term with Reversion: The primary term ends but reverts to a periodic tenancy. Example: the primary term is from January 1, 2020, to June 30, 2021, and a lease provision provides that the lease continues month to month thereafter until either party delivers written thirty-day notice of termination before the end of the renewal period. The tenancy ends as a matter of law only after proper advance written notice is delivered by one of the parties.

Tenancy at Will: A tenant at will is one who holds possession of premises by permission of an owner but without a fixed term. *Fandey v. Lee*, 880 S.W.2d 164, 169 (Tex. App.—El Paso 1994, writ denied). Example: an on-site employee is provided an apartment as part of his compensation package, but the employee's right to possession of the apartment is expressly contingent on his continued employment.

Tenancy at Sufferance: A tenant at sufferance is one who wrongfully continues in naked possession of property after his right to possession has ceased. *ICM Mortgage Corp. v. Jacob*, 902 S.W.2d 527, 530 (Tex. App.—El Paso 1994, writ denied); *Goggin v. Leo*, 849 S.W.2d 373, 377 (Tex. App.—Houston [14th Dist.] 1993, no writ); *see also Bockelmann v. Marynick*, 788 S.W.2d 569, 571 (Tex. 1990) (holding that tenant who remains in possession of premises after termination of lease for a definite termination occupies "wrongfully" and is tenant at sufferance). Example: a former owner remains in possession after foreclosure.

Holdover: A new tenancy commences when a tenant fails to vacate at the end of a specific term or after expiration of timely notice of termination delivered by either party before the end of the current lease term or renewal period.

Under the common-law holdover rule, a landlord may elect to treat a tenant holding over as

either a trespasser or as a tenant holding over under the terms of the original lease. *Bockelmann*, 788 S.W.2d at 571; *Howeth v. Anderson*, 25 Tex. 557, 571 (1860). Most standardized leases will include express holdover provisions, for example, "Rent is payable daily prorated over one month at 125% of the monthly rent."

§ 28.21:2 Forcible Entry and Detainer vs. Forcible Detainer

Understanding the distinction between the causes of action for forcible entry and detainer and forcible detainer is critical to the determination of the type and manner of the delivery of the notice to vacate required under Tex. Prop. Code § 24.005 before filing suit. The two causes of action for possession are as follows.

Forcible Entry and Detainer: The party in possession never had a contractual or common-law right of possession. Absent a legally enforceable lease, someone other than the owner who is the occupier of the premises is at best a tenant at sufferance and at worst a trespasser. *Fandey v. Lee*, 880 S.W.2d 164, 169 (Tex. App.—El Paso 1994, writ denied). Specifically, a person commits a forcible entry and detainer if the person enters the real property of another without legal authority or by force and refuses to surrender possession on demand. Tex. Prop. Code § 24.001(a). Forcible entry is statutorily defined as (1) an entry without the consent of the person in actual possession of the property, (2) an entry without the consent of a tenant at will or sufferance, or (3) an entry without the consent of a person who acquired possession by forcible entry. Tex. Prop. Code § 24.001(b).

Forcible Detainer: A forcible detainer occurs when the party in possession originally had a contractual or common-law right of possession and loses the right to possession by default. By statute, a person who refuses to surrender possession of real property on demand commits a forcible detainer if the person—

1. is a tenant or a subtenant willfully and without force holding over after the termination of the tenant's right of possession;
2. is a tenant at will or by sufferance, including an occupant at the time of foreclosure of a lien superior to the tenant's lease; or
3. is a tenant of a person who acquired possession by forcible entry.

Tex. Prop. Code § 24.002(a).

§ 28.21:3 Notice to Vacate

A notice to vacate is the statutory condition precedent to the filing of an action for either forcible detainer or forcible entry and detainer. It must be in writing (with one exception), delivered to the premises, and include a specific time deadline for delivery of possession. Tex. Prop. Code § 24.005. Oral notices to vacate may be delivered only to an occupant who obtained possession by forcible entry and detainer under Tex. Prop. Code § 24.001. Tex. Prop. Code § 24.005(d).

Each notice to vacate should include an unequivocal demand for possession of the premises. The content is critical, as the bases articulated in the notice must correspond to the proof at trial. *See Jessie v. Jerusalem Apartments*, No. 12-06-00113-CV, 2006 WL 3020368, at *3 (Tex. App.—Tyler Oct. 25, 2006, no pet.) (mem. op.); *Nealy v. Southlawn Palms Apartments*, 196 S.W.3d 386, 390–91 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (notice to vacate merely stated "[o]wner desires possession" and "undesirable tenant behavior"). In the context of federally subsidized housing, federal regulations and due process require the notice to adequately detail the grounds for termination. *Moon v. Spring Creek Apartments*, 11 S.W.3d 427, 433, 435 (Tex. App.—Texarkana 2000, no pet.) (holding that at trial the court must determine whether the due-process goals for notice have

been sufficiently satisfied: (1) adequate notice is provided so as to enable the tenant to prepare a defense; (2) the tenant is allowed to be represented by counsel; (3) the tenant is given an opportunity to present evidence, cross-examine witnesses, and present a defense; and (4) the decision is rendered on the merits). Affordable housing leases subject to HUD regulations may have additional requirements such as (1) contractually defined "good cause," (2) a ten-day opportunity to "discuss," (3) the duty to contemporaneously deliver to the public housing agency (i.e., the housing authority who has the contract with the landlord) a copy of a notice to vacate delivered to a Section 8 tenant as required by Part C of a housing assistance payments contract with a public housing agency, (4) Violence Against Women Act notification, and (5) other requirements for the notice to vacate. *See, e.g.*, 34 U.S.C. § 12491 (Violence Against Women Act); 24 C.F.R. § 966.4; United States Department of Housing and Urban Development, *Handbook 4350.3, Rev-1, Occupancy Requirements of Subsidized Multifamily Housing Programs* ch. 8, para. 8-13-B-2(c)(4), **www.hud.gov/sites/documents/43503C8HSGH.PDF**. If the lease does not require prior notice and demand for payment, the landlord is not required to make demand for payment before serving a notice to vacate. *Santos v. City of Eagle Pass*, 727 S.W.2d 126, 128–29 (Tex. App.—San Antonio 1987, no writ). However, a letter advising the tenant that if a default in rent payment is not cured within ten days the landlord will file a forcible entry and detainer suit does not suffice as a notice to vacate if the suit is never filed. *Schecter v. Folsom*, 417 S.W.2d 180, 182–83 (Tex. App.—Dallas 1967, no writ).

§ 28.21:4 Method of Delivery of Notice to Vacate

Tex. Prop. Code § 24.005(f) establishes the method required for delivery of the notice to vacate. The method chosen depends on the cause of action to be pursued and whether the underlying agreement includes the right to recover attorney's fees and the desire of the plaintiff to recover attorney's fees at the time of trial; the consideration for the landlord is the additional week's notice required to perfect the right to recover attorney's fees at the time of trial when there is no agreement or an agreement is silent about the recovery of attorney's fees. When the underlying agreement allows for recovery of attorneys' fees, or there is no agreement for attorneys' fees and the plaintiff does not intend to recover attorney's fees, the notice must be delivered (1) in person to the tenant or any person residing at the premises who is sixteen years of age or older, (2) by affixing the notice to the inside of the main entry door of the premises, or (3) by regular mail, registered mail, or certified mail, return receipt requested, to the premises in question. Tex. Prop. Code § 24.005(f). An alternative form of delivery exists if (1) the dwelling has no mailbox and has a keyless bolting device, alarm system, or dangerous animal that prevents the landlord from entering the premises to leave the notice on the inside of the main entry door or (2) the landlord reasonably believes that harm to any person would result from personal delivery to the tenant or a person residing at the premises or from personal delivery to the premises by affixing the notice to the inside of the main entry door. In such a case, the landlord may securely affix the notice on the outside of the main entry door in a sealed envelope on which is written the tenant's name, address, and "IMPORTANT DOCUMENT" or substantially similar language in capital letters, and also must deposit in the mail in the same county in which the premises are located a copy of the notice to the tenant not later than 5:00 P.M. of the same day the notice is posted at the premises. Tex. Prop. Code § 24.005(f–1).

Practice Note: Posting the notice to vacate on the outside of the main entry door under Tex. Prop. Code § 24.005(f–1) has multiple requirements, each of which constitute an element of

proof for the landlord to prevail at trial; the practitioner should determine that each element can be established at trial. When there is no agreement for attorney's fees and the plaintiff seeks to recover attorney's fees, the notice must be delivered by registered or certified mail, return receipt requested. Tex. Prop. Code § 24.006(a).

Practice Note: The notice-to-vacate statutes complicate the manner in which notices to vacate must be delivered. Tex. Prop. Code § 24.005(f), (f–1). The failure to properly deliver the notice to vacate, particularly when attempting to comply with Tex. Prop. Code § 24.005(f–1), can result in a take-nothing judgment in favor of the tenant if the tenant raises an affirmative defense of insufficient notice. Instead of attempting to comply with the statutory provisions allowing various forms of hand delivery to the premises (and if allowed under the lease), consider simply delivering a five-day (or more) notice to vacate via certified mail, return receipt requested, along with a first-class mail counterpart. This eliminates the myriad of issues of proof regarding hand delivery if compliance with Tex. Prop. Code § 24.005(f–1) is being attempted.

§ 28.21:5 Notice Periods for Notices to Vacate

Written Leases: Two time periods are applicable for notices to vacate delivered for the breach of a written lease; the time period is determined by whether the lease includes a provision allowing for the recovery of attorney's fees and whether attorney's fees are to be requested at trial.

If the agreement provides for recovery of attorney's fees, the landlord must give at least three days' written notice to vacate the premises before filing suit, unless the written lease or agreement provides for a longer or shorter time period. *See* Tex. Prop. Code §§ 24.005(a), 24.006(b). A longer or shorter notice period expressly agreed to in the lease is controlling. Tex. Prop. Code § 24.005(a). Certain HUD form leases for subsidized housing require a ten-day opportunity for the tenant to discuss the default with the landlord and additional default and notice requirements. Relying on Tex. Prop. Code § 24.005(e), the Fourteenth Court of Appeals has held that the three-day notice period required for a notice to vacate may not run concurrently with the ten-day discussion period required in the HUD lease; the notice must be delivered subsequent to the expiration of the original ten-day discussion period. *Kennedy v. Andover Place Apartments*, 203 S.W.3d 495, 498 (Tex. App.—Houston [14th Dist.] 2006, no pet.). However, some HUD leases have been revised to now allow the time to run concurrently.

If the lease does not include language entitling the landlord to recover attorney's fees, and the landlord intends to seek attorney's fees at the time of trial, the notice must state that if the tenant does not vacate the premises before the eleventh day after receipt of the notice, the landlord may recover attorney's fees. The demand must be sent by registered or certified mail, return receipt requested, at least ten days before the date suit is filed. Tex. Prop. Code § 24.006(a).

Oral Leases: If the landlord does not intend to seek recovery of attorney's fees at trial, written notice to vacate must be given at least three days before filing a forcible detainer suit. Tex. Prop. Code § 24.005(a). If the landlord does intend to seek recovery of attorney's fees, the notice must state that if the tenant does not vacate the premises before the eleventh day after receipt of the notice, the landlord may recover attorney's fees. The demand must be sent by registered or certified mail, return receipt requested, at least ten days before the date suit is filed. Tex. Prop. Code § 24.006(a).

Tenancies at Will: Two time periods are applicable for notices to vacate delivered to terminate a tenancy at will; the time period is determined by whether attorney's fees are to be requested at trial. The general notice rule requires a three-day written notice period before filing suit unless the parties have contracted for a shorter or longer notice period in a written lease or agreement. Tex. Prop. Code § 24.005(b). If the lease or agreement does not include language allowing for the recovery of attorney's fees, and the landlord intends to seek recovery of attorney's fees at the time of trial, the notice must state that if the tenant does not vacate the premises before the eleventh day after receipt of the notice, the landlord may recover attorney's fees. The demand must be sent by registered or certified mail, return receipt requested, at least ten days before the date suit is filed. Tex. Prop. Code § 24.006(a).

Tenancies at Sufferance: When the former owner wrongfully retains possession after a foreclosure, and the plaintiff has no intention to seek attorney's fees, a three-day written notice requirement applies before filing suit unless the parties have contracted for a shorter or longer notice period in a written lease or agreement. Tex. Prop. Code § 24.005(b). If the lease or agreement does not include language allowing for the recovery of attorney's fees, and the landlord intends to seek recovery of attorney's fees at the time of trial, the notice must state that if the tenant does not vacate the premises before the eleventh day after receipt of the notice, the landlord may recover attorney's fees. The demand must be sent by registered or certified mail, return receipt requested, at least ten days before the date suit is filed. Tex. Prop. Code § 24.006(a).

Thirty-day written notice to a residential tenant is required if the purchaser chooses not to continue the lease and the tenant timely pays rent and is not otherwise in default under the tenant's lease after foreclosure. Tex. Prop. Code § 24.005(b). The tenant is considered to timely pay the rent if, during the month of the foreclosure sale, the tenant pays the rent for that month to the landlord before receiving any notice that a foreclosure sale is scheduled during the month, or pays the rent for that month to the foreclosing lienholder or the purchaser at foreclosure not later than the fifth day after the date of receipt of a written notice of the name and address of the purchaser that requests payment. Tex. Prop. Code § 24.005(b). If the purchaser intends to collect attorney's fees at trial, the notice must state that if the tenant does not vacate the premises before the eleventh day after receipt of the notice, the landlord may recover attorney's fees, and the demand must be sent by registered or certified mail, return receipt requested, at least ten days before the date suit is filed. Tex. Prop. Code § 24.006(a).

Holdover: If the landlord does not seek recovery of attorney's fees at trial, written notice to vacate must be given at least three days before filing a forcible detainer suit unless the parties have contracted for a shorter or longer notice period in a written lease or agreement. Tex. Prop. Code § 24.005(a). If the lease does not include language entitling the landlord to recover attorney's fees, and the landlord intends to seek attorney's fees at the time of trial, the notice must state that if the tenant does not vacate the premises before the eleventh day after receipt of the notice, the landlord may recover attorney's fees. The demand must be sent by registered or certified mail, return receipt requested, at least ten days before the date suit is filed. Tex. Prop. Code § 24.006(a).

The landlord must also comply with the tenancy termination notice requirements of Tex. Prop. Code § 91.001. A monthly tenancy or a tenancy from month to month may be terminated by the tenant or the landlord giving notice of termination to the other. Tex. Prop. Code § 91.001(a). If a notice of termination is given under section 91.001(a) and the rent-paying period is at least

one month, the tenancy terminates on the later of (1) the day given in the notice for termination or (2) one month after the day on which the notice is given. Tex. Prop. Code § 91.001(b). If a notice of termination is given under section 91.001(a) and the rent-paying period is less than a month, the tenancy terminates on the later of (1) the day given in the notice for termination or (2) the day following the expiration of the period beginning on the day on which notice is given and extending for a number of days equal to the number of days in the rent-paying period. Tex. Prop. Code § 91.001(c). If a tenancy terminates on a day that does not correspond to the beginning or end of a rent-paying period, the tenant is liable for rent only up to the date of termination. Tex. Prop. Code § 91.001(d).

The tenancy termination notice requirements of Tex. Prop. Code § 91.001(a)–(d) do not apply if the landlord and tenant have agreed in an instrument signed by both parties on a different period of notice to terminate the tenancy or that no notice is required, or there is a breach of contract recognized by law. Tex. Prop. Code § 91.001(e).

Forcible Entry: When no attorney's fees are sought, oral or written notice to vacate may demand that the party in possession vacate either immediately or by a specified deadline. Tex. Prop. Code § 24.005(d). If the owner intends to seek attorney's fees at the time of trial, the notice must state that if the tenant does not vacate the premises before the eleventh day after receipt of the notice, the owner may recover attorney's fees. The demand must be sent by registered or certified mail, return receipt requested, at least ten days before the date suit is filed. Tex. Prop. Code § 24.006(a).

Tenant of a Person Who Acquired Possession by Forcible Entry: When no attorney's fees are sought, a three-day written notice period applies. Tex. Prop. Code § 24.005(c). If the plaintiff intends to seek attorney's fees at the time of trial, the notice to vacate must state that if the tenant does not vacate the premises before the eleventh day after receipt of the notice, the plaintiff may recover attorney's fees. The demand must be sent by registered or certified mail, return receipt requested, at least ten days before the date suit is filed. Tex. Prop. Code § 24.006(a).

Practice Note: The practitioner should make certain that the notice to vacate terminates solely the right to possession; avoid notices that terminate the lease. If a landlord terminates the lease as opposed to solely the right to possession of the premises, the tenant can take the position that all duties of the tenant, including the duty to maintain the premises in good condition, are terminated.

[Sections 28.22 through 28.25 are reserved for expansion.]

IV. Trial Procedure

§ 28.26 New Rules for Justice Courts

The supreme court adopted new rules of procedure for justice courts effective August 2013; these rules of procedure now appear in the 500 to 510 series. Texas Supreme Court, *Final Approval of Rules for Justice Court Cases*, Misc. Docket No. 13-9049 (Apr. 15, 2013), 76 Tex. B.J. 440 (2013). *See also* Acts 2011, 82d Leg., 1st C.S., ch. 3, §§ 5.02, 5.07 (H.B. 79), eff. Jan. 1, 2012; Acts 2013, 83d Leg., R.S., ch. 2, §§ 1, 3 (H.B. 1263), eff. Sept. 1, 2013. The application of the new rules of procedure and rules of evidence for eviction are found in Tex. R. Civ. P. 500.3, Application of Rules in Justice Court Cases.

§ 28.27 Trial Procedure Generally

An eviction case is a lawsuit brought to recover possession of real property under chapter 24 of the Texas Property Code. The owner or any authorized agent may represent the owner in justice court. Tex. R. Civ. P. 500.4; Tex. Prop. Code § 24.011.

A claim for rent may be joined with an eviction case if the amount of rent due and unpaid is not more than $10,000, excluding statutory interest and court costs but including attorney's fees, if any. Eviction cases are governed by rules 500–507 and 510 of part V of the Texas Rules of Civil Procedure. To the extent of any conflict between rule 510 and the rest of part V, rule 510 applies. Tex. R. Civ. P. 500.3(d).

The other Rules of Civil Procedure and the Rules of Evidence do not apply except when the judge hearing the case determines that a particular rule must be followed to ensure that the proceedings are fair to all parties or when otherwise specifically provided by law or the rules. Tex. R. Civ. P. 500.3(e).

§ 28.27:1 Time Periods

The filing deadlines of the parties in Tex. R. Civ. P. 510 no longer follow the mailbox rule; if a document is filed by mail and not *received* by the court by the due date, the court may take any action authorized by the rules, including issuing a writ of possession requiring a tenant to leave the property. Tex. R. Civ. P. 510.2.

§ 28.27:2 Jurisdiction

The justice court in the precinct in which the real property is located has exclusive original jurisdiction for eviction suits. Tex. Gov't Code § 27.031(a)(2); Tex. Prop. Code § 24.004. "An insufficient description [of the property] in the complaint in forcible entry and detainer is not such a defect as to deprive the court of jurisdiction. The complaint can be amended in the Justice of the Peace Court." *Family Investment Co. of Houston v. Paley*, 356 S.W.2d 353, 355–356 (Tex. App.—Houston 1962, writ dism'd). The limited concurrent probate court jurisdiction of repealed Texas Probate Code section 5A(b) did not directly carry over to the new Texas Estates Code; however, Tex. Est. Code § 32.001(b) may still vest some jurisdiction in the probate court for an eviction relating to an estate: "A probate court may exercise pendent and ancillary jurisdiction as necessary to promote judicial efficiency and economy." It is well settled in Texas that justice courts have exclusive jurisdiction over suits for possession unless the determination of title is required to determine the issue of possession. *See McGlothlin v. Kliebert*, 672 S.W.2d 231, 232–33 (Tex. 1984); *Rice v. Pinney*, 51 S.W.3d 705, 709 (Tex. App.—Dallas 2001, no pet.). The merits of title are not adjudicated in justice courts. Tex. R. Civ. P. 510.3(e).

Certain allegations of an issue with title will not divest the justice court of jurisdiction in a suit for possession. For example, defaults leading to foreclosure under deeds of trust having language to the effect that if the property is sold under deed of trust the prior owner becomes a tenant at will or tenant at sufferance will not divest the court of jurisdiction. *Dormady v. Dinero Land & Cattle Co., L.L.C.*, 61 S.W.3d 555, 558–59 (Tex. App.—San Antonio 2001, pet. dism'd w.o.j.) (deed of trust provision stated: "If any of the property is sold under this deed of trust, [prior owner] shall immediately surrender possession to the purchaser. If [prior owner] fails to do so, [prior owner] shall become a tenant at sufferance of the purchaser, subject to an action for forcible detainer."); *see also Falcon v. Ensignia*, 976 S.W.2d 336, 338 (Tex. App.—Corpus Christi–Edinburg 1998, no pet.) ("Justice courts may adjudicate possession even where issues related to the title of real property are tangentially or collaterally related to possession."). Likewise, a justice court will not be divested of jurisdiction when a wrongful foreclosure pro-

ceeding is pending in district court after nonjudicial foreclosure sale after default under a deed of trust. *Rice*, 51 S.W.3d at 713 (holding that when deed of trust had tenant-at-sufferance reversion language, a justice or county court is not deprived of jurisdiction by existence of a title dispute but is deprived of jurisdiction only if "the right to immediate possession necessarily requires the resolution of a title dispute") (quoting *Haith v. Drake*, 596 S.W.2d 194 (Tex. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.). A justice court will also not be divested of jurisdiction in defaults under contracts for deed that include language to the effect that after default the purchaser becomes a tenant at sufferance or tenant at will. *See Martinez v. Daccarett*, 865 S.W.2d 161, 163–64 (Tex. App.—Corpus Christi–Edinburg 1993, no writ).

On the other hand, other kinds of allegations of title issues will divest the justice court of jurisdiction in a suit for possession; for example, defaults under contracts for deed that do not include language to the effect that "after default, purchaser becomes a tenant at will or tenant at sufferance." *Ward v. Malone*, 115 S.W.3d 267, 271 (Tex. App.—Corpus Christi–Edinburg 2003, pet. denied); *Aguilar v. Weber*, 72 S.W.3d 729, 735 (Tex. App.—Waco 2002, no pet.). Likewise, a justice court will be divested of jurisdiction when it is necessary to determine the existence of a marital life estate in the real property at issue. *Fernandez v. Mendoza*, No. 05-03-01680-CV, 2005 WL 110349, at *2–3 (Tex. App.—Dallas Jan. 20, 2005, pet. denied).

A justice court does not have jurisdiction in a forcible entry and detainer or forcible detainer suit and must dismiss if the defendant files a sworn statement alleging that the suit is based on a deed executed in violation of chapter 21A of the Texas Business and Commerce Code. Tex. Prop. Code § 24.004(b).

Practice Note: If a temporary restraining order issues to enjoin a suit for possession and resolution of a title dispute is not necessary to determine the issue of possession, the attorney should consider immediately moving for dissolution of the temporary restraining order under Tex. R. Civ. P. 680. *Cf. Breceda v. Whi*, 224 S.W.3d 237, 240 (Tex. App.—El Paso 2005, orig. proceeding) (injunction issued to prevent landlord from disturbing quiet enjoyment of tenant but expressly carving out from effect of injunction the right of landlord to prosecute forcible detainer action was proper).

§ 28.27:3 Venue

Mandatory venue is in the justice precinct in which all or part of the premises are located. Tex. Civ. Prac. & Rem. Code § 15.084. If the petition is filed in the wrong precinct, the court must dismiss the case; the plaintiff will not be entitled to a refund of the filing fee but will be refunded any service fees paid if the case is dismissed before service is attempted. Tex. R. Civ. P. 510.3(b).

§ 28.27:4 Sworn Complaint

The allegations of the complaint must be sworn to. Tex. R. Civ. P. 510.3(a). The complaint must include—

1. the name of the plaintiff;
2. the name, address, telephone number, and fax number, if any, of the plaintiff's attorney, if applicable, or the address, telephone number, and fax number, if any, of the plaintiff;
3. the name, address, and telephone number, if known, of the defendant;
4. the amount of rent due and unpaid at the time of filing and within the jurisdictional limits of the court and the amount of money, if any, the plaintiff seeks;

5. the basis for the plaintiff's claim against the defendant, including the facts and grounds for eviction, and when the eviction is based on a written residential lease the plaintiff must name all tenants obligated under the lease whom the plaintiff seeks to evict;
6. a statement about whether the plaintiff consents to e-mail service of the answer and any other motions or pleadings;
7. a description, including the address, if any, of the premises that the plaintiff seeks possession of;
8. a description of when and how the notice to vacate was delivered; and
9. a statement that attorney's fees are being sought, if applicable.

Tex. R. Civ. P. 502.2, 510.3. The complaint must list all home and work addresses of the defendant known to the plaintiff and must state that the plaintiff knows of no other home or work addresses of the defendant in the county where the premises are located to support a judgment based on substituted service. Tex. R. Civ. P. 510.4(c). Since Tex. R. Civ. P. 510.4(c) contemplates a defendant having more than one home address, it is reasonable to require a plaintiff relying on substituted service to state that it knows that a defendant is currently living somewhere other than on the leased premises before obtaining a judgment based on substituted service by delivery to the leased premises. *Thomas v. Olympus/Nelson Property Management*, 148 S.W.3d 395, 400 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (holding that service under former concomitant Tex. R. Civ. P. 510.4(c) would not support default judgment when sworn complaint failed to list hospital address where tenant was receiving inpatient treatment).

Additional bases for a suit for possession are found in the statute describing acts of the landlord that do not constitute retaliation. An eviction or lease termination based on the following circumstances, which are valid grounds for eviction or lease termination in any event, does not constitute retaliation:

1. the tenant is delinquent in rent when the landlord gives notice to vacate or files an eviction action;
2. the tenant, a member of the tenant's family, or a guest or invitee of the tenant intentionally damages property on the premises or by word or conduct threatens the personal safety of the landlord, the landlord's employees, or another tenant;
3. the tenant has materially breached the lease, other than by holding over, by an action such as violating written lease provisions prohibiting serious misconduct or criminal acts, except as provided by this section;
4. the tenant holds over after giving notice of termination or intent to vacate;
5. the tenant holds over after the landlord gives notice of termination at the end of the rental term and the tenant does not take action for retaliation until after the landlord gives notice of termination; or
6. the tenant holds over and the landlord's notice of termination is motivated by a good-faith belief that the tenant, a member of the tenant's family, or a guest or invitee of the tenant might (a) adversely affect the quiet enjoyment by other tenants or neighbors; (b) materially affect the health or safety of the landlord, other tenants, or neighbors; or (c) damage the property of the landlord, other tenants, or neighbors.

Tex. Prop. Code § 92.332(b).

See form 28-14 in this chapter for a suit on sworn complaint.

§ 28.27:5 May Join Suit for Rent

A suit for rent may be joined with an action for forcible entry and detainer whenever the suit for rent is within the jurisdiction of the justice court and must be brought in the county and precinct in which all or part of the property is located. Tex. Civ. Prac. & Rem. Code § 15.091; Tex. R. Civ. P. 510.3(b), (d). Late fees, "insufficient funds" fees, and other amounts due under the lease may not be included in the suit for possession.

Practice Note: Some leases include provisions that all payments received may be applied first to nonrent monetary obligations and then to rent. When representing the landlord, the attorney should determine whether the landlord's accounting practices and the lease allow the "carry" of a rent obligation. When representing the tenant, review the provisions of the lease and petition to determine whether the landlord is entitled to the amounts requested.

Practice Note: When representing the landlord, the prayer in the petition should always request all rent due as of the date of judgment.

Practice Note: A lease provision providing that the full month's rent is due and owing on the first of the month should not be prorated through the day of trial unless a written lease provides otherwise. When representing the landlord and a court attempts to prorate the rent to the date of the hearing, the attorney should vigorously argue that—

1. a judgment for possession will not become final for five days and is subject to appeal for trial de novo;
2. if a writ of possession must issue and be served for the plaintiff to obtain possession, it could take up to three additional weeks during which the tenant will continue to have possession; and
3. the client has a contractual right to the full month of rent as of the rental due date under the lease.

Practice Note: If rent through the date of judgment would exceed the maximum jurisdictional limits of the justice court (currently $10,000), the best practice is to plead an express reservation of the right to seek rents due in a court of competent jurisdiction.

Practice Note: If a landlord loses an eviction suit, has joined a suit for rent, and then fails to appeal, the tenant can take the position that res judicata applies and the take-nothing judgment against the landlord created a waiver of all rent due through the time of judgment. Since the joinder of a suit for rent is optional, a landlord may elect not to take the risk of losing rent with an adverse ruling, particularly if there are notice or fact issues making the landlord's burden of proof at trial problematic. In fact, some landlords no longer include rent with the eviction suit, as there may be additional delinquent amounts due and owing on the tenant's account (e.g., late fees, insufficient funds fees, damages to the premises) that the landlord will send to collections after the tenant surrenders the unit.

§ 28.27:6 Request for Immediate Possession after Trial; Bond

In exigent circumstances, the party filing the suit for possession may file an immediate possession bond under the provisions of Tex. R. Civ. P. 510.5. The sole benefit to a plaintiff filing an immediate possession bond is the right to the issuance of a writ of possession on the date of trial but only if the defendant fails to appear or file a written answer and a judgment for possession is rendered by default. Tex. Prop. Code § 24.0061(b); Tex. R. Civ. P. 510.5.

The bond may be filed at any time before the final judgment in a forcible detainer action; however, the defendant must have seven days' notice of the filing of the bond before a writ of possession issues. Tex. R. Civ. P. 510.5(a), (c).

The bond must be in an amount to be approved by the judge in the probable amount of costs of suit and damages that may result to the defendant in the event that the suit has been improperly instituted and be conditioned that the plaintiff will pay the defendant all costs and damages that are adjudged against the plaintiff. Tex. R. Civ. P. 510.5(a). The court must notify the defendant that the plaintiff has filed a possession bond in the same manner as service of citation; the notice must inform the defendant that if the defendant does not file an answer or appear for trial, and judgment for possession is granted by default, an officer will place the plaintiff in possession of the property on or after the seventh day after the date the defendant is served with the notice. Tex. R. Civ. P. 510.5(b). The court may grant immediate possession only after a bond for possession is filed and timely served after the defendant fails to answer or appear for trial and a default judgment for possession issues. Tex. Prop. Code § 24.0061(b); Tex. R. Civ. P. 510.5(c).

Practice Note: If the practitioner intends to file an immediate possession bond, always file it *with* the petition.

§ 28.27:7 Citation

After filing the sworn complaint, the justice of the peace is required to immediately issue citation directed to each defendant. Tex. R. Civ. P. 510.4. The citation must—

1. be styled "The State of Texas";
2. be signed by the clerk under seal of court or by the judge;
3. contain the name, location, and address of the court;
4. state the date of filing of the petition;
5. state the date of issuance of the citation;
6. state the file number and the names of the parties;
7. state the plaintiff's cause of action and relief sought;
8. be directed to the defendant;
9. state the name and address of the attorney for the plaintiff, or if the plaintiff does not have an attorney, the address of the plaintiff;
10. state the date the defendant must appear in person for trial at the court issuing citation, which must not be less than ten days nor more than twenty-one days after the petition is filed;
11. notify the defendant that if the defendant fails to appear in person for trial, judgment by default may be rendered for the relief demanded in the petition;
12. inform the defendant that, upon timely request and payment of a jury fee no later than three days before the day set for trial, the case will be heard by a jury;
13. contain all warnings required by chapter 24 of the Texas Property Code; and
14. include the following statement: "For further information, consult Part V of the Texas Rules of Civil Procedure, which is available online and also at the court listed on this citation."

Tex. R. Civ. P. 510.4.

Personal service of citation is required by Tex. R. Civ. P. 510.4(b)(2). Alternative service by delivery to the premises is allowed when the constable, sheriff, or other person authorized by written court order is unsuccessful in serving the

citation under Tex. R. Civ. P. 510.4(b); the petition lists all home and work addresses of the defendant that are known to the plaintiff (e.g., if a tenant is incarcerated, the petition must include the address of the place of incarceration) and states that the plaintiff knows of no other home or work addresses of the defendant in the county where the premises are located; and the constable, sheriff, or other person authorized files a sworn statement that it has made diligent efforts to serve such citation on at least two occasions at all addresses of the defendant in the county where the premises are located, stating the times and places of attempted service. Tex. R. Civ. P. 510.4(c)(1). A judge must promptly consider a sworn statement filed under Tex. R. Civ. P. 510.4(c)(1) and determine whether citation may be served by delivery to the premises. The plaintiff is not required to make a request or motion for alternative service. Tex. R. Civ. P. 510.4(c)(2).

If the judge authorizes service by delivery to the premises, the constable, sheriff, or other person authorized by written court order must, at least six days before the day set for trial, (1) deliver a copy of the citation with a copy of the petition attached to the premises by placing it through a door mail chute or slipping it under the front door; if neither method is possible, the officer may securely affix the citation on the front door or main entry to the premises; and (2) deposit in the mail a copy of the citation with a copy of the petition attached, addressed to defendant at the premises and sent by first-class mail. Tex. R. Civ. P. 510.4(c)(3). The constable, sheriff, or other person authorized by written court order to deliver citation must note on the return of service the date the citation was delivered and the date it was deposited in the mail. Tex. R. Civ. P. 510.4(c)(4); *see also* Tex. Prop. Code § 24.0051(a) (referring to the predecessor to Tex. R. Civ. P. 510.4; *see* Texas Supreme Court, *Final Approval of Rules for Justice Court Cases*, Misc. Docket No. 13-9049 (Apr. 15, 2013), 76 Tex. B.J. 440 (2013)).

§ 28.27:8 Defendant's Pleadings

The defendant should always file a written answer, including a general denial. Notwithstanding Tex. R. Civ. P. 500.3(e), which provides that other rules of procedure and evidence do not apply, the defendant should always consider filing additional defensive pleadings since the court may determine that a particular rule must be followed "to ensure that the proceedings are fair to all parties." These include the following.

Plea to the Jurisdiction: Although a plea to the jurisdiction can be raised for the first time on appeal, the best practice is to raise the issue in the trial court. *See Waco I.S.D. v. Gibson*, 22 S.W.3d 849, 850 (Tex. 2000) (orig. proceeding). Two of the most common pleas to the jurisdiction in response to a suit for possession are title disputes (claims that determination of title is necessary for resolution of the right to possession) and claims that the premises in question are not in the justice precinct in which the case is filed. *See* Tex. Gov't Code § 27.031(a)(2); Tex. Prop. Code § 24.004; Tex. R. Civ. P. 510.3(b).

Motion to Transfer Venue: A traditional Tex. R. Civ. P. 86 motion to transfer venue is not the appropriate vehicle if all or part of the premises at issue are not in the justice court precinct in which the suit for possession was filed. In that event, the court must dismiss the matter for lack of jurisdiction. *See* Tex. Civ. Prac. & Rem. Code § 15.084; Tex. R. Civ. P. 510.3(b).

If a party in justice court believes it cannot get a fair trial before a specific judge and files a sworn motion to that effect supported by the sworn statement of two other credible persons, change is mandatory. Tex. R. Civ. P. 502.4(e).

On the written consent of all parties or their attorneys, filed with the court, venue must be transferred to the court of any other justice of the peace of the county, or any other county.

Tex. R. Civ. P. 502.4(f). *Caveat*: The use of this procedure in an eviction case may create a jurisdictional issue unless the new court sits in the precinct where all or part of the premises are located.

Motion to Abate: A motion to abate is used to prevent the plaintiff's case from going forward on the pleadings until the plaintiff corrects the defect. *Martin v. Dosohs I, Ltd.*, 2 S.W.3d 350, 354 (Tex. App.—San Antonio 1999, pet. denied). It must be verified. *Sparks v. Bolton*, 335 S.W.2d 780, 785 (Tex. App.—Dallas 1960, no writ). The two most common bases for abatement are that the plaintiff has no assumed name certificate (or an incorrect or expired certificate) and that the Servicemembers Civil Relief Act applies.

If the plaintiff has no, or an incorrect or expired, assumed name certificate on file, it cannot prosecute an action in the courts of Texas. Tex. Bus. & Com. Code § 71.201; *Sixth RMA Partners v. Sibley*, 111 S.W.3d 46, 55 (Tex. 2003).

Where the Servicemembers Civil Relief Act applies, at any time after the filing of the suit for possession, the court, the servicemember, or someone on behalf of the servicemember, for premises occupied or intended to be occupied primarily as a residence and for which the monthly rent does not exceed $2,400 (as adjusted for inflation after 2003), may move the court for a stay of the proceedings on the grounds that the servicemember's ability to pay the rent is materially affected by military service. On such application, the court must stay the proceedings for a period of ninety days unless, in the opinion of the court, justice and equity require a longer or shorter period of time, or adjust the obligation under the lease to preserve the interests of all parties. 50 U.S.C. § 3951.

Death of Defendant: A suggestion of death should be filed. Thereafter, the clerk is to issue a *scire facias* to the representative of the estate to appear and defend. Tex. R. Civ. P. 152.

Bankruptcy of Defendant: A suggestion of bankruptcy should be filed.

Jury Demand: Request must be made at least three or more days before the trial date, and the party demanding the jury must pay the jury fee. Tex. R. Civ. P. 510.7(b).

Special Exceptions: The defendant, even if he is pro se, should specially except to defects in the plaintiff's pleadings, or the defects are waived. Tex. R. Civ. P. 90; *Moore v. Sieber*, No. 06-06-00030-CV, 2006 WL 3290895, at *1 (Tex. App.—Texarkana Nov. 21, 2006, no pet.) (mem. op.).

Special Denials: The defendant should file verified denials if there is a misnomer, the plaintiff has no legal capacity to sue, the plaintiff is not entitled to recover in the capacity in which the plaintiff sues, there is a defect of parties, or any other ground under Tex. R. Civ. P. 93.

§ 28.27:9 Defendant's Affirmative Defenses

Even though the new rules of procedure in eviction cases in justice court are limited to rule 510, the defendant may attempt to affirmatively plead affirmative and avoidance defenses it may have or the court, on objection, should disallow the defendant from introducing evidence on the defense. Tex. R. Civ. P. 94. Because the only issue to be decided is whether the landlord or the tenant is entitled to have possession of the premises, questions of legal title to the property, fraud, negligence, deceptive trade practices, and other theories of law not relating to the question of possession are not properly asserted in an eviction proceeding.

The defendant in one eviction proceeding offered as a defense proof of the following facts: the property owners had entered into an oral

contract to sell the property to the occupants, the occupants had entered into possession of the property and made valuable improvements to it, the owners were attempting to perpetrate a fraud on the occupants through a forcible detainer suit, and the owners had filed the suit in retaliation for the occupants having brought a disciplinary proceeding against the owners' son, who was an attorney. The court of appeals held that these questions had no relevancy to the question in the forcible detainer suit of which party had the right to immediate possession of the premises, and evidence pertaining to those affirmative defenses was inadmissible in that suit. *Fandey v. Lee*, 880 S.W.2d 164, 169–70 (Tex. App.—El Paso 1994, writ denied).

The most common affirmative defenses to a suit for possession are the following.

Insufficient Notice: The landlord failed to expressly comply with all the notice-to-vacate requirements under Tex. Prop. Code § 24.005.

Payment: The defendant includes an account stating distinctly the nature of the payments and the payments made. Tex. R. Civ. P. 95.

Release; Estoppel; Waiver: Where the appellant housing authority entered into a new lease two days after it perfected appeal by filing an appeal bond, the housing authority waived the right to sue for possession. *Joseph v. Beaumont Housing Authority*, 99 S.W.3d 765, 766 (Tex. App.—Beaumont 2003, no pet.) (per curiam).

Most standard commercial leases contain a nonwaiver clause. In such cases the contract controls, and acts of the landlord may not constitute a waiver of any other covenants the tenant is required to perform. In *Shields Ltd. Partnership v. Bradberry*, 526 S.W.3d 471, 475 (Tex. 2017), the court held that a party by its conduct may waive a nonwaiver clause but that engaging in the very conduct disclaimed as a basis for waiver is insufficient as a matter of law to nullify a nonwaiver provision. Absent such a paragraph, a landlord should be aware that only slight acts on his part may waive his right to enforce the lease. *See G.C. Murphy Co. v. Lack*, 404 S.W.2d 853, 858–59 (Tex. App.—Corpus Christi–Edinburg 1966, writ ref'd n.r.e.). If the landlord has notice of a breach of the lease, any recognition by the landlord of the continued tenancy of the tenant will have the effect of a waiver of the landlord's right to terminate the lease. The refusal of the landlord to accept timely tender of rent may constitute a waiver of the landlord's right to declare the lease in default unless there is a new breach. *Harris v. Ware*, 93 S.W.2d 598, 599–600 (Tex. App.—Waco 1936, writ ref'd). The landlord who accepts rent from a tenant after full notice of a breach of a covenant or condition in the lease for which a forfeiture might have been demanded waives his right to declare a forfeiture for the breach until a new breach occurs. *Theophilakos v. Costello*, 54 S.W.2d 203, 205 (Tex. App.—Waco 1932, no writ). The right to terminate a lease for failure to make payments when due is waived by assurances from the landlord that the tenant need not worry about timely payments. *Ada Oil Co. v. Logan*, 447 S.W.2d 205, 209 (Tex. App.—Houston [14th Dist.] 1969, no writ). The landlord's acceptance of partial payment of rent does not necessarily preclude his right to terminate the lease. *Jowell v. Pearsall*, 331 S.W.2d 514, 515 (Tex. App.—Texarkana 1959, no writ). Acceptance of rent for the premises after taking proper legal steps to terminate the lease for cause is not a waiver of the landlord's right to repossess the premises unless the facts show an intent to waive. *Crawford v. Texas Improvement Co.*, 196 S.W. 195, 197 (Tex. App.—El Paso 1917, writ dism'd). A landlord who has been very indulgent in allowing rents to become overdue cannot be precluded from terminating the lease. *McCray v. Kelly*, 130 S.W.2d 458, 462 (Tex. App.—Galveston 1939, writ dism'd).

Retaliation: *See* Tex. Prop. Code § 92.335.

Failure of Condition Precedent: An example is the failure to deliver the prior notification when the plaintiff uses a conditional notice to vacate with a right to cure by payment. *See* Tex. Prop. Code § 24.005(i).

Fair Housing Act Violation: *See* 42 U.S.C. §§ 3601–3631; Tex. Prop. Code §§ 301.001–.171.

Usury: Though often attempted as a defense by tenants, usury does not apply to real property leases because the lease is not for the retention or forbearance of money. *Apparel Manufacturing Co., Inc. v. Vantage Properties, Inc.*, 597 S.W.2d 447, 449 (Tex. App.—Dallas 1980, writ ref'd n.r.e.). The court held that a lease transaction is not a lending transaction and therefore does not meet the definition of usury. In *River Oaks Shopping Center v. Pagan*, 712 S.W.2d 190, 192 (Tex. App.—Houston [14th dist.] 1986, writ ref'd n.r.e.), the court found that all rent due under the lease was incurred at the time of the execution of the lease and the subsequent rental payments were merely the time in which the tenant had to repay it.

Deceptive Trade Practices: In a commercial lease there exists an implied warranty that the premises are suitable for their intended commercial purposes. *Davidow v. Inwood North Professional Group—Phase I*, 747 S.W.2d 373, 377 (Tex. 1988). The *Davidow* court held that the tenant's obligation to pay rent and the landlord's implied warranty of suitability are mutually dependent. That is, a breach of the warranty authorizes an abatement of rent. *Davidow*, 747 S.W.2d at 377. See Tex. Prop. Code §§ 92.052, 92.056 for a landlord's duty to repair in residential lease contexts.

Covenant of Quiet Enjoyment: Most leases provide an express covenant of quiet enjoyment of the premises. If the lease does not provide it, the law implies such a covenant. The covenant, then, is best defined as one in which the tenant shall not be evicted or disturbed by the lessor. In *Goldman v. Alkek*, 850 S.W.2d 568, 570–72 (Tex. App.—Corpus Christi–Edinburg 1993, no writ), the court held that the landlord breached the covenant of quiet enjoyment when the landlord made demands for additional amounts of money not required by the lease, the tenant paid the additional amounts, and the landlord attempted to terminate the lease, because such an action would sufficiently show that actions of the landlord hindered the tenant and his occupation in the enjoyment of the leased premises.

By virtue of the covenant of quiet enjoyment, a legal duty has been found on the part of the landlord to protect the tenant from disturbance that may be created by the acts of tenants of an adjoining portion of the building. *Maple Terrace Apartment Co. v. Simpson*, 22 S.W.2d 698, 700 (Tex. App.—Texarkana 1929, no writ).

Constructive Eviction: Constructive eviction is an intentional act or omission of the landlord permanently depriving a tenant, without his consent, of the use and beneficial enjoyment of the premises or any substantial part thereof so that the tenant abandons the premises. *Hoover v. Wukasch*, 274 S.W.2d 458, 460 (Tex. App.—Austin 1955, writ ref'd n.r.e.). Constructive eviction has been defined as having four distinct elements: (1) intent on the landlord's part that the tenant no longer enjoy the premises, (2) a material act by the landlord substantially interfering with the use and enjoyment of the premises for the purpose for which they were let, (3) an act that permanently deprives the tenant of the use and enjoyment of the premises, and (4) an abandonment of the premises by the tenant within a reasonable time of the commission of the act. *Briargrove Shopping Center v. Vilar Joint Venture, Inc.*, 647 S.W.2d 329, 334 (Tex. App.—Houston [1st Dist.] 1982, no writ). The landlord's intent may be inferred from the circumstances. *Lazell v. Stone*, 123 S.W.3d 6, 12 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (changing locks and informing commercial tenant that she is not welcome on property

was evidence of intent to constructively evict). *Cf. Quitta v. Fossati*, 808 S.W.2d 636, 643 (Tex. App.—Corpus Christi–Edinburg 1991, writ denied) (landlord's threat to "get the sheriff" was not evidence of constructive eviction). A tenant cannot complain that the landlord constructively evicted him when the eviction results from the actions of third parties acting without the landlord's authority or permission; the act or omission complained of must be that of the landlord. *Fidelity Mutual Life Insurance Co. v. Kaminsky*, 768 S.W.2d 818, 820, 822 (Tex. App.—Houston [14th Dist.] 1989, no writ) (landlord is not responsible for actions of third parties when landlord does not permit third party to act; act or omission complained of must be that of landlord and not merely of third party acting without landlord's authority or permission).

The proper measure of general damages for wrongful eviction of a tenant by a landlord is the difference between the market rental value of the leasehold for the unexpired term of the lease and stipulated rentals. It is the object and purpose of the law to compensate a tenant who has been wrongfully evicted from the premises for the actual loss sustained. This does not include special damages, such as lost profits. *Briargrove Shopping Center*, 647 S.W.2d at 336.

Texas law relieves tenants of contractual liability for any remaining rentals due under the lease if they can establish constructive eviction by the landlord. *Downtown Realty v. 509 Tremont Building, Inc.*, 748 S.W.2d 309, 312 (Tex. App.—Houston [14th Dist.] 1988, no writ). A landlord's acts or omissions can form the basis of a constructive eviction. *See Steinberg v. Medical Equipment Rental Services, Inc.*, 505 S.W.2d 692, 677 (Tex. App.—Dallas 1974, no writ).

Persistent requests for past-due rent in the presence of customers does not meet the legal requirements of constructive eviction. *Stillman v. Youmans*, 266 S.W.2d 913, 916 (Tex. App.—Galveston 1954, no writ). Intention on the part of the landlord that the tenant no longer enjoy the premises can be presumed from the surrounding circumstances. *Richker v. Georgandis*, 323 S.W.2d 90, 98 (Tex. App.—Houston 1959, writ ref'd n.r.e.). Leasing to a competitor of the tenant is not constructive eviction. *Sherrer v. Sparks*, 78 S.W.2d 1035 (Tex. App.—San Antonio 1935, no writ). Removing trade fixtures can be a constructive eviction. *Stephens v. Anderson*, 275 S.W.2d 869, 871 (Tex. App.—Austin 1955, writ ref'd n.r.e.). Sending a default letter demanding payment of rent is not constructive eviction. *Weissberger v. Brown-Bellows-Smith, Inc.*, 289 S.W.2d 813, 817 (Tex. App.—Galveston 1956, writ ref'd n.r.e.). If the lease calls for written notice to the landlord before the landlord has the duty to make repairs, and the tenant fails to give written notice, the tenant cannot rely on the landlord's failure to make the repairs as constructive eviction. *Hoover v. Wukasch*, 274 S.W.2d 458, 460 (Tex. App.—Austin 1955, writ ref'd n.r.e.). An eviction is not established where it appears that the tenant vacated the premises voluntarily or left for reasons other than the conduct of the landlord. *Nabors v. Johnson*, 51 S.W.2d 1081, 1082 (Tex. App.—Waco 1932, no writ); *Ogus, Rabinovich & Ogus Co. v. Foley Bros. Dry Goods Co.*, 252 S.W. 1048, 1052 (Tex. Comm'n App. 1923).

Termination: If the landlord elects to terminate a lease because of some default by the tenant, the landlord may not recover future rentals from the lease. *Glasscock v. Console Drive Joint Venture*, 675 S.W.2d 590, 592 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.). This case is interesting in that it was submitted on an agreed statement of facts. The landlord stipulated in open court that the exhibits were true and correct copies of the instruments and to the truth of the matters contained in them. One of the exhibits was the landlord's verified petition for forcible detainer, which contained a state-

ment consistent with the lease agreement that the landlord may exercise the option to terminate the lease. The landlord lost its future rentals claim.

A tenant cannot unilaterally terminate a lease absent a breach of the landlord. Abandonment by the tenant does not terminate a contract. *Stubbs v. Stuart*, 469 S.W.2d 311, 312–13 (Tex. App.—Houston [14th Dist.] 1971, no writ). In *Crawford v. Haywood*, 392 S.W.2d 387, 389 (Tex. App.—Corpus Christi–Edinburg 1965, no writ), the court held that mere abandonment and declaration of intention not to pay rent does not abrogate the landlord's rights under the lease. Suing under the lease for rents is an affirmation of the lease. *Meehan v. Pickett*, 463 S.W.2d 481, 484 (Tex. App.—Beaumont 1971, writ ref'd n.r.e.).

A tenant vacating the leased premises has a duty to notify the landlord of its departure. Until notification is effective and terminates the tenancy, the tenant remains in legal possession of the premises and is responsible for damages to the leasehold. *Flores v. Rizik*, 683 S.W.2d 112, 116 (Tex. App.—San Antonio 1984, no writ).

Surrender of a lease held by the tenant and acceptance of possession by the landlord ordinarily releases the tenant from liability for rents that would thereafter accrue. Whether there has been an acceptance by the landlord that releases the tenant from further obligations under the lease involves determining the intent of the parties. *Southmark Management Corp. v. Vick*, 692 S.W.2d 157, 159 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.). A landlord, of course, can agree to release a tenant from liability under a lease. *Franchise Stores Realty Corp. v. Dakri*, 721 S.W.2d 397, 398 (Tex. App.—Houston [1st Dist.] 1986, no writ); *but see Schecter v. Folsom*, 417 S.W.2d 180, 182–83 (Tex. App.—Dallas 1967, no writ) (letter advising tenant that if tenant did not cure default and payment of rent within ten days landlord would file forcible entry and detainer suit did not constitute notice by landlord that lease was forfeited when suit was never filed).

Election of Remedies: Generally, the filing of a forcible detainer suit or the removal of a tenant is not an election of remedies. *See McHaney v. Hackleman*, 347 S.W.2d 822, 826–27 (Tex. App.—San Antonio 1961, writ ref'd n.r.e) ("[T]he law is well settled that the mere institution of suit, which is not prosecuted to judgment, or the application for a remedy, does not constitute an election of remedies, unless the litigant has received some benefit or his opponent has suffered some loss or detriment."); *but see Carter v. Long*, 455 S.W.2d 812 (Tex. App.—Texarkana 1970, writ ref'd n.r.e.) (landlord's action of filing forcible detainer suit had effect of evicting tenant from premises, and by landlord's action of eviction, he terminated lease by retaking possession of premises; those acts constituted an election of remedies in that landlord elected to terminate agreement and retake exclusive possession rather than seek remedies under agreement).

Disposal of Property or Conversion (Commercial Tenancies): Tex. Prop. Code § 93.002(e) gives the commercial landlord the right to remove and store any abandoned property of the tenant that remains on the premises. In addition to the commercial landlord's other rights, the landlord may dispose of the property sixty days after the date the property is stored. To do this, the landlord must deliver, by certified mail to the tenant at the tenant's last known address, a notice stating that the landlord may dispose of the tenant's property if the tenant does not claim the property within sixty days of the date the property is stored. Tex. Prop. Code § 93.002(e).

In *Wilson v. Moore*, 122 S.W. 577, 579 (Tex. App. 1909, no writ), the court held that conversion of the tenant's property was not found because the tenant was requested to take the

property. The tenant voluntarily left the property and the landlord did not make any claim on or assume any ownership over it. In *Alsbury v. Linville*, 214 S.W. 492, 495 (Tex. App.—San Antonio 1919, writ dism'd w.o.j.), the court held that landlords are authorized to take possession of the premises upon abandonment by tenants.

Landlords taking possession of abandoned premises are required to safely care for the property left at the premises by the tenant. When a landlord, upon abandonment of the premises, retook possession to remove personal belongings of the tenant without intent to appropriate the belongings and so held the property subject to the tenant's order, he was not guilty of conversion of the belongings. *See American Cotton Co-op Ass'n v. Plainview Compress & Warehouse Co.*, 114 S.W.2d 689 (Tex. App.—Amarillo 1938, writ dism'd). The court held that one who is rightfully in possession of property, although the legal title thereto may be in another, is not guilty of conversion. To establish allegations of conversion it must be shown that the person charged unlawfully exercised dominion and control over the property of another to the exclusion of the exercise of the right of possession by the owner or some other person entitled to its possession. *American Cotton Co-op Ass'n*, 114 S.W.2d at 692–94. Assuming a valid initial taking of the property by the landlord, it is well settled that there is a corresponding obligation on the part of the landlord to safely care for such property and keep it for the benefit of the owner until the demanded rent has been paid. *Johnson v. Lane*, 524 S.W.2d 361, 364 (Tex. App.—Dallas 1975, no writ). In *Prewitt v. Branham*, 643 S.W.2d 122, 123 (Tex. 1982), the supreme court held that where there was a forged signature on a lease agreement for realty, there could be a conversion of the document in which the rights were conferred.

In forcible detainer suits the landlord, in removing a tenant's property after a successful suit, has no duty to protect or store the property of the tenant. When the tenant was served with process and notice to vacate the premises, the notice required that the tenant remove the person and the personal property. When the tenant failed to remove property as required under a forcible detainer suit, the tenant placed its property at risk. *Conroy v. Manos*, 679 S.W.2d 124, 126 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

Time of the Essence: Generally in contracts, and specifically in real estate transactions, time is not of the essence unless the express agreement of the parties makes it so. When time is not of the essence a contract need not necessarily be performed precisely at the agreed time. A party has a reasonable time in which to perform the contract. *Montgomery v. Montgomery*, 99 S.W. 1145, 1147 (Tex. App.—Dallas), *aff'd*, 105 S.W. 38 (Tex. 1907). When time is of the essence in a contract, a party must perform or tender performance in literal compliance with the provisions about time to avoid a forfeiture or to entitle him to enforce a contract in a suit for specific performance. *Heffington v. Gillespie*, 176 S.W.2d 205, 211–12 (Tex. App.—Fort Worth 1943, no writ); *see also Maxwell v. Lake*, 674 S.W.2d 795 (Tex. App.—Dallas 1984, no writ). Language clearly showing an intention that time be of the essence is required to be in the contract. *See Nicholason v. Whyte*, 236 S.W. 770, 773 (Tex. App.—Dallas 1921, no writ). However, where time is of the essence as expressly shown in the contract, such performance may be extended by the parties' waiver of strict compliance. *Hage v. Westgate Square Commercial*, 598 S.W.2d 709, 711 (Tex. App.—Waco 1980, writ ref'd n.r.e.). The waiver may be shown by parol evidence or course of dealing. *Hage*, 598 S.W.2d at 712. Most lease contracts contain time-is-of-the-essence clauses.

Failure of Consideration: In conjunction with a breach of the covenant of quiet enjoyment or a breach of warranty of suitability, tenants can plead a failure of consideration. Failure of consideration occurs when, because of some

supervening cause after an agreement is reached, the promised performance fails. *Suttles v. Thomas Bearden Co.*, 152 S.W.3d 607 (Tex. App.—Houston [1st Dist.] 2004, no pet.). Failure of consideration may result as a consequence of fraud, mutual mistake, or failure of one party to perform its obligation under an agreement that the purported property is not what it was represented by the buyer. 14 Tex. Jur. 3d *Contracts* § 107. However, breach of a covenant in a contract for the sale of land will not necessarily amount to a failure of consideration. *Lozano v. Meyers*, 8 S.W.2d 785, 787 (Tex. App.—San Antonio 1928), *aff'd*, 18 S.W.2d 588 (Tex. Comm'n App. 1929).

Exercising Option to Renew: Exercise of an option to renew, unless excused in rare cases of equity, must be unqualified, unambiguous, and strictly in accordance with the terms of the agreement. *Zeidman v. Davis*, 342 S.W.2d 555, 558 (Tex. 1961); *Meadows v. Midland Super Block Joint Venture*, 255 S.W.3d 739, 743 (Tex. App.—Eastland 2008, no pet.). Generally, when a contract requires only that one party notify the other, and the matter is not defined in the contract, notice occurs when it is mailed. *Brown v. Swift-Eckrich, Inc.*, 787 S.W.2d 599, 600 (Tex. App.—El Paso 1990, writ denied). *But see Meadows*, 255 S.W.3d at 743–45 (where lease required that renewal notice in form of next month's rent check for month-to-month lease be received by first day of the month, renewal was untimely, even though it had been accepted in this fashion for fourteen years).

§ 28.27:10 Postponement

Trial in an eviction case must not be postponed for more than seven days unless both parties agree in writing. Tex. R. Civ. P. 510.7(c).

§ 28.28 Trial

The issues to be adjudicated at trial in a forcible-detainer proceeding are—

1. possession—the right to actual possession;
2. rent—the amount of delinquent rent due at the time of judgment (if pleaded);
3. attorney's fees—the attorney's fees incurred by the plaintiff; and
4. court costs—court costs.

Tex. Prop. Code § 24.006(b); Tex. R. Civ. P. 510.8.

In a forcible-entry-and-detainer proceeding, the plaintiff has the burden to prove the additional element that the defendant "entered the real property of another without legal authority or force." *Yarto v. Gilliland*, 287 S.W.3d 83, 87 n.3 (Tex. App.—Corpus Christi–Edinburg 2009, no pet.).

The plaintiff must prove facts corresponding to the bases stated in the notice to vacate delivered to the defendant. *Nealy v. Southlawn Palms Apartments*, 196 S.W.3d 386, 395 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (where notice to vacate listed "owner desires possession" and "undesirable tenant behavior" as grounds, proof that defendant loitered on the premises, police responded to two assault incidents at defendant's unit, defendant rode a four-wheeler in pedestrian area of the apartments, and that there were two police reports that defendant "mooned" other tenants and maintenance personnel did not fit into the grounds stated in the notice to vacate and defendant properly objected). The failure to object to the introduction of facts outside the provisions of the notice to vacate results in trial by consent in a suit for possession. *Torres v. Corpus Christi Housing Authority*, No. 13-04-00591-CV, 2006 WL 2168086, at *2 (Tex. App.—Corpus Christi–Edinburg Aug. 3, 2006, no pet.) (mem. op.).

Counterclaims and the joinder of suits against third parties are not permitted in an eviction case, Tex. R. Civ. P. 510.3(d), however, attor-

ney's fees for defending possession may be awarded on appeal to county court. Tex. R. Civ. P. 510.11.

§ 28.28:1 Selected Issues at Trial

No Innocent Tenant Defense in Publicly Subsidized Housing: A public housing agency may, in its discretion, evict a tenant for drug-related activity whether or not tenant knew, or should have known, about the activity as there is no exception in 42 U.S.C. § 1437d(*l*)(6) for innocent tenants. *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125, 130–31 (2002).

Lease/Purchase Contracts: After a tenant exercises an option to purchase in a "lease/purchase contract," Texas Property Code chapter 92 no longer applies to the lease and the contract is then treated as an executory contract under Tex. Prop. Code §§ 5.061–.086. Tex. Prop. Code § 5.0621(b).

Forty-Nine-Day Period between Notice to Vacate after Foreclosure and Filing of Suit for Possession Not Unreasonable: After foreclosure sale, a forty-nine-day period between the notice to vacate and the filing of the suit for possession is not unreasonable where there is no testimony that there was a lease between the parties and that rent was paid. *See Potter v. Mullen*, No. 05-04-00014-CV, 2005 WL 1316122, at *3 (Tex. App.—Dallas June 3, 2005, pet. denied).

Interpreters: By failing to object to proceeding without an interpreter, a party waives the right to challenge the issue on appeal. *Martinez v. Cherry Avenue Mobile Home Park*, 134 S.W.3d 246, 248–50 (Tex. App.—Amarillo 2003, no pet.).

Proof in Foreclosure Suits for Possession: Certified copies of trustee's deed and deed of trust establishing a landlord-tenant relationship after foreclosure and written notice to vacate establish the right to possession as a matter of law. *Mortgage Electronic Registration Systems v. Knight*, No. 09-04-452 CV, 2006 WL 510338, at *4 (Tex. App.—Beaumont Mar. 2, 2006, no pet.) (mem. op.).

§ 28.28:2 Judgment

If the judgment is in favor of the plaintiff, the judge must render judgment for possession of the premises, costs, delinquent rent as of the date of entry of the judgment, if any, and attorney's fees if recoverable by law. Tex. R. Civ. P. 510.8(b). If the judgment or verdict is in favor of the defendant, the judge must render judgment against the plaintiff for costs and attorney's fees if recoverable by law. Tex. R. Civ. P. 510.8(c). A judgment in a proceeding for forcible detainer does not have res judicata effect with respect to other issues related to the lease other than the right to immediate possession of the property. *Buttery v. Bush*, 575 S.W.2d 144, 146 (Tex. App.—Tyler 1978, writ ref'd n.r.e.); *see also McGlothlin v. Kliebert*, 672 S.W.2d 231, 233 (Tex. 1984) ("The forcible entry and detainer action is not exclusive, but cumulative, of any other remedy that a party may have in the courts of this state."); *Aguilar v. Weber*, 72 S.W.3d 729, 732 (Tex App.—Waco 2002, no pet.) ("[F]orcible detainer actions in justice court may be brought and prosecuted concurrently with suits to try title in district court."); *Dormady v. Dinero Land & Cattle Co., L.L.C.*, 61 S.W.3d 555, 558 (Tex. App.—San Antonio 2001, pet. dism'd w.o.j.) ("[P]arties may pursue both a forcible detainer action in justice court and a suit to quiet title in district court.").

Each judgment in a nonpayment-of-rent case involving residential property must include a finding of the amount of rent due by the tenant for each rental pay period during an appeal, and, where a portion of rent is paid by a government agency, the portion of rent paid by the tenant and the portion of the rent paid by the government agency. Tex. Prop. Code § 24.0053(a).

If an eviction case is based on nonpayment of rent and the tenant's rent during the rental agreement term has been paid wholly or partly by a government agency, either party may contest the portion of the rent that the justice court determines must be paid into the county court registry by the tenant under Tex. Prop. Code § 24.0053. The contest must be filed on or before the fifth day after the date the justice signs the judgment. If a contest is filed, not later than the fifth day after the date the contest is filed the justice court shall notify the parties and hold a hearing to determine the amount owed by the tenant in accordance with the terms of the rental agreement and applicable laws and regulations. After hearing the evidence, the justice court shall determine the portion of the rent that must be paid by the tenant under Tex. Prop. Code § 24.0053. Tex. Prop. Code § 24.0053(c). If the tenant objects to the court's ruling, the tenant must pay into the court registry only the portion of the rent the tenant claims to be due until the issue is decided de novo at the hearing on the merits in county court or upon the landlord's motion to reconsider in county court. Tex. Prop. Code § 24.0053(d).

§ 28.28:3 Attorney's Fees

Leases usually provide for reasonable attorney's fees for enforcing a lien or collecting delinquent rent. Also, Tex. Civ. Prac. & Rem. Code § 38.001 allows for recovery of attorney's fees in suits based on contract. For a discussion of attorney's fees, see chapter 31 in this manual.

§ 28.28:4 No Motion for New Trial

No motions for new trial are allowed. Tex. R. Civ. P. 510.8(e). The erroneous filing of a motion for new trial does not extend the time period for appeal. *RCJ Liquidating Co. v. Village, Ltd.*, 670 S.W.2d 643, 644 (Tex. 1984) (per curiam).

§ 28.29 Appeal

§ 28.29:1 Perfecting Appeal

An appeal is perfected when a bond, cash deposit, or sworn statement of inability to pay is timely filed. Tex. R. Civ. P. 510.9(f). The bond, cash deposit, or sworn statement of inability to pay must be filed with the justice court within five days after the judgment is signed. Tex. R. Civ. P. 510.9(a). The failure to timely file an appeal bond is jurisdictional. *State v. Jones*, 220 S.W.3d 604, 608 (Tex. App.—Texarkana 2007, no pet.).

The judge is to set the amount of the bond to be filed or cash deposit to be made to include the damages accruing during the appeal (rents), attorney's fees, and court costs. Tex. R. Civ. P. 510.9(b), 510.11. The rules no longer promulgate a form of bond; under former and now repealed Tex. R. Civ. P. 750, the supreme court had promulgated a form that may still be accepted by many courts:

> The State of Texas, County of
> _____
>
> Whereas, upon a writ of forcible entry (or forcible detainer) in favor of A.B., and against C.D., tried before _____, a Justice of the Peace of _____ County, a judgment was rendered in favor of A.B. on the ___ day of ___, A.D., and against the said C.D., from which the C.D. has appealed to the county court; now therefore, the said C.D. and his sureties, covenant that he will prosecute his said appeal with effect and pay all costs and damages which may be adjudged against him, provided the sureties shall not be liable in an amount greater than $____, said amount being the amount of the bond herein.

Given under our hands this ____ day of ____, A.D.

Signature of Principal

Signatures of Sureties

Tex. R. Civ. P. 750, repealed 2013. *See* Texas Supreme Court, *Final Approval of Rules for Justice Court Cases*, Misc. Docket No. 13-9049 (Apr. 15, 2013), 76 Tex. B.J. 440 (2013). Other courts may require specific affidavits of the sureties listing nonexempt property subject to execution. Within five days of the filing of the bond or cash deposit, the appellant must serve notice of the appeal via hand delivery, mail, courier with receipt, fax, e-mail if the party consented to service by e-mail, or any other method authorized by the court. Tex. R. Civ. P. 510.9(d), 501.4. Failure to serve notice of the filing of the appeal bond is not jurisdictional. *Mitchell v. Armstrong Capital Corp.*, 877 S.W.2d 481, 481–82 (Tex. App.—Houston [14th Dist.] 1994, no writ).

A defective appeal bond vests jurisdiction in the county court subject to amendment of the bond. *Family Investment Co. of Houston v. Paley*, 356 S.W.2d 353, 355 (Tex. App.—Houston 1962, writ dism'd). A bond may be contested by the same procedure as in a sworn statement of inability to pay; see the following paragraphs.

Sworn Statement of Inability to Pay: In addition to perfecting the tenant's appeal, the filing of a sworn statement of inability to pay perfects the right of the tenant to remain in possession of the leased premises during the pendency of the appeal. *See* Tex. Prop. Code § 24.0054(a–3); Tex. R. Civ. P. 510.9(c)(5)(B). In nonpayment-of-rent cases in which a sworn statement of inability to pay is filed, the tenant has the additional requirement to deposit into the court registry the amount of the tenant's monthly rent on a regular basis. Tex. Prop. Code § 24.0053(a–3), (b). The justice court must make available a blank form of the sworn statement of inability to pay for the use of an appealing tenant. Tex. Prop. Code § 24.0052(b).

The affidavit must contain—

1. the tenant's identity;
2. the nature and amount of the tenant's employment income;
3. the income of the tenant's spouse, if applicable and available to the tenant;
4. the nature and amount of any government entitlement income of the tenant;
5. all other income of the tenant;
6. the amount of available cash and funds available in savings or checking accounts of the tenant;
7. real and personal property owned by the tenant;
8. the tenant's debts and monthly expenses;
9. the number and age of the tenant's dependents and where those dependents reside; and
10. the following statement: "I am unable to pay court fees. I verify that the statements made in this statement are true and correct."

Tex. Prop. Code § 24.0052(a); Tex. R. Civ. P. 510.9(c), 502.3(b).

The court must promptly notify all other parties of the filing of a sworn statement of inability to pay, Tex. Prop. Code § 24.0052(c), no later than the next business day. Tex. R. Civ. P. 510.9(d). A landlord may contest the sworn statement of inability to pay on or before the fifth day after the date the affidavit is filed. If the landlord contests the affidavit, the justice court shall notify the parties and hold a hearing to determine whether the tenant is unable to pay the costs of appeal or file an appeal bond. The hearing shall be held no later than the fifth day after the date

the landlord notifies the court clerk of the landlord's contest. At the hearing, the tenant has the burden to prove by competent evidence, including documents or credible testimony of the tenant or others, that the tenant is unable to pay the costs of appeal or file an appeal bond. Tex. Prop. Code § 24.0052(d).

If the justice court approves the affidavit, the tenant does not have to pay the filing fee of the county court or file an appeal bond to perfect the appeal. Tex. Prop. Code § 24.0052(e). If the justice court disapproves the affidavit, the tenant may, within five days, appeal the disapproval to the county court for resolution. The county court must set the hearing within five days and hear the contest de novo. If the affidavit is approved by the county court, the court must direct the justice court to transmit to the county clerk the transcript, records, and papers of the case. Tex. R. Civ. P. 510.9(c)(3). If the county court disapproves the affidavit, the tenant may still perfect the appeal by posting an appeal bond or making a cash deposit within one business day. Tex. R. Civ. P. 510.9(c)(4).

Practice Note: When representing the landlord, the attorney should consider not contesting the affidavit of inability to pay as it will inordinately delay final judgment.

Once an appeal is perfected, the judge must stay all further proceedings on the judgment and must immediately send to the clerk of the county court a certified copy of all docket entries, a certified copy of the bill of costs, and the original papers in the case together with any money in the court registry, including the sums deposited after the filing of the sworn statement of inability to pay. Tex. R. Civ. P. 510.10(a).

Payment of Filing Fee in County Court: If a bond or cash deposit was filed to perfect the appeal, the appellant must pay the filing fee in county court within twenty days of notification that the transcript was received; otherwise the appeal is deemed not perfected and the transcript and file documentation is returned to the justice court, which may proceed as though no appeal had been perfected. Tex. R. Civ. P. 143a. If an affidavit of inability to pay is not contested or is otherwise approved after being contested by the landlord, no filing fee is due in the county court.

Practice Note: A tenant/appellant may file an appeal bond solely to extend his right to possession and then fail to pay the filing fee in county court to extend that right for the twenty days that Tex. R. Civ. P. 143a allows. When representing the landlord, the attorney should consider immediately paying the filing fee and immediately set the trial de novo in county court.

§ 28.29:2 Tenant's Right to Maintain Possession during Appeal

If the appeal was perfected on the basis of an appeal bond, the tenant is entitled to maintain possession of the property during the appeal.

Appeal Based on Sworn Statement of Inability to Pay: If the breach is for nonpayment of rent and the tenant has appealed by filing a sworn statement of inability to pay, the justice court must provide to the tenant a written notice at the time the sworn statement of inability to pay is filed that contains the following information in bold or conspicuous type:

1. the amount of the initial deposit of rent, equal to one rental period's rent under the terms of the rental agreement, that the tenant must pay into the justice court registry;
2. whether the initial deposit must be paid in cash, cashier's check, or money order, and to whom the cashier's check or money order, if applicable, must be made payable;
3. the calendar date by which the initial deposit must be paid into the justice court registry, which must be within

five days of when the sworn statement of inability to pay was filed; and

4. a statement that failure to pay the required amount into the justice court registry may result in the court issuing a writ of possession without hearing.

Tex. Prop. Code § 24.0053; Tex. R. Civ. P. 510.9(c)(5)(A).

A tenant who files a sworn statement of inability to pay is entitled to stay in possession of the premises during the pendency of the appeal by complying with the following procedure:

1. Within five days of the date that the tenant/appellant files a sworn statement of inability to pay, the tenant/appellant must pay into the justice court registry the amount set forth in the notice provided at the time the tenant/appellant filed the statement.

2. During the appeal process as rent becomes due under the rental agreement, the tenant/appellant must pay the designated amount into the court registry within five days of the rental due date under the terms of the rental agreement.

3. If the tenant/appellant fails to pay the rent into the court registry within the time limits prescribed by these rules, the appellee may file a notice of default in county court. Upon sworn motion by the appellee and a showing of default to the judge, the court shall issue a writ of possession.

4. The landlord/appellee may withdraw any or all rent in the county court registry upon (a) sworn motion and hearing, prior to final determination of the cause, showing just cause; (b) dismissal of the appeal; or (c) order of the court upon final hearing.

5. All hearings and motions under this rule shall be entitled in precedence in the county court.

Tex. R. Civ. P. 510.9(c)(5)(B).

Some justice courts and some attorneys mistakenly believe the timely payment of the designated amount into the registry of the court is a jurisdictional prerequisite to perfect the tenant's appeal of a nonpayment-of-rent case. The sole effect of the timely payment of the designated sum into the registry of the court is to perfect the tenant's right to maintain possession of the premises during the pendency of the appeal, as a default judgment on the case in chief is not authorized by a tenant/appellant's default under Tex. R. Civ. P. 510.9(c)(5)(B). *Kennedy v. Highland Hills Apartments*, 905 S.W.2d 325, 327 (Tex. App.—Dallas 1995, no writ) (examining the predecessor to Tex. R. Civ. P. 510.9(c)(5)(B)).

Recovering Possession for Tenant/Appellant's Failure to Pay Rent into Court Registry (Nonpayment-of-Rent Cases Only): When the tenant/appellant fails to comply with the requirements to pay rent into the registry of the court in nonpayment-of-rent cases, the procedure for the landlord/appellee to recover possession is as follows:

1. *Limited jurisdiction of justice court.* If the tenant/appellant was provided with notice under Tex. R. Civ. P. 510.9(c)(5)(A), fails to pay the designated amount into the justice court registry within five days, and the transcript has not been transmitted to the county clerk, the landlord is entitled, upon request and payment of the applicable fee, to a writ of possession, which the justice court must issue immediately and without hearing. Tex. R. Civ. P. 510.9(c)(5)(B)(i)

2. *Jurisdiction vested in county court.* Once the transcript has been

transmitted by the justice court clerk to the county clerk, the only court having jurisdiction of the determination of the failure of the tenant/appellant to timely deposit the designated amounts into the registry of either the justice court or the county court is the county court. *See* Tex. Prop. Code § 24.0054(b). Some justice courts mistakenly "hold" the tenant's appeal, in violation of the requirement to immediately deliver the transcript to county court under Tex. R. Civ. P. 510.10(a), "waiting" on the tenant to pay the designated amount into the registry of the justice court. *See* Tex. R. Civ. P. 510.10(a).

3. *Motion to obtain possession in county court for failure to deposit the designated amount.* If the tenant/appellant fails to pay the designated amount into either court registry within the proper time limits set forth in Tex. R. Civ. P. 510.9(c)(5)(B), the landlord may file a sworn motion in county court that the tenant/appellant is in default. The landlord must notify the defendant of the motion and hearing date. Upon a showing that the tenant/appellant is in default, the county court must issue a writ of possession, unless on or before the day of the hearing the tenant/appellant pays into the court registry all rent not paid into the court registry pursuant to Tex. R. Civ. P. 510.9(c)(5)(B)(iv), and the landlord's reasonable attorney's fees in filing the sworn motion. Tex. Prop. Code § 24.0054(b); Tex. R. Civ. P. 510.9(c)(5)(B)(iv).

4. *Issuance and service of writ of possession issued under Tex. Prop. Code § 24.0054(c).* If the tenant has not paid into the court registry all rent and the attorney's fees in filing the sworn motion under Tex. Prop. Code § 24.0054(b) before the Tex. R. Civ. P. 510.9(c)(5)(B)(iv) default, the writ of possession issues immediately. Tex. Prop. Code § 24.0054(b). If the tenant complies with Tex. Prop. Code § 24.0054(b) on one occasion and then fails a second time to timely deposit sums into the registry of the court, the writ issues immediately but not may be executed before the sixth day after the date the writ is issued. Tex. Prop. Code § 24.0054(c), (d).

5. *Governmental assistance payments not paid by agency.* When a governmental entity fails to pay the tenant subsidy to the landlord or into the registry of either the justice or county court, the landlord may file a motion to require the tenant to regularly pay the full amount of rent into the registry of the court, which motion, after notice and hearing, must be granted if the landlord proves by credible evidence that (1) a portion of the rent is owed by a government agency, (2) the portion of the rent paid by the government agency is unpaid, (3) the landlord did not cause wholly or partly the agency to cease making payments, (4) the landlord did not cause wholly or partly the agency to pay the wrong amount, and (5) the landlord is not able to take reasonable action that will cause the agency to resume making the payments of its portion of the total rent due under the rental agreement. Tex. Prop. Code § 24.0054(f).

Practice Note: When representing the landlord on a Tex. R. Civ. P. 510.9(c)(5)(B)(iv) default, the attorney should always request the immediate issuance of the writ of possession so that the ministerial act of the county clerk's issuance occurs as soon as possible.

Practice Note: While a writ of possession that issued under Tex. Prop. Code § 24.0054(b) could arguably be served on the date of the hearing, the most conservative practice for a landlord is to always have the writ of possession issued but not served until the sixth day after issuance to avoid the conflicts under Tex. Prop. Code §§ 24.0054, 24.0061(b).

Sums Deposited into the Registry of the Court: The landlord/appellee may withdraw any or all rent in the county court registry upon a sworn motion and hearing before final determination of the case showing just cause, dismissal of the appeal, or by order of the court after final hearing. Tex. R. Civ. P. 510.9(c)(5)(B)(v).

§ 28.29:3 Trial De Novo

The appeal of a suit for possession is heard by the county court de novo. Tex. R. Civ. P. 510.10(c). All aspects of the appeal of a suit for possession are entitled to precedence in the county court. Tex. R. Civ. P. 510.10(c).

The county clerk is to notify both parties of receipt of the transcript and the docket number in county court. Tex. R. Civ. P. 510.10(b). If the appellant perfected the appeal by filing an appeal bond, the notification will usually include notice that the appellant must pay the filing fee. *See* Tex. R. Civ. P. 143a. The notice to the defendant must also advise the defendant of the requirement to file a written answer within eight days if one was not filed in the justice court. Tex. R. Civ. P. 510.10.

The only counterclaim allowed in an appeal of a suit for possession is for the recovery of attorney's fees incurred for defending the right to possession. *See* Tex. Prop. Code § 92.335; Tex. R. Civ. P. 510.3(e), 510.11. The fee for the counterclaim must be paid, or the introduction of proof on the counterclaim may be subject to the objection of the plaintiff. *See* Tex. Gov't Code § 51.317(b).

If the defendant failed to file a written answer in the justice court and fails to file a written answer within eight days after the transcript is filed in county court, a judgment by default may be issued by the county court. Tex. R. Civ. P. 510.12.

The de novo trial of a nonjury appeal may be set on eight days' notice. Tex. R. Civ. P. 510.12. *Cattin v. Highpoint Village Apartments*, 26 S.W.3d 737, 739 (Tex. App.—Fort Worth 2000, pet. dism'd w.o.j.) (holding that "the plain language of [the predecessor to Tex. R. Civ. P. 510.12] governs the time for trial in forcible detainer appeals. Applying [Tex. R. Civ. P.] 245 as Appellants suggest would ignore the specific rules governing forcible detainer actions and the plain language of [the predecessor to Tex. R. Civ. P. 510.12.] and undermine the purpose behind [the forcible detainer rules].").

A jury demand delivered in an eviction appeal on less than the thirty-day notice required in Tex. R. Civ. P. 216(a) may be reasonable; the (now three)-day requirement in the predecessor to Tex. R. Civ. P. 510.7(b) applies only in justice court. *Collins v. Cleme Manor Apartments*, 37 S.W.3d 527, 531–32 (Tex. App.—Texarkana 2001, no pet.).

At the trial on the merits in county court, a prevailing landlord is entitled to recover rentals (if requested), attorney's fees (provided that the landlord complied with Tex. Prop. Code § 24.006), and court costs through trial but may not recover damages for other causes of action. Tex. R. Civ. P. 510.11; *Krull v. Somoza*, 879 S.W.2d 320, 322 (Tex. App.—Houston [14th Dist.] 1994, writ denied). A prevailing tenant may recover attorney's fees from the landlord for defending the right to possession. Only the party prevailing in the county court may recover damages and court costs. Tex. Prop. Code § 24.006(d).

§ 28.29:4 Appeal to Court of Appeals

In 2011, the legislature revised Tex. Prop. Code § 24.007 to allow appeals from final judgments for possession in county court in both commercial and residential evictions. Acts 2011, 82d Leg., R.S., ch. 3, § 2.02 (H.B. 79), eff. Jan. 1, 2012. The 2015 legislative session revised the statute; now only commercial evictions filed before January 1, 2016, will be entitled to be appealed through the court of appeals and supreme court. The county court will be the court of last resort for commercial evictions filed after January 1, 2016. Acts 2015, 84th Leg., R.S., ch. 1113, §§ 1–2 (H.B. 3364), eff. Jan. 1, 2016.

The county court must set a supersedeas bond in an amount that provides protection for the appellee to the same extent as in any other appeal, taking into consideration the value of rents likely to accrue during appeal, damages that may occur as a result of the stay during appeal, and other damages or amounts as the court may deem appropriate. Tex. Prop. Code § 24.007. The supersedeas bond must be filed within ten days of the date the judgment was signed. Tex. Prop. Code § 24.007; Tex. R. Civ. P. 510.13. If the supersedeas bond is not timely filed, a writ of possession may issue and be executed. *Kemper v. Stonegate Manor Apartments, Ltd.*, 29 S.W.3d 362, 362 (Tex. App.—Beaumont 2000, pet. dism'd w.o.j.), *disapproved on other grounds by Marshall v. Housing Authority of City of San Antonio*, 198 S.W.3d 782, 786 n.2 (Tex. 2006).

If the tenant perfects an appeal but vacates his unit during the pendency of appeal, the issue of the tenant's right to possession becomes moot at lease expiration. *Marshall*, 198 S.W.3d at 782.

§ 28.30 Writ of Possession

If a judgment or verdict is in favor of the plaintiff, a justice court must issue a writ of possession on or after the sixth calendar day after the date the judgment for possession was signed. Tex. R. Civ. P. 510.8(d). If judgment for possession is rendered by default, a justice court must issue a writ of possession immediately if the plaintiff has filed and timely served a possession bond under Tex. R. Civ. P. 510.5, but only on or after the seventh day after the date the tenant was served with notice of the filing of the possession bond. Tex. Prop. Code § 24.0061(b); Tex. R. Civ. P. 510.5(c).

When the tenant/appellant files a bond or cash deposit pursuant to Tex. R. Civ. P. 510.9 and fails to pay the filing fee in county court within twenty days, the county clerk must return the transcript to the justice court, and the justice court may issue the writ of possession upon return of the transcript. Tex. R. Civ. P. 143a.

In appeals of nonpayment-of-rent cases where the tenant/appellant has filed a sworn statement of inability to pay under Tex. R. Civ. P. 510.9(c), the county clerk issues a writ of possession immediately after the plaintiff/appellee establishes default under Tex. R. Civ. P. 510.9(c)(5)(B)(iv). Provided no supersedeas bond is filed by the tenant/appellant within ten days after the judgment is signed under Tex. Prop. Code § 24.007, the county clerk issues the writ of possession on or after the eleventh day. Tex. R. Civ. P. 510.13. When the tenant timely appeals but fails to file a supersedeas bond within ten days after the judgment is signed, writ of possession may issue and be served. *Compare Kemper v. Stonegate Manor Apartments, Ltd.*, 29 S.W.3d 362, 362 (Tex. App.—Beaumont 2000, pet. dism'd w.o.j.) (holding case is moot once landlord takes possession), *with Marshall v. Housing Authority of City of San Antonio*, 198 S.W.3d 782, 786 (Tex. 2006) (appeal not moot when tenant timely and clearly expresses intent to exercise right of appeal and if appellate relief is not futile; disapproving of *Kemper* to the extent it conflicts).

The prevailing plaintiff must pay the fee for the issuance of the writ of possession by the county clerk or justice court and the fee for service by the constable or sheriff set by the commissioners court. Tex. Loc. Gov't. Code § 118.0545(d).

The officer executing the writ must post a written warning of at least 8-1/2 by 11 inches on the exterior of the front door of the rental unit notifying the tenant that the writ has been issued and that the writ will be executed on or after a specific date and time stated in the warning not sooner than twenty-four hours after the warning is posted. Tex. Prop. Code § 24.0061(d)(1).

The officer executing the writ of possession may use reasonable force to execute the writ. Tex. Prop. Code § 24.0061(h). The officer shall—

1. deliver possession of the premises to the landlord, Tex. Prop. Code § 24.0061(d)(2)(A);

2. instruct the tenant and all persons claiming under the tenant to leave the premises immediately, and if the persons fail to comply, physically remove them, Tex. Prop. Code § 24.0061(d)(2)(B);

3. instruct the tenant to remove or to allow the landlord, the landlord's representatives, or other persons acting under the officer's supervision to remove all personal property from the rental unit other than personal property claimed to be owned by the landlord, Tex. Prop. Code § 24.0061(d)(2)(C); and

4. place, or have an authorized person place, the removed personal property outside the rental unit at a nearby location but not blocking a public sidewalk, passageway, or street, Tex. Prop. Code § 24.0061(d)(2)(D).

The writ of possession may not be executed when it is raining, sleeting, or snowing. Tex. Prop. Code § 24.0061(d)(2)(D); *Campos v. Investment Management Properties*, 917 S.W.2d 351, 355 (Tex. App.—San Antonio 1996, writ denied). The officer executing the writ of possession may not require the landlord to store the personal property. Tex. Prop. Code § 24.0061(f). Some standardized leases include an agreement between the landlord and tenant that the landlord may take certain steps to dispose of the personal property after execution of the writ of possession. *See, e.g.*, Texas Apartment Association, Inc., Apartment Lease Contract (2017), § 14.3, **www.taa.org/resources/texas-apartment-association-sample-apartment-lease-contract-english-and-spanish/**.

Warehouseman's Lien: Tex. Prop. Code § 24.0062 discusses warehouseman's liens. If the property is stored by the sheriff or constable in a bonded or insured public warehouse, the warehouseman has a lien on the property for his reasonable moving and storage charges. The lien does not attach to any property until the property has been stored by the warehouseman. Tex. Prop. Code § 24.0062(a). The officer must send a written notice to the tenant of the address and telephone number of the warehouse and the tenant's right to redeem the property by paying the warehouseman's charges. See Tex. Prop. Code § 24.0062(b), (c) for notice requirements. If the tenant does not redeem the property within thirty days, the warehouseman may sell the property to satisfy his charges. Tex. Prop. Code § 24.0062(b)(5).

Practice Note: When obtaining a writ of possession issued by the county clerk after appeal, the best practice is to deliver the writ to the constable of the justice precinct in which the premises are located for execution, as the constable is usually more experienced in execution than the sheriff.

§ 28.31 Implications of Tenant Bankruptcy

The automatic stay under 11 U.S.C. § 362 that goes into effect the moment a tenant files a petition for relief affects the prosecution of a suit for possession; however, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 specifically limited the effect of the stay in suits for possession in certain circumstances. In the very limited circumstances below, no motion for relief from stay is necessary to continue the prosecution of an eviction.

Specifically, the filing of a petition for relief under the Bankruptcy Code does not operate as a stay in the following scenarios.

Final Judgment: Bankruptcy proceedings will not operate as a stay when the landlord's judgment for possession for residential property has become final before the tenant files the petition for relief in bankruptcy. 11 U.S.C. § 362(b)(22).

Suit Based on Endangerment of Property: When the suit for possession is based on the tenant's endangerment of residential property, bankruptcy proceedings will not act as an automatic stay beginning fifteen days after the landlord files with the bankruptcy court and serves on the tenant/debtor a certification that such a suit for possession has been filed or a certification that the tenant/debtor has endangered property during the thirty-day period preceding the date of the filing of the certification. 11 U.S.C. § 362(m), (b)(23). The tenant/debtor must file an objection to the certification under 11 U.S.C. § 362(m) within fifteen days after the filing and service of the certification. If no objection is timely filed, or if an objection is timely filed and rejected by the bankruptcy court at a hearing held within ten days of the filing of the objection, then the stay is of no further effect. 11 U.S.C. § 362(m).

Suit Based on Illegal Use of Controlled Substances: When the suit for possession is based on the illegal use of controlled substances on the premises, bankruptcy proceedings will not act as an automatic stay beginning fifteen days after the landlord files with the bankruptcy court and serves on the tenant/debtor a certification that such a suit for possession has been filed or a certification that the tenant/debtor has endangered property during the thirty-day period preceding the date of the filing of the certification. 11 U.S.C. § 362(m), (b)(23). The tenant/debtor must file an objection to the certification under 11 U.S.C. § 362(m) within fifteen days after the filing and service of the certification. If no objection is timely filed, or if an objection is timely filed and rejected by the bankruptcy court at a hearing held within ten days of the filing of the objection, then the stay is of no further effect. 11 U.S.C. § 362(m).

§ 28.32 Distress Warrants (Commercial and Agricultural Leases)

A distress warrant is a judicial remedy filed in justice court that perfects the landlord's statutory commercial or agricultural lien by having the constable seize the tenant's personal property subject to the lien; after seizure, the distress warrant is returnable to the court in which the commercial landlord's suit for rent is pending. Distress warrants are covered in Tex. R. Civ. P. 610–620 and section 54.025 of the Texas Property Code. They are not available for enforcement of a residential landlord's lien.

The landlord may seek a distress warrant directing a sheriff or constable to attach and hold specified property. The person to whom rent or an advance is payable or the person's agent, attorney, assign, or other legal representative may apply to an appropriate justice court for a distress warrant under any of three circumstances: (1) if the tenant owes any rent or, for an agricultural lien, any advance; (2) if the tenant is

about to abandon the premises; or (3) if the tenant is about to remove the tenant's property from the premises. Tex. Prop. Code §§ 54.006, 54.025. Enforcing a landlord's lien by having property seized before final judgment is also called "distraint." In place of a distress warrant, a landlord may seek a writ of prejudgment attachment or sequestration as its remedy. Generally, the application for a distress warrant must be filed with an appropriate justice court at the commencement of a suit or at any time during its progress. Tex. R. Civ. P. 610 outlines the requirements for the application and affidavits. If the warrant is to issue before final judgment, the court must hold a hearing, which may be ex parte, and require a bond of the landlord. *See* Tex. R. Civ. P. 610, 611. If the suit is based on an agricultural landlord's lien, the application must be filed with a justice court in the precinct in which the leasehold is located or in which the property subject to the lien is located or with the justice court that has jurisdiction of the cause of action. Tex. Prop. Code § 54.006. If the suit is based on a building landlord's lien, the application must be filed with a justice court in the precinct in which the building is located. Tex. Prop. Code § 54.025.

§ 28.32:1 Commercial Landlord's Statutory Lien

The landlord of a building leased for nonresidential purposes has a statutory preference lien on a tenant's property for rent that becomes due during the twelve-month period succeeding the date of the beginning of the rental agreement or the anniversary of the date. Tex. Prop. Code § 54.021. By way of priority, unless a landlord perfects its security interest on an annual basis, beginning on the date the lease commences, an intervening security interest of another creditor will have priority over the landlord's lien. *See* Tex. Bus. & Com. Code § 9.203; *Bank of North America v. Kruger*, 551 S.W.2d 63, 66 (Tex. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.). For example, the building landlord's lien loses priority to the security interest of another creditor if the lease covers the period between January 1, 2020, and December 31, 2020, and the security interest is perfected after December 31, 2020. Tex. Prop. Code § 54.021, therefore, effectively divides a lease into contract years for purposes of determining whether a perfected secured creditor's security interest will supersede a statutory landlord's lien. Each year of the contract is viewed separately. At the beginning of each contract year, if the secured creditor's UCC financing statement has been filed during the previous year, its lien will be superior to the landlord's lien. *FDIC v. Sears, Roebuck & Co.*, 743 S.W.2d 772, 773 (Tex. App.—El Paso 1988, no writ). The lien does not attach to property exempted by statute from forced sale. Tex. Prop. Code § 54.023.

For an affidavit and lien statement, see form 28-2 in this chapter.

§ 28.32:2 Perfection of Commercial Landlord's Statutory Lien

The statutory lien is unenforceable for rent on a commercial building that is more than six months past due unless the commercial landlord files a verified lien statement with the county clerk of the county in which the building is located that contains (1) an account, itemized by month, of the rent for which the lien is claimed; (2) the name and address of the tenant or subtenant, if any; (3) a description of the leased premises; and (4) the beginning and termination dates of the lease. Tex. Prop. Code § 54.022.

Filing the statement presumably makes the lien enforceable against the tenant regardless of when it is filed, but the time of filing can be crucial in protecting the lien's priority against intervening liens. For this reason the statement should be filed no later than six months after rent for any given month becomes due. *See Industrial State Bank v. Oldham*, 221 S.W.2d 912, 914 (Tex. 1949).

For an affidavit and lien statement, see form 28-2 in this chapter.

§ 28.32:3 Duration of Commercial Landlord's Statutory Lien

The lien exists while the tenant occupies the building and until one month after the day the tenant abandons it. Tex. Prop. Code § 54.024.

§ 28.32:4 Agricultural Landlord's Statutory Lien

An agricultural landlord acquires a lien on an agricultural tenant's property for rent due and for "the money and the value of property that the landlord furnishes or causes to be furnished to the tenant to grow a crop on the leased premises and to gather, store, and prepare the crop for marketing." Tex. Prop. Code § 54.001. The lien does not arise if the rent charged by the agricultural landlord exceeds certain percentages of the value of grain or cotton crops grown on the premises. Tex. Prop. Code § 54.003. The agricultural lien is effective against a purchaser of the tenant's crops regardless of actual notice or lack of notice to the purchaser, and the landlord may enforce the lien by foreclosing on the crops or by suing the purchaser for conversion. *Dill v. Graham*, 530 S.W.2d 157, 160 (Tex. App.—Amarillo 1975, writ ref'd n.r.e.).

§ 28.32:5 Attachment of Agricultural Landlord's Statutory Lien

This lien attaches to property on the leased premises that the landlord directly or indirectly furnishes to a tenant on which to grow crops, and it attaches to those crops grown in the year that the rent accrues or the property is furnished. However, if the landlord provides everything except labor, the lien attaches only to the crops grown in the year that the property is furnished. The lien does not attach to the goods of a merchant, trader, or mechanic if the tenant sells and delivers the goods in good faith in the regular course of business. Agricultural products, animals, and tools subject to a statutory agricultural lien may not be exempted from forced sale by other statutes. Tex. Prop. Code § 54.002(d).

In addition to filing suit to foreclose the lien, the landlord may secure a distress warrant. See section 28.32 above and sections 28.32:6 through 28.32:16 below regarding distress warrants, form 28-1 in this chapter for a petition to foreclose the lien, and forms 28-3 through 28-11 for forms applicable to distress warrants. Sequestration may also be appropriate if the landlord fears the tenant may dispose of property subject to the lien. See sections 8.16 through 8.24 in this manual regarding sequestration.

§ 28.32:6 Availability

A distress warrant may be requested either at the beginning of the suit or at any time during its progress. Tex. R. Civ. P. 610.

§ 28.32:7 Application for Distress Warrant

The application for a distress warrant may be supported by affidavits of the plaintiff, the plaintiff's agent, the plaintiff's attorney, or other persons having knowledge of the relevant facts but must include a statement that the amount sued for is rent or advances described by statute or must produce a writing signed by the tenant to that effect and must further swear that the distress warrant is not sued out for the purpose of vexing or harassing the defendant. The application must meet all statutory requirements and must state grounds for issuing the warrant and specific facts relied on by the plaintiff to warrant the required findings by the justice of the peace. Two or more grounds for the warrant may be stated conjunctively or disjunctively. Tex. R. Civ. P. 610.

"The application and any affidavits shall be made on personal knowledge and shall set forth

such facts as would be admissible in evidence provided that facts may be stated based upon information and belief if the grounds of such belief are specifically stated." Tex. R. Civ. P. 610. Attorneys generally should not execute affidavits on their clients' behalf. See section 19.17:3 in this manual. See form 28-3 in this chapter for an application for a distress warrant and form 28-4 for an affidavit.

§ 28.32:8 Hearing

No warrant may issue before final judgment except on written order of the justice of the peace after a hearing, which may be ex parte. Tex. R. Civ. P. 610.

§ 28.32:9 Order

Tex. R. Civ. P. 610 specifies the required elements of the order granting the application for the distress warrant, which include findings of fact supporting the statutory grounds, the maximum value of the property to be seized, the amount of bond required of the plaintiff, the amount of bond required of the debtor to replevy, and a commandment that the property be kept safe and preserved subject to further orders of the court having jurisdiction. See form 28-5 in this chapter for an order for issuance of distress warrant.

§ 28.32:10 Plaintiff's Bond

No distress warrant can issue before final judgment until the plaintiff has filed a bond with the justice of the peace in an amount to adequately compensate the defendant if the plaintiff fails to prosecute his suit to effect and pay all damages and costs as may be adjudged against him for wrongfully suing out the warrant. Tex. R. Civ. P. 610, 611.

§ 28.32:11 Requisites of Warrant

The warrant must be directed to the sheriff or any constable within the state, commanding him to attach and hold as much of the defendant's property, not exempt by statute, of reasonable value in approximately the amount fixed by the justice of the peace, as is found within the county. Tex. R. Civ. P. 612.

On the face of the warrant, "in 10-point type and in a manner calculated to advise a reasonably attentive person of its contents," the following notice must be displayed.

> To _____, Defendant:
>
> You are hereby notified that certain properties alleged to be owned by you have been seized. If you claim any rights in such property, you are advised:
>
> YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WARRANT.

Tex. R. Civ. P. 613. See form 28-7 in this chapter for a distress warrant.

§ 28.32:12 Service and Return of Warrant

The defendant must be served with a copy of the distress warrant, the application, accompanying affidavits, and orders of the justice of the peace in any manner prescribed for service of citation or as provided in rule 21a. Tex. R. Civ. P. 613. If the value of the property subject to the warrant falls within the jurisdictional limits of the justice court, the warrant will be returned to that court; otherwise the warrant is made returnable to the district court with jurisdiction over the action.

Tex. R. Civ. P. 619. See form 28-8 in this chapter for an officer's return.

§ 28.32:13 Tenant's Right to Replevy

If the seized property has not been claimed or sold, the tenant may replevy all or part of the property at any time before judgment by filing a bond in double the amount of the landlord's debt; the amount of the judgment rendered and any costs assessed against the tenant shall be first satisfied, to the extent possible, out of the bond. Tex. Prop. Code § 54.048; Tex. R. Civ. P. 614. If the property has been sold by court order, the defendant can replevy the proceeds of the sale. Tex. R. Civ. P. 614.

§ 28.32:14 Wrongful Distraint

A landlord who wrongfully obtains a distress warrant may be liable for wrongful distraint. *See McKee v. Sims*, 45 S.W. 564, 565 (Tex. 1898); *see also McAfee v. Chandler*, 7 S.W.2d 623, 624 (Tex. App.—Amarillo 1928, no writ) (exemplary damages may be levied where distress warrant issued without probable cause and for purpose of harassing defendant). Liability for wrongful distraint may arise from levying a distress warrant on property in excess of the amount sued, making false allegations in the landlord's affidavit about the amount of rent due, or levying on property not subject to the landlord's lien. In *McVea v. Verkins*, the court held that to enforce a contractual landlord's lien and to obtain possession of the property subject to the lien absent consent by the tenant, the landlord must foreclose the lien by judicial proceedings and in no other way. 587 S.W.2d 526, 531 (Tex. App.—Corpus Christi–Edinburg 1979, no writ) (citing *Schwulst v. Neely*, 50 S.W. 608, 609 (Tex. App.—Dallas 1899, no writ)). In *Bank of North America v. Kruger*, the court held that contractual landlord's liens are subject to provisions of the Uniform Commercial Code but that statutory landlord's liens are not. 551 S.W.2d 63, 65 (Tex. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.).

§ 28.32:15 Dissolution or Modification of Distress Warrant

After issuance of the warrant, the defendant or any intervening party who claims an interest in the seized property may seek to vacate, dissolve, or modify the seizure by sworn written motion. Tex. R. Civ. P. 614a.

§ 28.32:16 Emergency Sale of Perishable Property

If property seized under a distress warrant is "in danger of serious and immediate waste or decay" or if keeping it until trial will greatly reduce its value, the court may order an emergency sale. Tex. R. Civ. P. 615. Procedures for determining whether the property is perishable and for selling it are prescribed in Tex. R. Civ. P. 616–618. For an application for emergency sale, see form 28-9 in this chapter; for an affidavit for emergency sale, see form 28-10; and for an order for emergency sale, see form 28-11.

[Sections 28.33 through 28.40 are reserved for expansion.]

V. Remedies and Damages After Tenant Abandons Premises

§ 28.41 Common-Law Remedies

The case of *Speedee Mart Inc. v. Stovall*, 664 S.W.2d 174, 177 (Tex. App.—Amarillo 1983, no writ), outlines the four common-law remedies available to a landlord when a tenant

breaches a lease by abandoning a property and terminating rental payments:

1. *Decline to repossess property.* The landlord may decline to repossess the property, electing instead to maintain the lease in full force and effect. Under this option, he can sue on the contract for the rent as it comes due. This option, however, is now somewhat suspect with the supreme court's indication of a requirement to mitigate damages. See section 28.42 below regarding mitigation.

2. *Anticipatory breach/own purposes.* The landlord may treat the tenant's conduct as an anticipatory breach of contract and repossess and retain the property for his own purposes. Under this option, he recovers the present value of the rentals that accrue under the lease contract reduced by the reasonable cash market value of the lease for the unexpired term.

3. *Anticipatory breach/relet.* The landlord may treat the tenant's conduct as an anticipatory breach of contract, repossess the property, and lease it to another tenant. Under this option, he can recover the actual rental reduced by the amount to be received from the new tenant.

4. *Forfeiture.* The landlord may declare the lease forfeited. Under this option, he relieves the tenant of liability for future rental payments.

See Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc., 948 S.W.2d 293 (Tex. 1997); *Lakeside Leasing Corp. v. Kirkwood Atrium Office Park Phase 3*, 750 S.W.2d 847, 851 (Tex. App.—Houston [14th Dist.] 1998, no writ); *Look v. Werlin*, 590 S.W.2d 526, 528 (Tex. App.—Houston [1st Dist.] 1979, no writ).

The common-law remedies are available unless the parties contract otherwise. *Speedee Mart*, 664 S.W.2d at 177 n.1. In *Speedee Mart*, the court of appeals reversed the trial court's judgment because at the time of trial the damages model was based on future rent calculated from the time of trial, not the future rent calculated from the time of breach. The court held that the proper calculation should be future rent from the time of breach to the end of the lease reduced to its present value, then further reduced by the reasonable cash market value of the lease for the unexpired term. *See Speedee Mart*, 664 S.W.2d at 178.

In *Look*, 590 S.W.2d at 527, the court held that, based on the testimony given at trial, the leased premises had a market value only in the event of reletting. Therefore, since the space had not been relet, the market value was zero.

§ 28.42 Mitigation and Damages

Monetary damages under a commercial lease contract are not easily calculated. The question of mitigation further complicates this analysis. Texas has both a judicial and legislative approach to mitigation. The concurring opinion in *Brown v. Republic-Bank First National Midland*, 766 S.W.2d 203, 204–05 (Tex. 1988), notes that on the question of whether a landlord should mitigate its damages, there is a pronounced disagreement among the states springing from the fact of the dual nature of a lease as both a contract and a conveyance of an interest in land. While the *Brown* court did not decide the issue of whether there should be an implied duty to mitigate placed on a landlord, in *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293 (Tex. 1997), the court explicitly held that a landlord has a duty to mitigate. The duty to mitigate is not absolute but requires the landlord to use reasonable efforts to fill the premises or the landlord is barred from recovery from the breaching tenant to the extent the landlord could have reasonably avoided

damages. *Austin Hill Country Realty, Inc.*, 948 S.W.2d at 299.

When the tenant contends that the landlord has failed to mitigate damages, the tenant must plead the landlord's failure to mitigate as an affirmative defense; otherwise, the tenant may not offer evidence of the landlord's failure to mitigate. *Austin Hill Country Realty, Inc.*, 948 S.W.2d at 299–300. The tenant has the burden of proof to demonstrate whether or not the landlord has mitigated. *Austin Hill Country Realty, Inc.*, 948 S.W.2d at 299–300.

In 1997, the legislature added a mitigation rule, which provides that (1) a landlord has a duty to mitigate damages if a tenant abandons the leased premises in violation of the lease and (2) a provision of a lease that purports to waive this right or to exempt a landlord from liability under it is void. Tex. Prop. Code § 91.006. By its terms, Code section 91.006 is applicable only to leases that were entered into on or after September 1, 1997, and where the tenant abandoned the leased premises. The statute uses the term *abandon* and therefore should not be applicable to situations in which (1) the tenant's right to possession of the leased premises has been terminated for default (before the tenant abandons) or (2) the tenant has been removed from the leased premises via lockout or court order. If there is no termination of the tenant's right to possession of the leased premises, lockout, or court order, abandonment likely occurred. Abandonment is a fact issue, but see Tex. Prop. Code § 93.002(d), which defines abandonment in the context of a commercial lease as follows: "A tenant is presumed to have abandoned the premises if goods, equipment or other property, in an amount substantial enough to indicate a probable intent to abandon the premises, is being or has been removed from the premises and the removal is not within the normal course of the tenant's business." If section 91.006 is not applicable, *Austin Hill Country Realty, Inc.*, provides the Texas law.

Since *Austin Hill Country Realty, Inc.*, several courts of appeals have handed down relevant opinions. Two significant opinions are *Cash America International, Inc. v. Hampton Place, Inc.*, 955 S.W.2d 459 (Tex. App.—Fort Worth 1997, pet. denied), and *Stucki v. Noble*, 963 S.W.2d 776 (Tex. App.—San Antonio 1998, pet. denied).

In *Cash America*, the commercial landlord brought an action against the tenant for anticipatory breach of lease. The court stated that the mitigation instructions sanctioned by the supreme court ask the jury to reduce damages not only for the reasonable cash market value of the unexpired term but also by the amount of damages that could have been avoided had the landlord used reasonable care in attempting to relet the leased premises.

In *Stucki*, the commercial landlord brought an action against the tenant to recover amounts due under a lease. The tenant argued that the summary judgment granted at the trial court level should be set aside on the grounds that the landlord failed to mitigate damages and because fact issues remained regarding mitigation. The lease specifically provided that the landlord had no obligation to "relet or attempt to relet the premises" in the event of the tenant's default. The court of appeals upheld the contractual waiver, citing *Austin Hill Country Realty, Inc.*: "[A] landlord's duty to mitigate his damages arises only when the landlord and the tenant have not contracted otherwise." *Stucki*, 963 S.W.2d at 781. The court also noted that the burden of proving failure to mitigate was on the tenant and that it had been waived it in this case because the tenant had offered no evidence to support his allegations of failure to mitigate. *Stucki*, 963 S.W.2d at 781.

The two major differences between the judicial and legislative approaches are that (1) the statutory provision, which applies only if the tenant abandons the premises, may not be waived by

agreement of the landlord and tenant, and (2) the statutory provision does not qualify the landlord's duty to mitigate on whether or not the landlord has a contractual right to reenter without forfeiting the lease.

Form 28-1

A petition to foreclose a lien, such as the one below, should be used with actions to seize property.

This form assumes that the lien being enforced is a commercial landlord's lien, as described in Tex. Prop. Code §§ 54.021–.025. It should be modified as appropriate for residential or agricultural landlord's liens. It also assumes that attorney's fees are recoverable under a provision in the lease. If there is no such provision, attorney's fees are recoverable under chapter 38 of the Texas Civil Practices and Remedies Code if timely demand is made. See section 1.23 in this manual.

See section 14.10 for other forms of party designation. See also section 14.2 regarding exercising caution in pleading conditions precedent.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Petition and Application to Foreclose Landlord's Lien

1. *Parties.* Plaintiff is [**name of plaintiff**] ("Plaintiff"), whose address is [**address, city, state**]. Defendant is [**name of defendant**] ("Defendant"), who can be served with citation at [**address, city, state**].

2. *Jurisdiction.* This [District] Court has jurisdiction of this matter under Tex. Const. art. V, § 8, and Tex. Gov't Code § 24.008.

3. *Venue.* Venue is proper in [**county**] County, Texas, under Tex. Civ. Prac. & Rem. Code § 15.0115(a) as all or part of the real property the subject of the parties' lease is located in [**county**] County, Texas.

4. *State of Claim for Relief.* Pursuant to Tex. R. Civ. P. 47, Plaintiff states that it is seeking monetary relief of $[**amount**] and nonmonetary relief.

5. *Facts.* On [**date**], Plaintiff as landlord and Defendant as tenant entered into a lease by which Plaintiff leased to Defendant the real property located at [**address, city, county**] County, Texas. Defendant agreed to pay Plaintiff $[**amount**] per [**time period**] as rent. Defendant now owes Plaintiff $[**amount**] but has failed to pay Plaintiff. [**Include any other relevant**

facts, such as dates of demand letters.] A copy of the lease is attached as Exhibit [**exhibit number/letter**] and incorporated by reference.

6. *Lien.* Plaintiff holds a landlord's lien on [**describe property**] under section 54.021 of the Texas Property Code [**include if applicable:** and a security interest in the property under section 9.203 of the Texas Business and Commerce Code]. Plaintiff has the right to foreclose the lien as prescribed by law to satisfy Plaintiff's claim for rent due and unpaid.

7. *Conditions Precedent.* All conditions precedent have been performed or have occurred.

8. *Attorney's Fees.* Defendant's failure to pay the rent due Plaintiff has made it necessary for Plaintiff to employ the undersigned attorney to file suit. The lease provides that Defendant is liable for Plaintiff's attorney's fees in the event of default. Reasonable fees for the attorney's services rendered and to be rendered through trial and appeal are in the minimum amount of $[**amount**].

9. *Prayer.* Plaintiff prays that—

a. Defendant be cited to appear and answer;

b. Plaintiff be granted judgment for $[**amount**] as the principal amount due on the debt;

c. Plaintiff be granted foreclosure of the landlord's lien against the property described in this petition;

d. Plaintiff be granted judgment for prejudgment and postjudgment interest at the highest legal or contractual rate allowed by law;

e. Plaintiff be granted judgment for at least $[**amount**] as reasonable attorney's fees, with additional contingent amounts in the event of appellate proceedings;

f. Plaintiff be granted judgment for all costs of court; and

g. Plaintiff be granted all further relief to which Plaintiff may be entitled.

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach exhibit(s). Prepare an application for a distress warrant (form 28-3) or writ of sequestration (form 8-8).

Form 28-2

This affidavit can be used to perfect the landlord's lien for unpaid rent as discussed at sections 28.32:1 and 28.32:2 in this chapter.

Affidavit and Lien Statement for Commercial Building Landlord's Lien under Tex. Prop. Code § 54.022

BEFORE ME, the undersigned authority, on this day personally appeared [**name of affiant**], who swore on oath that the following facts are true:

"I am the owner of [**describe property, e.g.,** a six-room office suite] located at [**address, city, county**] County, Texas. I have personal knowledge of all of the facts set forth herein and they are all true and correct. I claim a lien on the nonexempt personal property of [**name of tenant or subtenant**] located on the above-described premises.

"On [**date**], I entered into a contract to lease the above-described premises to [**name of tenant or subtenant**], whose address is [**address, city, county, state**]. The term of the lease began on [**date**] and [expires/expired] on [**date**].

"The amount of $[**amount**] is rent due. The account is itemized by month as follows: [**itemize the specific amount due for each period**].

"My address is [**address, city, county, state**]."

_____

[**Name of affiant**]
Affiant

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

File the affidavit with the county clerk of the county in which the building is located.

Form 28-3

See section 28.32 in this chapter before applying for a distress warrant. The application may be accompanied by affidavits, a sample of which is at form 28-4. See section 14.10 for other forms of party designation. See also section 14.2 regarding exercising caution in pleading conditions precedent.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Application for Distress Warrant

1. *Parties.* [**Name of plaintiff**], Plaintiff, whose address is [**address, city, state**], makes this Application for Distress Warrant. Defendant is [**name of defendant**], who can be served with citation at [**address, city, state**].

> State specific facts relied on by the plaintiff to warrant issuance of the writ. The following paragraph contains sample fact allegations; the actual allegations must be drafted to fit the facts.

2. *Facts.* Plaintiff leased [**describe leased premises**] to Defendant for a term extending from [**term of lease**], for a monthly rental of $[**amount**], which Plaintiff and Defendant agreed to be due on [**date**] during the term of the lease. Defendant has not paid monthly rental for [**time period**], even though Plaintiff has made timely demand for payment. Plaintiff claims a building landlord's lien on Defendant's personal property in the leased premises to the extent of the $[**amount**] now past due.

3. *Grounds.* Plaintiff seeks this distress warrant because Defendant [owes rent/is about to abandon the building/is about to remove his property from the building] to the detriment of Plaintiff's lien on Defendant's personal property.

The amount sued for is rent past due, and the distress warrant is not sued out for the purpose of vexing and harassing Defendant.

4. *Conditions Precedent.* All conditions precedent have been performed or have occurred.

5. *Affidavit.* Plaintiff is entitled to the issuance of a distress warrant before judgment on the grounds stated in the attached affidavit. The affidavit is incorporated in this application by reference.

6. *Prayer.* Plaintiff prays that—

a. a distress warrant issue immediately;

b. the warrant specify the maximum value of Defendant's property to be seized and the amount of bond required of Plaintiff and that the warrant command that the property be kept safe and preserved subject to further orders of the court having jurisdiction; and

c. Plaintiff be granted all further relief to which Plaintiff may be entitled.

_____

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach affidavit(s) (form 28-4). Prepare the following, as necessary, to take to the hearing: form 28-5 (order for issuance of distress warrant), form 28-6 (bond to defendant), form 28-7 (distress warrant), and form 28-8 (officer's return).

Form 28-4

The affidavit must be attached to the application, form 28-3 in this chapter. The distress warrant is discussed generally at section 28.32.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for distress warrant at form 28-3.

Affidavit for Distress Warrant

BEFORE ME, the undersigned authority, on this day personally appeared [**name of affiant**], who swore on oath that the following facts are true:

"I am [Plaintiff/[**other capacity, e.g.,** leasing agent of Plaintiff]] in this cause. [**Include if affiant is agent:** I am authorized to make this affidavit and to apply for a distress warrant in this cause.]

Select one of the following.

"I have personal knowledge of the facts stated in this affidavit, and they are all true and correct.

Or

"I make this affidavit on information and belief. The basis for that belief is the following: [**state specific grounds for belief**].

Continue with the following.

"Plaintiff has filed an action for a distress warrant in this Justice Court in support of an action seeking enforcement of Plaintiff's landlord's lien against Defendant's property. Plaintiff's lien is for rent owed by Defendant, and this warrant is necessary because Defendant

[owes rent/is about to abandon the building/is about to remove his property from the building].

"Plaintiff does not seek this warrant for the purpose of vexing and harassing Defendant."

_____

[Name of affiant]
Affiant

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

Form 28-5

Tex. R. Civ. P. 610 specifies the required elements of the order granting the application for the distress warrant. This form assumes that the hearing was conducted ex parte, without notice to the defendant. If the defendant receives notice and/or appears, the form should be modified accordingly.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for distress warrant at form 28-3.

Order for Issuance of Distress Warrant

At the hearing on Plaintiff's Application for Distress Warrant in this cause, Plaintiff appeared by and through his attorney of record. The hearing was conducted without notice to Defendant.

The Court finds that—

Specific findings of fact must be made; findings 1.–4. are examples only.

1. Plaintiff rented to Defendant [**describe premises**], for which Defendant agreed to pay Plaintiff $[**amount**] per month as rent. The lease began [**date**], and it specified that rental payments were due on the [**date**] of each month.

2. Defendant has not paid monthly rental for [**time period**], even though Plaintiff has made timely demand for payment.

3. Plaintiff claims a building landlord's lien on Defendant's personal property in the [**describe premises**] to the extent of the $[**amount**] now past due.

4. Defendant has [**basis on which plaintiff believes personal property will be removed**], so Plaintiff justly fears that Defendant may remove from the premises personal property subject to Plaintiff's lien.

Appropriate versions of findings 5.–8. are required in all orders.

5. The maximum value of property that may be seized is $_____.

6. The amount of bond required of Plaintiff is $_____.

7. The amount of bond required for Defendant to replevy is $_____.

8. The property must be kept safe and preserved subject to further orders of the court having jurisdiction.

It is therefore ORDERED that a distress warrant be issued against [**name of defendant**] for property in the maximum amount of $_____, conditioned that Plaintiff must post a bond in the amount of $_____, payable to Defendant, conditioned as required by law.

It is further ORDERED that Defendant may replevy part or all of the property taken by posting a bond in the amount of $_____, payable to Plaintiff, conditioned and approved as required by law.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

[**Name**]
Attorney for Plaintiff
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

If the application is granted, have the clerk issue a distress warrant (with application, affidavit, and order) for service on the defendant.

Form 28-6

The form of the bond is suggested by Tex. R. Civ. P. 592b. Bonds for distress warrants are discussed at section 28.32 in this chapter. A surety company may be used in lieu of one or more individual sureties. *See* Tex. Ins. Code §§ 3503.001–.005. If individual sureties are used, two will probably be required, and the form should be so modified. Duplicate originals should be prepared and executed, one for the clerk and the other for the sheriff or constable.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Bond to Defendant for Distress Warrant

WE, THE UNDERSIGNED, [**name of plaintiff**], Plaintiff, as principal and [**name of surety**] as surety, acknowledge ourselves bound to pay [**name of defendant**], Defendant, up to the sum of [**number**] dollars, conditioned that Plaintiff will prosecute this cause to effect and that Plaintiff will pay to the extent of the penal amount of this bond all damages and costs as may be adjudged against Plaintiff for wrongfully suing out this distress warrant.

SIGNED on _____.

_____
[**Name of plaintiff**]
Principal

_____
[**Name of surety company**]
Surety

By _____
Agent for Surety

APPROVED on _____.

_____

[**Name of clerk**], Clerk
[**Designation of court**]

By _____
Deputy

Form 28-7

Tex. R. Civ. P. 612 sets out the requisites for a distress warrant, and Tex. R. Civ. P. 613 discusses service on the defendant. See section 28.32 in this chapter regarding distress warrants generally.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for distress warrant at form 28-3.

Distress Warrant to Be Served on Defendant

To the sheriff or any constable of any county within the state of Texas, greetings:

Plaintiff has applied for and given bond for a distress warrant. You are therefore commanded to take into your possession, if it is found in your county, the following personal property: [**describe property**]. You are commanded to keep the property safe and preserved, subject to further orders of the court having jurisdiction, unless it is replevied.

Select one of the following. Select the first paragraph if the justice court has jurisdiction to finally try the cause. Select the second paragraph if the value of the property exceeds the jurisdictional amount for the justice court.

Herein fail not, but have you this warrant, with your return showing how you have executed it, before this Court on the first day of the next succeeding term of court at [**date and time**] at [**address of court**].

Or

Herein fail not, but have you this warrant, with your return showing how you have executed it, before [**designation of court to which warrant is returnable**] on or before the Monday next after the expiration of twenty days from the date the warrant is served.

Continue with the following.

You are to display to the interested persons present at the time of the levy the following:

To [**name of defendant**], Defendant:

You are hereby notified that certain properties alleged to be owned by you have been seized. If you claim any rights in such property, you are advised:

YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WARRANT.

ISSUED on _____.

_____

[**Name of clerk**], Clerk
[**Designation of court**]

Include a certificate of service (form 19-1). Prepare the officer's return (form 28-8).

Form 28-8

A return is usually included in the form warrant furnished by the clerk. If the attorney prepares the warrant, a return should be provided. For the caption, use the same docket number, style, and court designation as in the application for the distress warrant if the justice court retains jurisdiction. However, if the value of the property exceeds the jurisdictional limits of the justice court, the distress warrant is returned to the district court with proper jurisdiction. In that case this officer's return will bear the docket number and court designation appropriate for the district court.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the caption designating the appropriate court to which the distress warrant should be returned.

Officer's Return for Distress Warrant

CAME TO HAND at _____ __.M. on the _____ day of _____ and executed at _____ __.M. on the _____ day of _____ at _____, _____ County, Texas, by taking into possession the following property:

_____

_____

_____.

This property remains in my custody, subject to the further order of the court having jurisdiction.

The distance actually traveled by me in execution of this process was ____ miles, and my fees are $_____.

_____
SHERIFF OR CONSTABLE

Form 28-9

If the plaintiff applies for an emergency sale, the application must be accompanied by a bond, for which form 28-6 in this chapter may be adapted. An affidavit is usually required also; see form 28-10.

For the caption, use the same docket number, style, and court designation as in the application for the distress warrant (form 28-3) if the justice court retains jurisdiction. However, if the value of the property exceeds the jurisdictional limits of the justice court, the distress warrant is returned to a district court with jurisdiction, and this application for emergency sale is directed to that court instead.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the caption designating the court to which the distress warrant was returnable. See form 28-8.

Application for Emergency Sale of Perishable Property
[under Distress Warrant]

[**Name of plaintiff**], Plaintiff in this action, makes this Application for Emergency Sale of Perishable Property.

The [sheriff/constable] of [**county**] County, Texas, under a distress warrant has seized and holds [**describe property**], which is wasting, decaying, or greatly depreciating in value and will continue to do so before the underlying cause enforcing a lien on the property can be heard on its merits. The interest of justice will be served by selling the property and placing the proceeds in the registry of this Court.

An affidavit stating that the condition of the property requires its sale is attached to and incorporated in this application. Also attached is a bond to Defendant making Plaintiff responsible to Defendant in case the sale is illegally or unjustly applied for or made.

Plaintiff requests that the described property be sold as under ordinary execution and that the proceeds be placed in the registry of this Court.

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach an affidavit (form 28-10) and a bond (adapt form 28-6).
Prepare form 28-11 (order for emergency sale).

Form 28-10

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for emergency sale at form 28-9.

Affidavit for Emergency Sale of Perishable Property

[under Distress Warrant]

BEFORE ME, the undersigned authority, on this day personally appeared [**name of affiant**], who swore on oath that the following facts are true:

"I am [Plaintiff/[**other capacity, e.g.,** leasing agent of Plaintiff]] in this action. [**Include if affiant is agent:** I am authorized to make this affidavit and to apply for an order for emergency sale.] I have personal knowledge of the facts set forth herein, and they are all true and correct.

"The following property was seized under a distress warrant: [**describe property as in form 28-9**]. Defendant has not claimed or replevied it or dissolved the warrant, and the property is in danger of [serious waste or decay/great depreciation in value] if kept until trial. [**Include facts supporting allegations of waste or decline in value.**]"

_____

[**Name of affiant**]
Affiant

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

Form 28-11

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the application for emergency sale at form 28-9.

Order for Emergency Sale of Perishable Property

[under Distress Warrant]

The Court has heard Plaintiff's Application for Emergency Sale of Perishable Property in this action. The Court finds that good cause exists for the issuance of an order to sell the property described in this Order.

It is therefore ORDERED that an order of sale be issued directing the officer to sell, as under execution, the following property: [**describe property as in form 28-9**].

It is further ORDERED that the proceeds of the sale be placed in the registry of this Court pending a trial of the cause underlying this action. The officer will return the order of sale, sign it, and state on it the time and place of sale, name of the purchaser, amount of money received, and expenses of the sale.

SIGNED on _____.

_____

[JUSTICE/JUDGE] PRESIDING

APPROVED AS TO FORM:

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Name]
Attorney for Defendant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

If the application is granted, the clerk should issue an order of sale.

Form 28-12

Consideration of facts and circumstances is essential in determining the contents, method of delivery, and notice periods for notices to vacate. The practitioner should carefully read the relevant statutes, in particular Tex. Prop. Code §§ 24.005 and 24.006, and modify this form appropriately. See the discussion at sections 28.21:3–:5 in this manual and form 28-13.

Notice to Vacate for Nonpayment of Rent

[Date]

[Name of lessee]
[Address]

Via Certified Mail, Return Receipt Requested No. [number], First-Class Mail and Hand Delivery

RE: Notice to vacate for nonpayment of rent under lease (the "Lease") dated **[date]** between **[parties to lease]** for **[describe leased premises]** (the "Property")

[Salutation]:

Because you have not paid rent on the Property under your Lease, your rights to occupancy and possession of the Property are hereby terminated under the provisions of the Lease. You are still liable for rent and other charges you may owe under the Lease.

Demand for possession of the Property is hereby made. You are hereby given notice to vacate the Property on or before midnight on **[date]**, which is at least three days from the delivery of this notice to you and to the Property as required by Tex. Prop. Code § 24.005(a) and § 24.005(f). Your failure to vacate will result in appropriate legal action before the justice of the peace. Delay or postponement of such action shall not constitute waiver.

Sincerely,

_____

[Name of attorney]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Form 28-13

Consideration of facts and circumstances is essential in determining the contents, method of delivery, and notice periods for notices to vacate. The practitioner should carefully read the relevant statutes, in particular Tex. Prop. Code § 24.005 and § 24.006, and modify this form appropriately. See discussion at sections 28.21:3–:5 in this manual and form 28-12.

Notice to Vacate for Nondelinquency Breach of Lease

[Date]

[Name of lessee]
[Address]

Via Certified Mail, Return Receipt Requested No. [number], First-Class Mail and Hand Delivery

RE: Notice to vacate for nondelinquency breach of lease dated **[date]** (the "Lease"), between **[parties to lease]**, for **[describe leased premises]** (the "Property")

[Salutation]:

You have violated paragraph number[s] **[number[s]]** of the Lease, in that you **[describe default(s)]**. This is a substantial breach of the Lease. This is to notify you that my client is therefore exercising [his/her] right under the Lease to terminate your rights of occupancy and possession, effective immediately. You are still liable for rent and other charges you may owe under the Lease.

If you have not already moved out, demand for possession is hereby made and you are hereby given notice to vacate the Property on or before midnight on **[date]**, which is at least one day from the delivery of this notice to you or to the Property. Failure to move out by then will result in legal action before the Justice of the Peace. Delay or postponement of such action shall not constitute waiver.

Sincerely,

_____

[**Name of attorney**]
Attorney for Plaintiff
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Form 28-14

See section 28.27:4 in this chapter for requirements for sworn complaints for forcible detainer actions.

Effective September 1, 2020, the jurisdictional limits of county courts at law and justice courts will increase to $250,000 and $20,000, respectively. *See* Acts 2019, 86th Leg., R.S., ch. 696, §§ 2, 32 (S.B. 2342).

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Sworn Complaint for Forcible Detainer

Plaintiff, [**name of landlord**], ("Plaintiff") would respectfully show the Court as follows:

1. *Jurisdiction.* Pursuant to Tex. Gov't Code § 27.031(a)(2) and Tex. Prop. Code § 24.004, this Court has jurisdiction over this matter because the real property the subject matter of this suit is located in this justice precinct.

2. *Parties.* Plaintiff, [**name of landlord**], is [an/a] [individual/[**type of entity**]] authorized to do business in the state of Texas. Plaintiff's address is [**address, city, state**]. [The last three numbers of Plaintiff's driver's license number are [**numbers**]./Plaintiff has not been issued a driver's license.] [The last three digits of Plaintiff's Social Security number are [**numbers**]./Plaintiff has not been issued a Social Security number.] Defendant is [an/a] [individual/[**type of entity**]] in [**county**] County Justice Precinct [**insert number**]. Defendant's telephone number is [**number**].

3. *E-mail Service.* Plaintiff [does/does not] consent to e-mail service.

Include 4. if lessee is an individual.

4. *Nonmilitary.* Defendant [is/is not] in active duty military service.

Continue with the following.

5. *Service of Process.* Defendant may be served by personal service at the premises under Tex. R. Civ. P. 510.4(b) or, if required, Tex. R. Civ. P. 510.4(c). Defendant's address is listed in paragraph 7(a) below. Plaintiff knows of no other home or work addresses of Defendant in the county in which the Property is located.

6. *Venue.* Under Tex. Civ. Prac. & Rem. Code §§ 15.001, 15.011, and 15.0115, venue is proper in [**county**] County Precinct [**number**] because all or part of the Property complained of is located in [**county**] County Precinct [**number**].

7. *Facts.*

a. Plaintiff and Defendant entered into a written lease (the "Lease") for [**describe leased premises**] (the "Property") on [**date**].

b. Plaintiff has owned and managed the Property at all dates mentioned herein and owns and manages the Property as of this date.

c. Plaintiff has complied with all provisions of the Lease.

d. Defendant has materially breached the Lease in that Defendant has failed to timely make rental payments.

And/Or

d. Defendant has substantially violated [**describe lease provisions violated**] of the Lease, to wit, [**describe breach**].

Select one of the following.

e. Defendant is currently in arrears in the amount of $[**amount**].

Include the following if plaintiff is not seeking rent because the amount due is in excess of the jurisdictional limit of the court.

e. Plaintiff is not seeking an award of rent in this proceeding (see paragraph 10 below).

8. *Plaintiff's Right to Possession.* Under Tex. Civ. Prac. & Rem. Code §§ 15.001, 15.011, and 15.0115, venue is proper in [**county**] County Precinct [**number**] because all or part of the Property complained of is located in [**county**] County Precinct [**number**]. On [**date**], Plaintiff [**form[s] of delivery of notice to vacate; e.g.,** hand delivered] to Defendant at the Property written notice to vacate and demand for possession pursuant to Tex. Prop. Code § 24.005(a). Defendant has failed to surrender possession of the Property to Plaintiff. Therefore, pursuant to Tex. Prop. Code § 24.002, Defendant has committed a forcible detainer, and Plaintiff is entitled to immediate possession of the Property.

9. *Attorney's Fees.* Pursuant to Tex. Prop. Code § 24.006(b) [and Lease paragraph number [**number**]], Plaintiff is entitled to recover attorney's fees in the event Plaintiff prevails in this action. Defendant's default has made it necessary for Plaintiff to employ the undersigned attorney to file suit.

Include the following if attorney's fees are sought under Tex. Civ. Prac. & Rem. Code ch. 38.

This claim was timely presented to Defendant and remains unpaid.

Include the following if the claim for attorney's fees is based on contract.

Defendant agreed to pay reasonable attorney's fees according to the terms of the Lease.

Continue with the following.

Reasonable fees for the attorney's services rendered and to be rendered through trial and appeal are no less than $[**amount**].

Include the following reservation of rights when amount in controversy exceeds $10,000. Note that the jurisdictional limit of justice courts increases to $20,000 effective September 1, 2020.

10. *Reservation of Rights.* Plaintiff seeks only possession of the Property, court costs, and attorney's fees; Plaintiff expressly reserves the right to seek all rent and amounts due under the Lease in a court of competent jurisdiction.

Continue with the following.

11. *Prayer.* Plaintiff prays that—

a. Defendant be cited to appear and answer;

b. Plaintiff have judgment against Defendant for Possession of the Property, including removal of Defendant, removal of Defendant's possessions, and removal of all other occupants;

c. Plaintiff be granted judgment for all rent due and owing under the Lease as of the date of judgment;

d. Plaintiff be granted judgment for all reasonable and necessary attorney's fees through a motion for rehearing before the Texas Supreme Court;

e. Plaintiff be granted judgment for prejudgment and postjudgment interest on the above sums at the highest rate allowed by law;

f. Plaintiff be granted judgment for all costs of court; and

g. Plaintiff be granted such other and further relief as Plaintiff may be justly entitled.

DATED [**date**].

Respectfully submitted,

_____

[Name of attorney]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

STATE OF TEXAS)

COUNTY OF)

BEFORE ME, the undersigned authority, on this day personally appeared _____, the authorized agent for **[name of lessor]**, and stated that [he/she] has read the above and foregoing Sworn Complaint for Forcible Detainer and that each and every statement contained therein is within [his/her] personal knowledge and is true and correct.

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

Chapter 29
Probate and Guardianship

I. Probate Generally

II. Claims Procedure Generally

III. Dependent Administration

IV. Independent Administration

V. Guardianship

VI. Nonprobate Assets

VII. Special Situations

Forms

Chapter 29

Probate and Guardianship

I. Probate Generally

§ 29.1 Decedent's Estate in Probate

When a person dies, his estate remains subject to payment of his debts unless the property is exempted by law and provided that procedural guidelines are satisfied. Tex. Est. Code § 101.051. Claims against the estate will be paid in whole or on a pro rata basis to the extent the estate's assets will allow. Tex. Est. Code §§ 355.107–.108. Estate administration is the process of determining the relative rights of creditors and beneficiaries.

Some assets of the deceased can pass outside probate through methods such as rights of survivorship and trusts. See part VI. in this chapter.

Practice Note: The Texas Supreme Court has appointed a task force to promulgate plain language forms for pro se individuals to use in certain probate matters, such as small estate affidavit proceedings and muniments of title. Probate courts will be required to accept these forms once they become available to the public. *See* Tex. Gov't Code § 22.020; Acts 2015, 84th Leg., R.S., ch. 602, § 1 (S.B. 512), eff. Sept. 1, 2015; Texas Supreme Court, Order *Creating Landlord-Tenant Forms Task Force*, Misc. Docket No. 16-9003 (Jan. 21, 2016).

§ 29.2 Passage of Title through Probate

§ 29.2:1 Property Passed by Will

A mentally competent person having testamentary capacity and being of legal age (or having been emancipated) may pass his estate and all his rights to property by will. Tex. Est. Code § 251.001. When a person dies leaving a lawful will, he is said to have died "testate," and title and beneficial ownership of all his property devised or bequeathed by the will immediately vests in the respective devisees or legatees. The right of any beneficiary of the estate is subject to the payment of all claims against the estate and other limitations provided by law. Tex. Est. Code § 101.051. Additionally, on the issuance of letters testamentary or of administration, the personal representative has the right to possession of the real estate assets for purposes of administering the estate. Tex. Est. Code § 101.003; *Atlantic Insurance Co. v. Fulfs*, 417 S.W.2d 302, 305 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.).

§ 29.2:2 Intestate Succession

If a decedent owns or has a right to property in Texas but he dies without a will, he is said to have died "intestate," and his property vests immediately in his heirs at law. Tex. Est. Code § 101.001. Determination of heirs at law and passage of title through intestate succession is governed by Tex. Est. Code §§ 201.001–205.009. Title and inheritance rights of real property situated in another state are governed by the law of that state. *See Pellow v. Cade*, 990 S.W.2d 307, 313 (Tex. App.—Texarkana 1999, no pet.); *see also Restatement (Second) of Conflict of Laws* §§ 59, 223 (1971).

§ 29.2:3 Heirship Proceeding

If a decedent's property passes by intestate succession, either the personal representative, a party seeking the appointment of an independent administrator under Texas Estates Code section 401.003, the trustee of a trust holding assets for the benefit of the decedent, a person claiming to be a creditor, or the owner of part of the decedent's estate may apply for a determination of the decedent's heirs and the interests the respective heirs have in the decedent's property. Tex. Est. Code §§ 202.001–.002, 202.004. This proceeding must be brought in the appropriate court of the county in which venue would be proper as set out in Tex. Est. Code § 33.004, except where the proceeding is brought by the guardian of the decedent's estate. In such a case, the proceeding must be brought in the probate court where the guardianship was pending. Tex. Est. Code § 202.004(3).

§ 29.2:4 Affidavit of Heirship

Any affidavit or other sworn or acknowledged document concerning heirship recorded for five years or longer in the deed records of a county in which a decedent's property is located is prima facie evidence of the facts it states when introduced in an heirship proceeding. Tex. Est. Code § 203.001(a). Otherwise, such affidavits carry no significance, although third parties have traditionally relied on them. The statutory affidavit of heirship is different from the long-standing Texas procedure of transferring title to property based upon the filing of affidavits of heirship executed by two disinterested persons. *See* Stanley M. Johanson, *Johanson's Texas Estates Code Annotated* 185–86 (Thomson Reuters 2015). An affidavit of heirship should not be confused with a small estate affidavit; the latter is a statutory method of probating qualifying estates. See section 29.6:4 below.

§ 29.3 Administration of Estates

§ 29.3:1 Who May Apply for Administration

An executor named in the will, an administrator designated as authorized under section 254.006 of the Texas Estates Code, an independent administrator designated by all of the distributees of the decedent under sections 401.002(b) or 401.003, or any interested person may apply for the appointment of a personal representative. Tex. Est. Code § 301.051. "Interested persons" include heirs, devisees, spouses, creditors, or any others having a property right in or claim against the estate. Tex. Est. Code § 22.018. The application must be filed within four years of the decedent's death, unless administration is necessary to receive or recover funds or other property due the estate or to prevent real property owned by the estate from becoming a danger to public health, safety, or welfare and the applicant is a home-rule municipality that is a creditor of the estate. Tex. Est. Code § 301.002. Except with respect to foreign wills, letters testamentary will not be issued if a will is admitted to probate after four years from the decedent's death. Tex. Est. Code § 256.003(b). See section 29.6:3 below for a discussion of probate of will as muniment of title.

§ 29.3:2 When Administration Necessary

Administration is deemed necessary if two or more debts exist against an estate, if partition of the estate among the distributees is sought, if the administration is necessary to receive or recover funds or other property due the estate, or if the administration is necessary to prevent real property in the estate from becoming a danger to public health, safety, or welfare; a court may, however, authorize administration for other reasons. Tex. Est. Code § 306.002(c). See part VI. in this chapter for a discussion of assets that pass outside of probate at death.

An estate may be administered with or without court supervision (called "dependent" and "independent" administration, respectively). *See* Tex. Est. Code §§ 351.051, 401.001–.008; *Eastland v. Eastland*, 273 S.W.3d 815, 822–23 (Tex. App.—Houston [14th Dist.] 2008, no pet.). The principal difference is that the claim requirements and time frames are stricter in a dependent administration, and it is therefore easier for the creditor's claim to be rejected, disapproved, or barred. See sections 29.35 (dependent administrations) and 29.54 (independent administrations) below. Additionally, in an independent administration, the creditor may skip the claims process and immediately initiate suit for the collection of the debt. See sections 29.54:1 and 29.55:2.

§ 29.4 Personal Representative

§ 29.4:1 Personal Representative Generally

In this chapter, "personal representative" is used as a generic term including independent executor, independent or dependent administrator, temporary administrator, successor executor or administrator, administrator with will annexed, and guardian. *See* Tex. Est. Code § 22.031. These are the parties with whom a creditor will most likely have contact during the claims process. Generally, the difference between an executor and an administrator is that the former was named in the decedent's will.

§ 29.4:2 Duties of Personal Representative

A personal representative has a duty to exercise the same care for estate property as a prudent person would for his own property. Tex. Est. Code § 351.101. The representative has a fiduciary duty to the heirs or devisees. *Humane Society of Austin & Travis County v. Austin National Bank*, 531 S.W.2d 574, 580 (Tex. 1975), *cert. denied*, 425 U.S. 976 (1976).

After receiving letters testamentary or of administration, the personal representative must collect and take into possession the personal property, record books, title papers, and other business papers of the estate and must deliver these items to the persons entitled to receive them when administration is complete. Tex. Est. Code § 351.102.

§ 29.4:3 Duties and Obligations of Personal Representative to Creditors

It has been held that a personal representative stands in a fiduciary relationship to creditors. *Cochran's Administrators v. Thompson*, 18 Tex. 652 (1857); *Ex parte Buller*, 834 S.W.2d 622, 626 (Tex. App.—Beaumont 1992, no writ); *but see FCLT Loans, L.P. v. Estate of Bracher*, 93 S.W.3d 469, 481–82 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (holding that appointment as an independent executor does not necessarily give rise to a fiduciary duty to creditors); *Mohseni v. Hartman*, 363 S.W.3d 652, 657 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (executor does not owe duty of due care to creditor who alleges executor's mismanagement impaired estate's ability to pay creditor's claim). There are specific statutory duties for independent personal representatives; see section 29.52:2 below.

§ 29.4:4 Bond

Unless a decedent's will expressly dispenses with the need for a bond or a corporate fiduciary is appointed, a personal representative must post bond. Tex. Est. Code § 305.101. The judge shall set the bond in an amount sufficient to protect the estate and its creditors in accordance with Tex. Est. Code §§ 305.001–.257. Any interested person, including a creditor, may petition the court to raise the bond if it appears inadequate.

Tex. Est. Code § 305.251(b). On a showing of just cause, bond may be required of the personal representative if the representative has not otherwise been required to post bond, particularly in adversarial proceedings in which malfeasance is at issue. Tex. Est. Code § 305.002.

§ 29.5 Ascertaining Debtor's Death and Status of Probate

If no one associated with a debtor informs the creditor of the debtor's death, the creditor will have to ascertain the fact of death and the opening of probate administration, if any, by other means. All deaths in Texas are reported to the vital statistics unit; the time between the date of death and when it is reported varies from two weeks to several months. For a fee the unit will search its archives for a death record. A request may be sent by mail to Texas Vital Statistics, Department of State Health Services, 1100 West 49th Street, Austin, TX 78756-3101, by fax to 512-458-7711, or a certified copy of a death certificate may be ordered online at **https://txapps.texas.gov/tolapp/ovra**. A schedule of fees and an explanation of the application process is available on the Department of State Health Services website at **www.dshs.texas.gov/vs/reqproc/Ordering-a-Birth-or-Death-Verification-by-Mail**. A death verification can be ordered online at **www.dshs.texas.gov/vs/reqproc/verification.shtm**. The unit also sells microfilmed death records to private research databases such as LEXIS-NEXIS. See section 3.8 in this manual regarding using private research sources for finding debtors generally.

To ascertain whether an administration has been opened on a decedent's estate, the attorney should start by asking the clerk of the court having probate jurisdiction in the county in which the decedent last lived. For a county with a large population whose probate court may be unable or unwilling to search for this information on request, the attorney should look to see if the status of probate cases can be found on the county's website. Finally, the attorney should contact the customer service department of a title company. If a probate proceeding has been opened, the title company should be able to find the cause number of the proceeding.

§ 29.6 Special Administrations

§ 29.6:1 Temporary Administrator

The court may, by written order, immediately appoint a temporary administrator with limited powers. Tex. Est. Code § 452.001; *see also* Tex. Est. Code § 452.003. The purpose of temporary administration is to preserve the estate until it can pass into the hands of a person fully authorized to administer it. A temporary administration cannot exceed 180 days, but the court may make the temporary administrator a permanent one. Tex. Est. Code §§ 452.003, 452.008. A temporary administration is somewhat like a temporary injunction, preserving the status quo while the situation is assessed.

As a practical matter, a creditor should apply for the appointment of a temporary administrator only if no estate has been opened and it appears that assets are being disposed of or are in danger of being depleted by third parties. See section 29.8 below regarding the responsibilities of a creditor acting as personal representative. A better option may be a fraudulent transfer action coupled with a request for injunctive relief to stop the transfer or wastage. See section 14.30 in this manual regarding fraudulent transfer and sections 8.33 through 8.40 regarding injunctions.

The court may also appoint a temporary administrator with limited powers pending the contest of a will or administration. Tex. Est. Code § 452.051. This appointment can continue until the termination of the contest and the appointment of an administrator or executor with full powers. Tex. Est. Code § 452.051(b). At any time during the pendency of the contest, the

court may confer on the temporary administrator all the powers and authority of a permanent administrator with regard to claims against the estate, but the temporary administrator must give sufficient bond. Tex. Est. Code § 452.052.

A temporary administrator has only those rights and powers conferred by the court, and the court may require an additional bond at any time it extends the rights and powers of the temporary administrator. Any acts not expressly authorized are void. Tex. Est. Code §§ 452.101, 452.102; *see also Bandy v. First State Bank*, 835 S.W.2d 609, 615 (Tex. 1992). Before filing a claim in a temporary administration, a creditor should determine if the order appointing the temporary administrator grants the authority to act on claims against the estate. If the order does not confer this power, filing a claim may be fruitless. Texas law is unclear regarding the effect of filing a claim if the administrator lacks authority to act on it.

§ 29.6:2 Administration of Community Property

When a husband or wife dies intestate and the community property passes to the surviving spouse, no administration is necessary. Tex. Est. Code § 453.002. Although the surviving spouse need not qualify before a court, the community property subject to sole and joint management of a spouse during marriage continues to be subject to the liabilities of the now-deceased spouse. In addition, any nonexempt property that passes to that spouse's heirs or devisees remains subject to liabilities against it while the spouse was alive. Tex. Est. Code § 101.052. The surviving spouse or informal administrator must keep a distinct account of all community debts allowed or paid in the settlement of the estate. Tex. Est. Code § 453.006. The surviving spouse, in addition to other powers, may sue or be sued for the recovery of community property and may sell, mortgage, lease, and otherwise dispose of community property to pay community debts. Tex. Est. Code § 453.003(a).

§ 29.6:3 Probate of Will as Muniment of Title

A probated will is documentary evidence of a person's right to the devised property, otherwise known as a muniment of title. *See Ochoa v. Miller*, 59 Tex. 460 (1883). For a will to be probated as a muniment of title, there must be no debts owed by the estate except for those secured by liens against real estate, and there must be no other necessity for administration of the estate. Tex. Est. Code § 257.001.

The order admitting a will to probate as a muniment of title acts as legal authority that the devisee or legatee is entitled to receive the decedent's assets without administration of the estate. Tex. Est. Code § 257.102. No representative will be appointed by the court, and no letters testamentary will issue. If the decedent's estate is handled in this manner, the attorney for any creditor of the decedent should proceed to collect directly against the heirs as established in the will. See section 29.9 below.

Except for foreign wills, a will cannot be admitted to probate, even as a muniment of title, after four years from the decedent's death unless it is proved that the applicant was not in default in failing to apply for probate sooner. For a detailed analysis of who is the "applicant" and when default would bar the admission of the will, see *Ferreira v. Butler*, 575 S.W.3d 331 (Tex. 2019). Letters testamentary may not normally be issued if a will is admitted to probate after four years from the decedent's death. Tex. Est. Code § 256.003. See also section 29.3:1 above.

§ 29.6:4 Small Estate Affidavit

If the value of an estate's assets, not including homestead and exempt property, does not

exceed $75,000, and no application for an administration has been filed, the distributees of the estate may complete and file a small estate affidavit. Tex. Est. Code § 205.001. This affidavit must list the estate's known assets, liabilities, distributees, and the respective shares of each distributee. Tex. Est. Code § 205.002. It will not transfer title to the decedent's real property, except for the decedent's homestead (and then only if the affidavit is recorded in the deed records of the county in which the homestead is located). Tex. Est. Code § 205.006. If the decedent left a will, the affidavit does not affect the disposition of property left under the will. Tex. Est. Code § 205.008. Many probate courts have local rules that greatly restrict the use of small estate affidavits. If the decedent's estate is dealt with in this manner, the attorney for the creditor should proceed directly against the heirs as shown on the affidavit. See section 29.9 below.

§ 29.7 No Probate

If a decedent's heirs do not need a probate proceeding to pass title to the decedent's property or if they wish to avoid the probate process for another reason, they may simply choose not to probate the decedent's estate. Several devices, such as living trusts and survivorship agreements, take a decedent's property out of probate. See section 29.9 below regarding successor liability for a decedent's debts and part VI. in this chapter regarding nonprobate assets.

§ 29.8 Creditor's Ability to Institute Administration of Debtor's Estate

A creditor of a decedent may open probate administration and receive letters testamentary or letters of administration. If a named executor, a person designated as administrator under section 254.006 of the Texas Estates Code, the surviving spouse, any beneficiary, or any next of kin also applies for letters, their applications will take priority over the creditor's application. Tex. Est. Code § 304.001.

If appointed personal representative of the estate, the creditor will be held to the same duties and standards as any other personal representative. He will be charged with dealing with the decedent's property as a prudent person would take care of his own property. *See* Tex. Est. Code § 351.101. He will be held to a fiduciary's standard of care in the administration of the estate. *Humane Society of Austin & Travis County v. Austin National Bank*, 531 S.W.2d 574, 577 (Tex. 1975), *cert. denied*, 425 U.S. 976 (1976). A corporate fiduciary may be held to an even higher standard. *Ertel v. O'Brien*, 852 S.W.2d 17, 20 (Tex. App.—Waco 1993, writ denied); *but see FCLT Loans, L.P. v. Estate of Bracher*, 93 S.W.3d 469, 481–82 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (appointment as independent executor does not necessarily give rise to fiduciary duty to creditors). Furthermore, the creditor will have to post bond. *See* Tex. Est. Code § 305.101.

If an interested person wants to prevent the creditor from becoming personal representative of the estate, he can either pay the claim; prove that the creditor's claim is fictitious, fraudulent, illegal, or barred by limitation; or post bond of double the amount of the debt. The bond is secured by a lien against all the estate in the hands of the distributees. Tex. Est. Code §§ 301.201, 301.203.

Other creditors may have priority for being paid out of the estate; the creditor–personal representative should be wary of volunteering payment of any estate debt without prior provision of reimbursement and prioritization. *See* Tex. Est. Code § 355.103.

As personal representative, the creditor can play an active role in expediting the claims process. Also, the personal representative is entitled to a compensation of 5 percent of amounts received and paid out in cash, subject to certain limita-

tions, and to recover all reasonable expenses incurred in administering the estate. *See* Tex. Est. Code §§ 352.002, 352.051.

§ 29.9 Beneficiary's Liability for Decedent's Debts

§ 29.9:1 No Liability in General

While an estate is in administration the heirs or distributees are generally not liable for the decedent's debts. *Bailey v. Cherokee County Appraisal District*, 862 S.W.2d 581, 583 (Tex. 1993).

§ 29.9:2 No Administration or Administration Ceased

If an estate is distributed without any administration, the distributees are individually liable for a pro rata share of a claim against the decedent. *Blinn v. McDonald*, 46 S.W. 787 (Tex. 1898); *Potts v. W.Q. Richards Memorial Hospital*, 558 S.W.2d 939, 945 (Tex. Civ. App.—Amarillo 1977, no writ); *Perkins v. Cain's Coffee Co.*, 466 S.W.2d 801, 802–03 (Tex. Civ. App.—Corpus Christi 1971, no writ). The pro rata share is of assets actually received by the distributees or, if the property has been disposed of, is of the value of the disposed property. *Chadwick v. Watkins*, 258 S.W.2d 194, 197–98 (Tex. Civ. App.—Texarkana 1953, no writ). Additionally, the decedent's creditors have priority over claims against the distributees that arose after the distribution from the estate. *Wallace v. Republic National Bank & Trust Co.*, 80 F.2d 787, 789 (5th Cir. 1936), *cert. denied*, 298 U.S. 683. This pro rata liability also applies when the estate is withdrawn from administration. Tex. Est. Code § 354.058.

§ 29.9:3 After Final Distribution

No claim for money against a decedent's estate may be allowed after final distribution of the estate. If the action is not barred by limitations, however, a creditor may sue the distributees directly, but his recovery will be limited to the value of the property received by them. Tex. Est. Code § 355.063. An independent executor may determine for himself when an estate is ready for distribution, though there are unpaid claims against the estate; the creditor's remedy is against the devisees or legatees who, as distributees, take the property subject to debts owed by the estate. Anderson v. Huie, 266 S.W.2d 410, 412 (Tex. Civ. App.—Dallas 1954, no writ). A "legatee" includes a person entitled to a legacy under a will. Tex. Est. Code § 22.021. A "devisee" includes a legatee. Tex. Est. Code § 22.009. The creditor must plead and prove the distribution of the property. *Perkins v. Cain's Coffee Co.*, 466 S.W.2d 801, 803 (Tex. Civ. App.—Corpus Christi 1971, no writ).

§ 29.10 Exempt Property in Probate

§ 29.10:1 Homestead

If a decedent left a surviving spouse or minor child, his homestead is not liable for debts of the estate, except for purchase money, taxes due on it, work and material used in constructing improvements on it, an owelty of partition imposed against the entirety of the property, the refinance of a lien against the homestead, an extension of credit on the homestead, or a reverse mortgage. Tex. Est. Code § 102.004; *National Union Fire Insurance Co. of Pittsburgh v. Olson*, 920 S.W.2d 458, 461–62 (Tex. App.—Austin 1996, no writ). This applies regardless of whether the surviving family member occupies the property; it even applies if the decedent devised the property to someone other than the surviving family member. *Milner v. McDaniel*, 36 S.W.2d 992, 993 (Tex. 1931); *National Union Fire Insurance*, 920 S.W.2d at 462; *see also* Stanley M. Johanson, *Johanson's Texas Estates Code Annotated* 73–75 (Thomson Reuters 2015). See sections 27.34 through 27.40 in this manual for a discussion of the homestead.

§ 29.10:2 Personal Property

The personal property of a decedent that is exempt from forced sale at his death remains exempt from forced sale to satisfy debts of his estate, except for payment of funeral expenses and the expenses of his last illness, if claims for those expenses are timely presented. Tex. Est. Code §§ 353.155, 355.102, 403.001, 403.051(a)(3). See sections 27.32 and 27.41 in this manual for a discussion of exempt personal property.

§ 29.11 Allowances

§ 29.11:1 Allowance in Lieu of Exempt Property

If a decedent did not leave property exempted from forced sale, the court will make a reasonable allowance to substitute for the property and order it paid to the surviving spouse and children. The allowance in lieu of a homestead may not exceed $45,000, and the allowance in lieu of all other exempt property may not exceed $30,000, exclusive of the allowance for the support of the surviving spouse, minor children, and adult incapacitated children. Tex. Est. Code § 353.053; *see also* Tex. Est. Code § 403.001 (independent executor to set aside and deliver to those entitled exempt property and allowances for support).

§ 29.11:2 Family Allowance to Spouse, Minor Children, and Adult Incapacitated Children

The surviving spouse or any person authorized to act on behalf of minor children or adult incapacitated children of a deceased may petition the court for payment of a family allowance sufficient to provide support and maintenance for one year from the time of the decedent's death. Tex. Est. Code §§ 353.101, 353.102; *see also* Tex. Est. Code § 403.001. Payment of this allowance takes precedence over all claims against the estate except those for funeral expenses and expenses of the decedent's last illness. Tex. Est. Code §§ 353.104, 355.102; *see also* Tex. Est. Code § 403.051(a)(3) (independent executor classifies and pays approved and established claims). The family allowance is in addition to the passage of homestead and exempt property or an allowance in lieu of that property.

§ 29.12 Monitoring Probate Court Proceedings

§ 29.12:1 Request for Notice

A creditor may request notification of all motions, applications, and proceedings. The request must be filed with the county clerk, and the requesting party must pay the fees and costs for such notices. Tex. Est. Code § 51.202. It is generally more advantageous for the creditor's attorney to enter an appearance in the estate proceeding.

§ 29.12:2 Inventory and Appraisement; Affidavit in Lieu of Inventory, Appraisement, and List of Claims

A personal representative must file an inventory, appraisement, and list of claims of the estate within ninety days of qualifying unless the court shortens or extends the time for filing. Tex. Est. Code §§ 309.051(a), (b), 309.052. Alternatively, in the case of an independent administration, if there are no unpaid debts at the time the inventory is due, except for secured debts, taxes, and administration expenses, the personal representative may file in lieu of the inventory, appraisement, and list of claims an affidavit stating that all debts, except for secured debts, taxes, and administration expenses, are paid and that all beneficiaries, have received a verified, full, and detailed inventory. The affidavit must be filed

within ninety days, unless the court changes the time period. Tex. Est. Code § 309.056(b). Besides sending copies of the full, verified, detailed inventory to all persons or entities entitled to receive property from the estate, the personal representative must also send a copy of the inventory, appraisement, and list of claims to any interested person who requests it in writing or obtains an order from the court compelling the personal representative to provide a copy. Tex. Est. Code § 309.056(c). Unless requested in writing, the personal representative does not have to provide a copy of the full, verified, detailed inventory to devisees who are to receive property valued at $2,000 or less, who have received all property to which they are entitled under the will before the affidavit is filed, or who have waived their right to receive the inventory and appraisement. Tex. Est. Code § 309.056(b–1). Personal representatives often seek an extension of time to file an inventory, and the extension is routinely granted. But this information could be critical to the creditor's strategy, particularly for secured creditors choosing between matured secured claim status and preferred debt and lien status; see section 29.23 below. In an appropriate case, therefore, the attorney should consider opposing the representative's request for an extension to file an inventory.

§ 29.12:3 Contesting Probate Proceedings Generally

Any person interested in an estate may contest any proposed action to be decided by the probate court by filing its opposition in writing. Tex. Est. Code § 55.001. Proceedings that could be opposed include the prioritization, classification, and payment of claims; the granting of fees or commissions; the authorization of sales of property; the designation of exempt property; and the determination of family allowances.

[Sections 29.13 through 29.20 are reserved for expansion.]

II. Claims Procedure Generally

§ 29.21 Notice

§ 29.21:1 Methods of Notice—Publication, Posting, Mail

Personal representatives are required to give notice to creditors and other interested persons of the opening of administration by publication, certified or registered mail, or posting. Published notices must be printed in a newspaper of general circulation in the county in which letters of administration or letters testamentary are issued. Tex. Est. Code § 51.054. Mailed notices must be sent by certified or registered mail, return receipt requested, to the last known post office address of the creditor. Tex. Est. Code § 51.052. Posted notices are posted by the sheriff or constable at the courthouse door or the location in or near the courthouse where public notices are customarily posted in the county in which the proceedings occur, for not less than ten days before return day. Tex. Est. Code § 51.053.

§ 29.21:2 One Notice Sufficient

If a former representative, co-representative, or guardian has already given the required notices, a successor representative or guardian does not have to give repeated or additional notice. Tex. Est. Code §§ 308.055, 1153.005.

§ 29.21:3 Failure of Personal Representative to Give Notice

If a representative or guardian fails to give any required notice, the representative, guardian, and the sureties on their bonds, if any, will be liable for any damages suffered by any person because of that failure unless it appears that the creditor had actual notice. Tex. Est. Code §§ 308.056, 1153.005.

§ 29.21:4 Notice Requirements

Specific notice requirements are discussed below at section 29.34 (dependent administrations), section 29.53 (independent administrations), and section 29.63 (guardianships).

§ 29.22 Claims Generally

§ 29.22:1 Claim for Money vs. Contingent or Unliquidated Claim

A claim for money is a claim for a definite amount based on specific data, not a claim for an undetermined amount. *Anderson v. First National Bank*, 38 S.W.2d 768, 769–70 (Tex. 1931); *Connelly v. Paul*, 731 S.W.2d 657, 659 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.). A contingent or unliquidated claim is not a claim for money. A tort claim not reduced to judgment, for instance, would be a contingent or unliquidated claim. *Anderson*, 38 S.W.2d at 769–70; *Wilder v. Mossler*, 583 S.W.2d 664, 667 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ). Also, a claim for equitable relief is not a claim for money. *Lusk v. Mintz*, 625 S.W.2d 774, 776 (Tex. App.—Houston [14th Dist.] 1981, no writ).

§ 29.22:2 Claim Reduced to Judgment before Death

If a defendant dies after judgment is rendered against him, execution may not issue on the judgment; the debt must be presented and proved in the course of administration. Tex. R. Civ. P. 625. It appears that an alternative method of presentment is to file a certified copy of the judgment with the probate court. *Conrad v. Judson*, 465 S.W.2d 819, 827 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.).

If the judgment has not been abstracted by the time the judgment debtor dies, subsequent abstracting of the judgment will not convert the claim into a secured claim. *First National Bank v. Cone*, 170 S.W.2d 782 (Tex. Civ. App.—Fort Worth 1943, writ ref'd). If the judgment lien did not attach to the decedent's homestead during his life, it does not attach to the homestead property on death. *Harms v. Ehlers*, 179 S.W.2d 582 (Tex. Civ. App.—Austin 1944, writ ref'd). Otherwise, a properly abstracted judgment that attached to the decedent's property before death is a valid lien against the nonexempt real property owned by the decedent at death, and the judgment creditor should proceed as a secured creditor. See Tex. Est. Code § 22.024, defining "mortgage" or "lien" as including a judgment, attachment, or garnishment lien.

§ 29.22:3 Attorney's Fees

If a document evidencing or supporting a claim provides for attorney's fees, the creditor may include in his claim the portion of the fee he has already paid or contracted to pay the attorney to prepare, present, and collect the claim. Tex. Est. Code §§ 355.003, 1157.003. Attorney's fees ordinarily recoverable under chapter 38 of the Civil Practice and Remedies Code may also be collected. *Childs v. Taylor Cotton Oil Co.*, 612 S.W.2d 245 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.).

§ 29.23 Secured Claim

A secured claim is presented by the creditor as either a matured secured claim or a preferred debt and lien. *See* Tex. Est. Code §§ 403.052–.054. The failure of the creditor to make a timely and effective election results in the claim being treated as a preferred debt and lien. Tex. Est. Code § 403.052.

§ 29.23:1 Matured Secured Claim

A secured creditor holding a matured secured claim can elect to have the debt allowed and approved as fully matured, even if it has not yet matured under the terms of the original obligation; however, the personal representative will still pay the allowed and approved claim in the due course of administration. *See* Tex. Est. Code §§ 355.151–.160, 403.052–.054; see Tex. Est. Code §§ 1157.151–.153 for secured claim procedures in guardianships. The creditor has priority against the collateral over all other creditors and claims of the estate, except for (1) funeral expenses and expenses of the last illness, not to exceed $15,000 in each category; (2) allowances made to the surviving spouse and children, or to either of them; and (3) expenses of administration. Tex. Est. Code § 355.103. If the value of the collateral is not sufficient to fully pay the debt, the creditor holding a matured secured claim may collect any deficiency as a Class 8 unsecured claim. Tex. Est. Code §§ 355.102, 355.153, 403.053, 1157.151. See section 29.24:1 below regarding handling of mature secured claims by the personal representative and the court generally.

§ 29.23:2 Preferred Debt and Lien

A secured creditor electing as a preferred debt and lien may have the debt paid according to the terms of the instrument (typically a note) secured by the lien. The creditor may look only to the property for satisfaction of the debt; the debt cannot be collected from any other estate assets. If the debt is not paid by the deceased's successors in interest, the creditor must foreclose on the collateral to collect what he can from the proceeds of foreclosure. *See* Tex. Est. Code §§ 355.151(a)(2), 355.154, 355.155, 1157.151. See section 29.24:2 below regarding handling of preferred debts and liens by the personal representative and the court generally.

§ 29.23:3 Choice of Matured Secured Claim or Preferred Debt and Lien

A creditor should opt for matured secured claim status if either (1) the value of the property is substantially less than the debt or is rapidly declining in value, but there appear to be other assets from which to pay any deficiency, after allowances and Class 1 and Class 2 claims are paid or (2) the creditor deems it worthwhile to accelerate any outstanding installments. If the estate is in dependent administration and the creditor wants to actually foreclose his lien (as opposed to obtaining an order for the personal representative to sell the collateral), the claim must be a preferred debt and lien. See section 29.40:2 below.

§ 29.24 Handling of Secured Claims by Personal Representative and Court Generally

§ 29.24:1 Matured Secured Claim

If a secured claim is a matured secured claim, the court in a dependent administration, or the personal representative in an independent administration must treat it as a Class 3 claim and pay it to the extent of the value of the collateral, after Class 1 and Class 2 claims but before lower-priority claims are paid. Tex. Est. Code ch. 355, subch. C, D; ch. 403, subch. B (decedent's estate); Tex. Est. Code ch. 1157, subch. C, D (guardianship). See section 29.26 below regarding claim priority. If there are not enough

funds elsewhere in the estate to pay Class 1 and Class 2 claims, the representative must invade the collateral to pay those claims. If the collateral does not satisfy the entire claim, the representative must pay the deficiency as a Class 8 claim out of other assets of the estate, to the extent those assets are available. Tex. Est. Code § 355.102; *see also Wyatt v. Morse*, 102 S.W.2d 396, 398–99 (Tex. 1937).

Texas Estates Code sections 355.153 and 403.053 state that the secured creditor is not entitled to exercise any remedies in a manner that prevents the payment of the higher priority claims and allowances and, during the administration of the estate, is not entitled to exercise any contractual collection rights, including the power to foreclose, without either the prior written approval of the independent executor or court approval. Tex. Est. Code §§ 355.153(a), 403.053(a).

Section 403.053(a) may not be construed to suspend or otherwise prevent a creditor with a matured secured claim from seeking judicial relief of any kind or from executing any judgment against an independent executor. Except with respect to real property, any third party acting in good faith may obtain good title with respect to an estate asset acquired through a secured creditor's extrajudicial collection rights, without regard to whether the creditor had the right to collect the asset or whether the creditor acted improperly in exercising those rights during an estate administration due to having elected matured secured status. Tex. Est. Code § 403.053(b).

If a claim approved or established by suit as a matured secured claim is secured by property passing to one or more devisees in accordance with Texas Estates Code chapter 225, subchapter G, the independent executor shall collect from the devisees the amount of the debt and pay that amount to the creditor or shall sell the property and pay out of the sale proceeds the claim and associated expenses of sale consistent with the provisions of Tex. Est. Code § 355.153(b), (c), (d), and (e) applicable to court supervised administrations. Tex. Est. Code § 403.053(c).

§ 29.24:2 Preferred Debt and Lien

If a secured claim is a preferred debt and lien, the court or the personal representative in an independent administration may either pay off the debt or continue making payments. The creditor has priority over all other claims in the collateral, including Class 1 and Class 2 claims, but can look only to the collateral for satisfaction. *See Cessna Finance Corp. v. Morrison*, 667 S.W.2d 580 (Tex. App.—Houston [1st Dist.] 1984, no writ).

During an independent administration, a secured creditor whose claim is a preferred debt and lien against property securing the indebtedness under Tex. Est. Code § 403.052 is free to exercise any judicial or extrajudicial collection rights, including the right to foreclosure and execution, provided, however, the creditor does not have the right to conduct a nonjudicial foreclosure sale within six months after letters are granted. Tex. Est. Code §§ 403.052, 403.054.

§ 29.25 Claim Not Required for Offset

If a creditor, such as a bank, has a right of offset against funds of a decedent it is holding, it may exercise that right (assuming it has the right to do so otherwise) without having to file a claim in probate. *Bandy v. First State Bank*, 835 S.W.2d 609, 617 (Tex. 1992).

§ 29.26 Classification of Claims, Allowances, and Expenses of Decedent's Estate

Claims, allowances, and expenses are classified and have priority of payment as follows:

1. Class 1—funeral expenses and expenses of the decedent's last illness (including claims for reimbursement for these expenses) in a reasonable amount approved by the court, not to exceed $15,000 in each category (any excess shall be paid as a Class 8 claim);
2. allowances paid to the surviving spouse, the children, or both;
3. Class 2—expenses of estate administration, preservation, safekeeping, and management, including fees and expenses awarded under section 352.052 of the Texas Estates Code, and unpaid expenses of administration awarded in a guardianship of the decedent;
4. Class 3—secured claims, as far as they can be paid from the proceeds of property subject to the lien; if property is encumbered by more than one lien, the oldest is paid first, but no other preference is given to that lien;
5. Class 4—claims for the principal amount of and accrued interest on delinquent child support and child support arrearages that have been confirmed as a judgment or a determination of arrearages by a court under title 5 of the Texas Family Code or administratively determined by the Title IV-D agency, and claims for unpaid child support obligations under section 154.015 of the Texas Family Code;
6. Class 5—claims for taxes, penalties, and interest owed the state;
7. Class 6—claims for cost of confinement in the Texas Department of Criminal Justice;
8. Class 7—claims for repayment of medical assistance payments made by the state; and
9. Class 8—all other claims.

Tex. Est. Code §§ 355.102, 355.103; *see also* Tex. Est. Code §§ 352.052, 352.053.

§ 29.27 Foreclosure Generally

The death of a mortgagor or pledgor does not in itself revoke the ability of a secured creditor to conduct a nonjudicial foreclosure sale if the creditor already had that right; however, the creditor should avoid foreclosing on the property after the death of the debtor and before the administration of his estate is opened. *See Pearce v. Stokes*, 291 S.W.2d 309, 310–11 (Tex. 1956). See sections 29.40, 29.56, and 29.68 below regarding foreclosure sales in dependent administrations, independent administrations, and guardianships.

[Sections 29.28 through 29.30 are reserved for expansion.]

III. Dependent Administration

§ 29.31 Dependent Administration Generally

In a dependent administration, the judge of the court in which the estate is pending is responsible for ensuring that the administrator acts in compliance with court orders. A dependent administration allows the court to supervise and control the sale of estate property and assets, payment of debts, execution of contracts, settlement of lawsuits, and distribution of the estate. *See* Tex. Est. Code ch. 351, subch. B, D. Any interested person, including a creditor of the

estate, may apply for a dependent administration. Tex. Est. Code §§ 256.051, 301.051.

§ 29.32 When Dependent Administration Instituted

Letters of administration will be granted if the will fails to name an executor. Letters of administration may also be granted, if necessary, if all the executors named in the will decline to serve, fail to qualify within twenty days after letters testamentary have been issued, or fail to present the will for probate within thirty days after the testator's death, unless there is good cause. This type of administration is often referred to as administration with will annexed. The court may also order dependent administration on any other proof that administration is necessary or when the person dies intestate. Tex. Est. Code § 306.002.

§ 29.33 Administrator

Although it is possible for a personal representative in a dependent administration to be a party named in a will admitted to probate, the representative will more likely be an administrator, not an executor. For convenience, the term "administrator" will be used in this part III. to refer to the personal representative in a dependent administration.

See section 29.4 above regarding the rights and duties of personal representatives generally and whether bond will be required.

§ 29.33:1 Powers of Administrator

The administrator has a number of statutory powers, some of which may be exercised only with the court's permission. For collections purposes, they include the power to—

1. renew or extend any obligation owed by the estate;
2. make compromises or settlements in relation to property or claims in dispute or litigation;
3. compromise or pay in full any secured claim that has been allowed and approved by conveying the collateral to the secured creditor in satisfaction of the claim; and
4. abandon the administration of property of the estate that is burdensome or worthless. If the abandoned property is collateral securing a claim, it may be foreclosed on without further order of court.

These powers may be exercised only after written application to the probate court and authorization by court order. Tex. Est. Code § 351.051.

§ 29.33:2 Duties of Administrator

For purposes of creditors' claims against the estate, an administrator must—

1. give notice of his appointment (as described in section 29.34 below) (Tex. Est. Code §§ 308.051, 308.053);
2. prepare and file an inventory, appraisement, and list of claims or affidavit in lieu of inventory, appraisement, and list of claims with the probate court within ninety days of qualifying as administrator (Tex. Est. Code §§ 309.051–.052);
3. report to the court annually regarding the claims allowed, paid, rejected, or sued on, as well as a variety of other matters incident to the estate (Tex. Est. Code §§ 359.001–.002);
4. pay claims allowed and approved or established by suit, in order of priority (Tex. Est. Code §§ 355.101–.106);

5. close the administration when all debts known to exist against the estate have been paid in full or as far as the assets in the administrator's hands permit, and there is no further need for administration (Tex. Est. Code § 362.001); and
6. file a final verified account for final settlement of the estate (Tex. Est. Code § 362.003).

§ 29.34 Notice

§ 29.34:1 Notice by Publication or Posting

An administrator must, within one month of receiving letters, publish a notice of administration. If no newspaper of general circulation in the county in which letters were issued, notice must be posted. Tex. Est. Code § 308.051. A copy of the notice together with the publisher's affidavit must be filed with the court. Tex. Est. Code § 308.052.

§ 29.34:2 Notice to Secured Creditors

An administrator must, within two months of receiving letters, give notice by certified or registered mail, return receipt requested, to each creditor known to have a claim against the estate that is secured by property of the estate. If the administrator later learns of another secured creditor, he must send notice to that creditor within a reasonable time. The administrator must file with the court a copy of each notice and return receipt along with the administrator's affidavit stating the notice was mailed as required. Tex. Est. Code § 308.053.

§ 29.34:3 Permissive Notice to Unsecured Creditors

Although not required, an administrator may at any time before administration is closed give notice by mail to an unsecured creditor. This notice must contain the date of issuance of letters, the address where claims may be presented, an identification of how the claim should be addressed, and a notice that, unless the claim is presented within 120 days of receipt of the notice, it will be barred. Tex. Est. Code § 308.054. The creditor must give notice of its claim within 120 days of receiving this notice, or the claim will be barred. Tex. Est. Code §§ 355.060–.061. If the administrator chooses to send this notice, it must be mailed by certified or registered mail, return receipt requested. Tex. Est. Code § 308.054. No proof of this permissive notice need be filed with the court.

§ 29.35 Claims in Dependent Administration

§ 29.35:1 Claim for Money vs. Contingent or Unliquidated Claim

If a claim is not a claim for money, the creditor need not present it within six months of death or present it in statutorily prescribed form. *Carter v. Kahler*, 902 S.W.2d 85, 87 (Tex. App.—Houston [1st Dist.] 1995, no writ); *Donaldson v. Taylor*, 713 S.W.2d 716 (Tex. App.—Beaumont 1986, no writ).

A claim for money is a claim for a definite amount based on specific data, not a claim for an undetermined amount. See section 29.22:1 above.

§ 29.35:2 Form of Claim

A claim for money against an estate in dependent administration must be authenticated (i.e., supported by an affidavit that the claim is just and that all legal offsets, payments, and credits known to the affiant have been allowed). The attorney should attach a copy of the relevant instrument, account, or voucher if one is available, and the affiant should state the facts on

which the claim is founded. Tex. Est. Code §§ 355.004, 355.059. See form 29-1 in this chapter for a form claim.

§ 29.35:3 Evidence of Claim Lost or Destroyed

If evidence of the claim has been lost or destroyed, the affiant must state facts regarding loss or destruction of that evidence, as well as the amount, date, and nature of the claim, the due date of the claim, and that the creditor is still the owner of the claim. The claim must also be proved by disinterested testimony given either in open court or by deposition. If a claim is approved or allowed without this disinterested proof, the approval or allowance is void. Tex. Est. Code §§ 355.006, 355.062.

§ 29.35:4 Claim of Corporation

A claim presented on behalf of a corporation or other entity must include an affidavit made by an authorized officer or representative. In addition to the requirements set out in section 29.35:2 above, the affidavit must also state that the affiant has made diligent inquiry and examination. Tex. Est. Code § 355.005.

§ 29.36 Presentment

§ 29.36:1 Procedure Generally

A creditor may either present a claim for money directly to the administrator or deposit the claim with the court clerk. If it is deposited with the clerk, the clerk must notify the representative of the claim. Tex. Est. Code §§ 355.001–.002. A claim for money that is not barred by the statute of limitations may be presented at any time during the pendency of administration. Tex. Est. Code § 355.001.

§ 29.36:2 Deadline for Presentation of Unsecured Claim after Permissive Notice

A creditor holding an unsecured claim against an estate in a dependent administration who has received permissive notice regarding claims against the estate must present his claim within 120 days of receipt of the notice or the claim will be barred. Tex. Est. Code §§ 308.054, 355.060–.061.

§ 29.36:3 Deadline for Presentation of Secured Claim

If a secured creditor wants matured secured claim status, he must present his claim electing that status within six months from the date of issuance of letters or four months after receiving notice of the issuance of letters, whichever is later. Failure to present the claim with proper election within this period makes the secured claim a preferred debt and lien. Tex. Est. Code § 355.152.

§ 29.37 Handling of Claims by Administrator and Court

§ 29.37:1 Allowance or Rejection of Claims by Administrator

Once a creditor presents or files his claim, the administrator has thirty days to either allow or reject the claim in its entirety or to reject part and indicate which part is allowed or rejected. Tex. Est. Code § 355.051. The failure to timely allow or reject the claim constitutes a rejection. Tex. Est. Code § 355.052. The administrator is not required to notify the creditor that the claim has been rejected. *Russell v. Dobbs*, 354 S.W.2d 373, 376 (Tex. 1962). See section 29.38:1 below regarding strategies for creditors in this situation. If the claim is rejected through inaction but is subsequently proved through suit, the creditor can recover the costs of suit from the adminis-

trator individually and can seek the removal of the administrator. Tex. Est. Code § 355.052.

The administrator also has thirty days to object to the form of the claim. Tex. Est. Code § 355.007.

§ 29.37:2 Action by Court

Once an administrator has filed an allowance or rejection of a claim, the court clerk enters the claim on the court's claim docket. Tex. Est. Code § 355.053. If the administrator has allowed the claim and it has been entered on the claims docket for ten days, it will be either approved in whole or in part or disapproved by the court, and the court will also classify approved claims. Tex. Est. Code § 355.055. See section 29.26 above regarding classification of claims. Judgment cannot be rendered favoring a creditor on a claim for money that has not been presented to the administrator and either rejected or disapproved. Tex. Est. Code § 355.065.

If the claim is barred by limitations, the administrator is not supposed to allow it. If he does, the court should not approve it. Tex. Est. Code § 355.061. Even when a claim is in proper form and allowed, if the court is not satisfied that the claim is just, it must hold a hearing and receive evidence on the issue to determine the justness of the claim. Tex. Est. Code § 355.056.

If the administrator rejects the claim, the court cannot act on the claim until it is established by suit. See section 29.39 below regarding suit on a rejected claim.

§ 29.38 Claims Handling and Payment

§ 29.38:1 Rejected Claim

If a claim is rejected in whole or in part by the administrator, the creditor must institute suit within ninety days of the rejection or the claim is barred. Tex. Est. Code § 355.064. See section 29.37:1 above regarding how claims can be either actively rejected or rejected through the inaction of the administrator. Although the administrator has thirty days in which to allow or reject the claim, he is free to file his rejection anytime after receiving it and does not have to inform the creditor of his rejection. *Russell v. Dobbs*, 354 S.W.2d 373, 376 (Tex. 1962). Also, if the administrator allows the claim after the thirty-day period expires, the claim is still deemed rejected. *Lusk v. Mintz*, 625 S.W.2d 774, 776 (Tex. App.—Houston [14th Dist.] 1981, no writ).

Administrators have been known to reject a claim immediately, starting the ninety-day limitations period before the unwary creditor knows it has begun. Therefore, after the thirty-day period expires, the attorney should check the court file to determine the administrator's disposition, if any, of the claim. It is recommended that the petition be prepared at the same time the claim is prepared so it can be filed as soon as possible after ascertaining that the claim has been rejected. See section 29.39 below regarding suits on rejected claims.

If the creditor's suit is barred by the ninety-day rule, the creditor may still proceed against any joint debtor. *See Albiar v. Arguello*, 612 S.W.2d 219, 220 (Tex. Civ. App.—Eastland 1980, no writ).

The ninety-day limitation does not apply to claims other than claims for money. *Lusk*, 625 S.W.2d at 776; *National Guaranty Loan & Trust Co. v. Fly*, 69 S.W. 231 (Tex. Civ. App. 1902, no writ).

§ 29.38:2 Collection of Approved Claims

If a creditor's claim has been approved or established by suit and the administrator does not pay

the claim, the creditor may petition the court to be paid at any time after twelve months from the granting of letters testamentary. Tex. Est. Code § 355.107(a). If the estate has sufficient funds on hand, and after the administrator has been cited to appear and show cause why the creditor should not be paid, the court may order payment to the creditor from those funds. Tex. Est. Code § 355.107(c)

§ 29.39 Suit on Rejected Claim

§ 29.39:1 Jurisdiction

A suit on a rejected claim should be brought in the court in which administration of the estate is pending. Tex. Est. Code § 355.064(a); *Bailey v. Cherokee County Appraisal District*, 862 S.W.2d 581, 585 (Tex. 1993); *Howe State Bank v. Crookham*, 873 S.W.2d 745 (Tex. App.—Dallas 1994, no writ); *but see Phifer v. Nacogdoches County Central Appraisal District*, 45 S.W.3d 159, 169–70 (Tex. App.—Tyler 2000, pet. denied) (exception exists for suit to collect delinquent taxes on property located in different county from where probate located).

§ 29.39:2 Pleading Requirements

The suit should be filed against the administrator of the estate and should be styled, for example, "Jane Doe, Administrator of the estate of John Doe, deceased." An estate is not a legal entity and may not be sued. *See Henson v. Estate of Crow*, 734 S.W.2d 648, 649 (Tex. 1987); *Price v. Estate of Anderson*, 522 S.W.2d 690, 691 (Tex. 1975).

The petition should state the elements supporting the underlying cause of action—for example, a sworn account. Several additional elements must also be pleaded: the presentation of the claim to the administrator, its rejection, and the fact that ninety days have not elapsed since its rejection. *Butler v. Summers*, 253 S.W.2d 418, 422 (Tex. 1952); *Podgoursky v. Frost*, 394 S.W.2d 185 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.). Although pleading that all conditions precedent have occurred or have been performed would seem to fulfill these pleading requirements (*see* Tex. R. Civ. P. 54), the manual committee is not aware of Texas case law in support. The better practice, therefore, is to plead the specific procedural acts or omissions giving rise to the suit. See form 29-2 in this chapter for a petition that not only pleads the elements specifically but also contains an "all conditions precedent" allegation.

No execution may issue on a claim established by suit. The creditor should request that the final judgment in his favor state that it is to be paid in the due course of administration; he should also request that the judgment be entered in the claims docket as if originally approved for classification and payment. Tex. Est. Code § 355.066; Tex. R. Civ. P. 313.

§ 29.39:3 Cost Allocation

Costs for suits on claims are allocated as follows:

1. If the claim is allowed and approved, the estate pays.
2. If the claim is allowed but disapproved, the creditor pays.
3. If the claim is rejected but established by suit, the estate pays, unless the claim was rejected by operation of law because the administrator failed to act timely, in which case the administrator, individually, pays the costs (*see* Tex. Est. Code § 355.052).
4. If the claim is rejected but not established by suit, the creditor pays.
5. In suits to establish a claim after rejection in part, if the creditor fails to recover a judgment for a greater

amount than was allowed or approved, the creditor pays.

Tex. Est. Code § 355.111.

§ 29.40 Foreclosure and Other Court-Supervised Sales

§ 29.40:1 Generally

A creditor holding a claim secured by a valid lien that has been allowed and approved or established by suit may apply to the probate court to sell the property or as much of it as is necessary to satisfy the claim. The clerk will issue citation requiring the administrator to appear and show cause why the application should not be granted. If it appears advisable to discharge the lien out of the general assets of the estate or to refinance the claim, the court will so order; otherwise, the property will be ordered sold at public or private sale. Tex. Est. Code §§ 356.201–.203. Although the sale is to be performed "as in an ordinary sale of real estate," there is no other statutory reference regarding its limitation to real property; a creditor holding a security interest in personal property might consider using this statute to force the sale of the property.

The property can be either real or personal, but if real property is selected to be sold, it will be that which the court deems most advantageous to the estate to sell. Tex. Est. Code § 356.257. No property of any kind may be sold without court order. Tex. Est. Code § 356.001. If the court orders a sale, the proceeds will be used to pay the claim to the extent that it is not needed to discharge the liabilities of higher-priority claims—unless the lien is a preferred debt and lien. Tex. Est. Code § 355.104. In that event, higher-priority claims are not paid before the lien claimant is paid. *See* Tex. Est. Code § 355.154. An application and an order for court-ordered sale of collateralized property are at forms 29-3 and 29-4 in this chapter.

The deed that conveys title to real property must refer to and identify the decree of the court approving the sale. *See* Tex. Est. Code § 356.557.

§ 29.40:2 Preferred Debt and Lien

If a lien is considered as a preferred debt and lien and the property is not sold within six months after the granting of letters, the administrator is supposed to pay all accrued maturities and perform all other contractual terms. If he fails to do so, the creditor may apply to have the property sold or foreclosed. Tex. Est. Code § 355.155. If the creditor requests foreclosure, the application must be supported by the creditor's affidavit. Tex. Est. Code § 355.156. See form 29-5 in this chapter for an application and affidavit. The clerk must issue citation to the administrator and any other person described in the application as having a debt secured by the property; these people must be personally served. Tex. Est. Code § 355.157.

At the hearing, after determining that there is a default, the court must—

1. require the sale of the property subject to the unmatured part of the debt and apply the proceeds of the sale to the liquidation of the maturities;
2. require the sale of the property free of the lien and apply the proceeds to the payment of the whole debt; or
3. authorize foreclosure by the creditor as allowed by the terms of the mortgage instrument or security agreement or as authorized by law. The court may fix a minimum price for the property that does not exceed the property's fair market value.

Tex. Est. Code §§ 355.158–.159. See forms 29-6 through 29-8 for an order authorizing sale of property, a report of sale, and a decree confirming sale.

If foreclosure is authorized and the property is not sold because no bid for the minimum amount was made, the creditor may file another application. The court, in its discretion, may eliminate or modify the minimum price requirement and permit another foreclosure sale. Tex. Est. Code § 355.160.

§ 29.41 Claims by Administrator

The provisions of the Texas Estates Code regarding presentment of claims do not apply to any claim of an administrator. However, the administrator must file a verified claim within six months after his qualification, or the claim is barred. Tex. Est. Code § 355.201(a)–(b).

[Sections 29.42 through 29.50 are reserved for expansion.]

IV. Independent Administration

§ 29.51 Nature of Independent Administration

Independent administration is the administration of an estate with limited court involvement. *See* Tex. Est. Code §§ 401.001–.002; *Cunningham v. Parkdale Bank*, 660 S.W.2d 810 (Tex. 1983). It is usually created if the decedent providing in his will that no action shall be had in relation to the settlement of his estate other than the probate and recording of his will and the return of any required inventory, appraisement, and list of claims of the estate. Tex. Est. Code § 401.001. However, no special language is required so long as it shows the decedent's intent that the administration be free of court supervisions. *See Long v. Long*, 169 S.W.2d 763, 764 (Tex. Civ. App.—San Antonio 1943, writ ref'd); *see also In re Dulin's Estate*, 244 S.W.2d 242, 244 (Tex. Civ. App.—Galveston 1951, no writ) (holding that merely naming a person "as independent executor" was sufficient). Also, the distributees of a decedent, testate or intestate, may consent to independent administration. Tex. Est. Code §§ 401.002–.004.

If the decedent dies intestate and the heirs desire independent administration, they must first obtain a determination of heirship by judgment to avoid dependent administration. Tex. Est. Code § 401.003(b). The heirship proceeding and appointment of independent administrator are often done in the same hearing. An independent personal representative appointed by will is an independent executor, whereas one appointed in another manner is an independent administrator. *See* Tex. Est. Code § 22.017.

§ 29.52 Independent Executor

Just as it is possible for an executor to be named in a dependent administration, an administrator may be named in an independent administration. Generally, though, the personal representative in an independent administration is an executor named in the will. For convenience, the term "executor" will be used in this part IV. to refer to the personal representative in an independent administration.

See section 29.4 above regarding the rights and duties of personal representatives generally and whether bond will be required.

§ 29.52:1 Powers of Executor

An executor has the power to perform any act that a court-supervised executor or administrator could perform only under court order. Tex. Est. Code § 402.002; *see also Rowland v. Moore*, 174 S.W.2d 248 (Tex. 1943). An independent executor or administrator therefore has full authority to deal with creditors and resolve

claims. *See* Tex. Est. Code § 351.051. See section 29.33:1 above regarding powers of an administrator.

§ 29.52:2 Duties of Executor

An executor has the duty to give proper notice to creditors and to approve, classify, and pay or reject claims against the estate in order of priority. Tex. Est. Code § 403.051. See section 29.53 below regarding notice to creditors. See section 29.26 above for classification of claims.

§ 29.52:3 Liabilities of Executor

An executor is not required to give bond if the will states that no bond is necessary, unless it is shown that he has mismanaged the estate, has betrayed or is about to betray his trust, or is disqualified in some other way. Tex. Est. Code § 404.002. If the executor is not required to give bond, the heirs or other beneficiaries of an estate under independent administration may be required to do so if requested by any person having a claim against the estate. If bond is not given as ordered, the court can order a dependent administration. A creditor may sue on the bond if a claim goes unsatisfied. Tex. Est. Code § 403.060. Heirs and beneficiaries are rarely required to give bond. *See Kauffman v. Wooters*, 13 S.W. 549 (Tex. 1890).

§ 29.53 Notice

§ 29.53:1 Notice by Publication or Posting

An executor must, within one month of receiving letters, publish a notice of administration. If there is no newspaper of general circulation in the county in which letters were issued, notice must be posted. Tex. Est. Code §§ 308.051, 403.051(a)(1). A copy of the notice together with the publisher's affidavit must be filed with the court. Tex. Est. Code § 308.052.

§ 29.53:2 Notice to Secured Creditors

An executor must, within two months of receiving letters, give notice by certified or registered mail, return receipt requested, to each creditor known to have a claim against the estate that is secured by property of the estate. If the executor later learns of another secured creditor, he must send notice to that creditor within a reasonable time. Tex. Est. Code §§ 308.053, 403.051(a)(1). The administrator must file with the court a copy of each notice and return receipt along with the administrator's affidavit stating the notice was mailed as required. Tex. Est. Code § 308.053.

§ 29.53:3 Permissive Notice to Unsecured Creditors

Although not required, an executor may at any time before administration is closed give notice by mail to an unsecured creditor. This notice must contain the date of issuance of letters, the address where claims may be presented, an identification of how the claim should be addressed, and a notice that, unless the claim is presented within 120 days of receipt of the notice, it will be barred. Tex. Est. Code § 308.054, 403.051(a)(2). The creditor must give notice of its claim within 120 days of receiving this notice, or the claim will be barred. Unlike the permissive notices in dependent administrations, in order to effectively bar the claim within 120 days the notice to unsecured creditors in independent administrations must include a statement that a claim must be presented by one of the methods prescribed in Texas Estates Code chapter 403, subchapter B (i.e., by an authenticated written instrument that is hand-delivered with proof of receipt or mailed by certified mail, return receipt requested, to the executor or the executor's attorney; by a pleading filed in a lawsuit; or by an authenticated written instrument or a pleading that is filed in the court in which the estate is pending). Tex. Est. Code § 403.051(b); *see also* Tex. Est. Code § 403.056. If the admin-

istrator chooses to give this notice, it must be mailed by certified or registered mail, return receipt requested. Tex. Est. Code § 308.054. No proof of this permissive notice need be filed with the court.

§ 29.54 Claims in Independent Administration

§ 29.54:1 Presentment

Although presentment of claims in an independent administration is permitted, it is not required, except by specific provisions of the Texas Estates Code. Tex. Est. Code ch. 403, subch. B; *see Ditto Investment Co. v. Ditto*, 293 S.W.2d 267, 269 (Tex. Civ. App.—Fort Worth 1956, no writ). For example, see sections 29.54:2 and 29.54:3 below.

Where notice to the independent executor is required, it must be contained in (1) an authenticated written instrument that is hand-delivered with proof of receipt or mailed by certified mail, return receipt requested, to the independent executor or the executor's attorney, (2) a pleading filed in a lawsuit with respect to the claim, or (3) an authenticated written instrument or pleading filed in the court in which the administration of the estate is pending. Tex. Est. Code § 403.056.

The creditor may enforce payment by filing suit against the independent executor. *Bunting v. Pearson*, 430 S.W.2d 470 (Tex. 1968); *El Paso National Bank v. Leeper*, 538 S.W.2d 803, 806 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.). If such a suit is filed, the executor is not required to plead until after six months from the creation of the independent administration and the issuance of letters testamentary. Tex. Est. Code § 403.059.

In independent administrations, the statute of limitations is not tolled by the presentment of a claim, notice, or statement to the executor; it is only tolled by the written approval of the claim by the executor, a pleading filed in a suit pending at the decedent's death, or the filing of a suit against the executor. Tex. Est. Code § 403.057.

Practice Note: Generally, the procedures for establishing claims and suits on rejected claims that apply to dependent administrations do not apply to independent administrations. *See* Tex. Est. Code § 403.058; *see also Bunting*, 430 S.W.2d at 473. In an independent administration, there is no requirement that the creditor's claim be presented before it can be sued on, and the ninety-day requirement before filing suit does not apply. Tex. Est. Code §§ 403.058–.059. For a detailed explanation of the difference between claims against independently and dependently administered estates, see Stanley M. Johanson, *Johanson's Texas Estates Code Annotated* 359–60 (Thomson Reuters 2015).

§ 29.54:2 Deadline for Presentation of Unsecured Claim after Permissive Notice

A creditor holding an unsecured claim against an estate in independent administration who has received permissive notice regarding claims against the estate must give notice to the executor of the nature and amount of his claim within 120 days of receipt of the notice or the claim will be barred. Tex. Est. Code §§ 403.055–.056.

§ 29.54:3 Deadline for Presentation of Secured Claim

If a secured creditor wants matured secured claim status, he must present his claim electing that status within six months from the date of issuance of letters or four months after receiving notice of the issuance of letters, whichever is later. Tex. Est. Code § 403.052. In addition to giving the notice, a creditor whose claim is secured by real property and who seeks matured secured claim status must record a notice of the creditor's election in the deed records of the

county in which the real property is located. Tex. Est. Code § 403.052. If no election to be a matured secured claim is made, or the election is made but not within the prescribed period or is made within the prescribed period but the creditor has lien against real property and fails to record notice of the claim in the deed records, the claim will be treated as a preferred debt and lien. Tex. Est. Code § 403.052.

See section 29.23 above regarding matured secured claim and preferred debt and lien status generally.

§ 29.55 Suits against Independent Estate

§ 29.55:1 Jurisdiction

In counties with a statutory probate court, all suits against an independent executor or administrator regarding a claim against the estate must be filed in the probate court. In counties without a statutory probate court, the suits must be filed in the county courts with jurisdiction over probate proceedings, if any. Tex. Est. Code §§ 31.001(4), 31.002(4), 32.001–.005.

§ 29.55:2 Creditor's Pleading Requirements

There is no requirement that a creditor present his claim against an independently administered estate before it can be sued on. With one exception, a suit against an independent executor should look essentially like any other collections suit. *See* Tex. Est. Code §§ 403.058–.059. *See also Bunting v. Pearson*, 430 S.W.2d 470 (Tex. 1968); *Collins v. State*, 506 S.W.2d 293 (Tex. Civ. App.—San Antonio 1973, no writ). The exception is in the prayer, in which the creditor should pray that execution issue against property of the estate in the hands of the executor (or his successor) in the due course of administration. Tex. Est. Code § 403.059; Tex. R. Civ. P. 313. See form 29-9 in this chapter for a sample petition.

§ 29.55:3 Executor's Pleading Requirements

Although the suit may be brought at any time not otherwise barred by limitations, the executor does not have to plead until after six months from the date independent administration was created and the order appointing an executor was entered. Tex. Est. Code § 403.059.

§ 29.56 Foreclosure

A secured creditor has the same right of nonjudicial foreclosure that he would have if the debtor were alive. *See Pearce v. Stokes*, 291 S.W.2d 309, 310–11 (Tex. 1956). The executor, however, can enjoin such a foreclosure sale if the estate is insolvent and if the sale would result in claims being paid out of statutory priority. *Farmers' & Merchants' National Bank v. Bell*, 71 S.W. 570 (Tex. Civ. App. 1902, writ ref'd).

If the creditor elects matured secured claim status, his right to foreclose may be limited if foreclosure would prevent the preferential payment of allowances or Class 1 or Class 2 claims. Tex. Est. Code § 355.153. If the secured claim is classed as a preferred debt and lien, the creditor may not seek a deficiency. *See Wyatt v. Morse*, 102 S.W.2d 396, 398–99 (Tex. 1937). Additionally, the creditor whose claim is a preferred debt and lien cannot conduct a nonjudicial foreclosure sale in the first six months after letters are issued. Tex. Est. Code § 403.054.

For a judicial foreclosure, the creditor should sue both the executor and the distributees or heirs taking title to the collateral as determined by the court sitting in probate, either by will or heirship determination. The suit should be brought in a court having jurisdiction over matters relating to a probate proceeding. In counties

with a statutory probate court, the suit should be brought in the probate court. *See* Tex. Est. Code chs. 31, 32.

[Sections 29.57 through 29.60 are reserved for expansion.]

V. Guardianship

§ 29.61 Guardianship Generally

If a person is totally without capacity to care for himself, to manage his property, to operate a motor vehicle, to make personal decisions regarding his residence, and to vote in a public election, the court may appoint a guardian of his person, estate, or both. Tex. Est. Code § 1101.151. If he lacks capacity to do some but not all tasks necessary to care for himself or to manage his property, with or without supports and services, the court can appoint a guardian with limited powers. Tex. Est. Code § 1101.152. The person for whom a guardian is appointed is referred to as a "ward." Tex. Est. Code §§ 22.033, 1002.030.

§ 29.62 Guardian

§ 29.62:1 Powers of Guardian

A guardian has a number of statutory powers. For collections purposes, they include the power to—

1. renew or extend any obligation owed by the ward;
2. make compromises or settlements in relation to property or claims in dispute or litigation;
3. compromise or pay in full any secured claim that has been allowed and approved by conveying the collateral to the secured creditor in satisfaction of the claim; and
4. abandon the administration of property of the estate that is burdensome or worthless. If the abandoned property is collateral securing a claim, it may be foreclosed on without further order of court.

These powers may be exercised only after written application to the probate court and authorization by court order. Tex. Est. Code § 1151.102.

§ 29.62:2 Duties of Guardian

For purposes of creditors' claims against the estate, a guardian must—

1. give notice of his appointment (as described in section 29.63 below) (Tex. Est. Code §§ 1153.001–.004);
2. prepare and file an inventory, appraisement, and list of claims with the probate court within thirty days of qualifying as guardian (Tex. Est. Code §§ 1154.051–.052);
3. report to the court annually regarding the claims allowed, paid, rejected, or sued on, as well as a variety of other matters incident to the estate (Tex. Est. Code ch. 1163, subch. A);
4. pay claims allowed and approved or established by suit, in order of priority (Tex. Est. Code §§ 1157.101, 1157.103);

5. settle and close the guardianship when (a) the ward dies; (b) a minor ward becomes an adult by age, emancipation, or marriage; (c) the ward is decreed by the court to be restored to full capacity; (d) the spouse of a married ward qualifies as survivor in community and the ward does not own separate property; (e) the estate is fully expended; (f) the foreseeable income to the ward or the estate is so negligible as to make the guardianship burdensome; (g) the assets are placed in a management trust or pooled trust; or (h) the court otherwise determines the guardianship is unnecessary (Tex. Est. Code § 1204.001); and

6. file a final verified account for final settlement of the estate (Tex. Est. Code §§ 1204.101–.102).

§ 29.63 Notice

§ 29.63:1 Notice by Publication

A guardian must, within one month of receiving letters, publish a notice of guardianship. If no newspaper of general circulation is published in the county in which letters were issued, notice must be posted. Tex. Est. Code § 1153.001. A copy of the notice together with the publisher's affidavit must be filed with the court. Tex. Est. Code § 1153.002.

§ 29.63:2 Secured Creditors and Claims of Which Guardian Has Actual Knowledge

Notice by certified or registered mail, return receipt requested, must be given to all persons having a claim for money against a ward's estate if either the claim is secured by a deed of trust, mortgage, or vendor's, mechanic's, or other contractor's lien on real estate belonging to the estate, or the guardian has actual knowledge of the claim. This notice must be given within four months of the receipt of letters. The guardian must file with the court a copy of each notice to a secured creditor and return receipt along with the guardian's affidavit stating the notice was mailed as required. Tex. Est. Code § 1153.003. Additionally, although not required, a guardian may include in the required notice to an unsecured creditor that his claim will be barred unless presented within 120 days of receipt of the notice. Tex. Est. Code § 1153.004. The creditor must give notice of its claim within 120 days of receiving this notice, or the claim will be barred. Tex. Est. Code § 1157.060. No proof of this permissive notice need be filed with the court.

§ 29.63:3 One Notice Sufficient

If notice has been given by a former or co-guardian, repeated or additional notice need not be given. Tex. Est. Code § 1153.005(a).

§ 29.63:4 Failure of Guardian to Give Notice

If a guardian fails to give any required notice, the guardian and any sureties on his bond will be liable for damages suffered by any person because of that failure unless it appears that the creditor had actual notice. Tex. Est. Code § 1153.005(b).

§ 29.64 Claims in Guardianship

§ 29.64:1 Claim Defined

A "claim" includes a liability against the estate of a ward. Tex. Est. Code § 1002.005. Except in the notice provisions set out in section 29.63:2 above, there is no distinction in guardianships between claims for money and contingent or unliquidated claims.

§ 29.64:2 Form of Claim

Except as provided by section 1157.102 of the Texas Estates Code, a claim for money against a guardianship must be authenticated (i.e., supported by an affidavit that the claim is just and that all legal offsets, payments, and credits known to the affiant have been allowed). The attorney should attach a copy of the relevant instrument, account, or voucher if one is available, and the affiant should state the facts on which the claim is founded. Tex. Est. Code § 1157.004. See form 29-1 in this chapter for a form claim. See also section 29.64:5 below for a short discussion of section 1157.102 of the Texas Estates Code.

§ 29.64:3 Evidence of Claim Lost or Destroyed

If evidence of a claim has been lost or destroyed, the affiant must state facts regarding loss or destruction of that evidence, as well as the amount, date, and nature of the claim, the due date of the claim, and that the creditor is still the owner of the claim. The claim must also be proved by disinterested testimony given either in open court or by deposition. If a claim is approved or allowed without this disinterested proof, the approval or allowance is void. Tex. Est. Code §§ 1157.006, 1157.062.

§ 29.64:4 Claim of Corporation

A claim presented on behalf of a corporation must include an affidavit made by the cashier, treasurer, or managing official of the corporation. In addition to the requirements set out in section 29.64:2, the affidavit must also state that the affiant has made diligent inquiry and examination. Tex. Est. Code § 1157.005.

§ 29.64:5 Unauthenticated Claim

A guardian may pay an unauthenticated claim if he believes it to be just, but he and his sureties will be liable for the amount paid if the court subsequently determines the claim is unjust. Tex. Est. Code § 1157.102. Claims for daily living expenses and utility bills, for instance, might be paid in this manner without submission of an authenticated claim to the guardian or the court.

§ 29.65 Presentment

§ 29.65:1 When Claims May Be Presented

A claim against a guardianship estate may be presented at any time before the closing of the guardianship if suit on the claim would not be barred by limitation. Tex. Est. Code § 1157.001.

§ 29.65:2 Presentation of Secured Claim

A secured creditor desiring matured secured claim status must present a claim electing that status within the time provided by law, or the claim will be treated as a preferred debt and lien. The creditor may choose to elect preferred debt and lien status. Tex. Est. Code § 1157.151.

§ 29.66 Handling of Claims by Guardian and Court

§ 29.66:1 Allowance or Rejection of Claims by Guardian

Once a creditor presents or files his claim, the guardian has thirty days to either allow or reject the claim in its entirety or reject part and indicate which part is allowed or rejected. Tex. Est. Code § 1157.051. The failure to timely allow or reject the claim constitutes a rejection. Tex. Est. Code § 1157.052. The guardian is not required to notify the creditor that the claim has been rejected. *See Russell v. Dobbs*, 354 S.W.2d 373, 376 (Tex. 1962) (decedent's estate). If the claim is rejected through inaction but subsequently proved through suit, the creditor can recover the

costs of suit from the guardian individually, and can seek to have the guardian removed. Tex. Est. Code § 1157.052.

The guardian also has thirty days to object to the form of the claim. Tex. Est. Code § 1157.007.

§ 29.66:2 Action by Court

Once a guardian has filed an allowance or rejection of the claim, the court clerk enters the claim on the court's claim docket. Tex. Est. Code § 1157.053. If the guardian has allowed the claim and it has been entered on the claims docket for ten days, it will be either approved in whole or in part or disapproved by the court, and the court will also classify approved claims. Tex. Est. Code § 1157.055. See section 29.66:3 below regarding classification of claims. Judgment cannot be rendered favoring a creditor on a claim for money that has not been presented to the guardian and wholly or partly rejected. Tex. Est. Code § 1157.064(a).

If the claim is barred by limitations, the guardian is not supposed to approve it. If he does, the court should not allow it. Tex. Est. Code § 1157.061. Even though the claim is in proper form and approved by the guardian, if the court is not satisfied that the claim is just, it must hold a hearing and receive evidence on the issue to determine the justness of the claim. Tex. Est. Code § 1157.056.

If the guardian rejects the claim, the court cannot act on the claim until it is established by suit. See section 29.67 below regarding suit on a rejected claim.

§ 29.66:3 Order of Payment of Claims

Guardians must pay claims that are allowed and approved or established by suit in the following order:

1. expenses for the care, maintenance, and education of the ward or the ward's dependents;
2. funeral expenses and expenses of the last illness of a deceased ward, subject to prior payment of claims allowed and approved or established by suit before the ward's death;
3. expenses of administration; and
4. other claims against the ward or the ward's estate.

Tex. Est. Code § 1157.103(a).

If the estate is insolvent, the guardian must give first priority to the payment of claims relating to administration of the guardianship. Tex. Est. Code § 1157.103(b).

§ 29.67 Suit on Rejected Claim

§ 29.67:1 Jurisdiction

A suit on a rejected claim should be brought in the court with jurisdiction over the guardianship. Tex. Est. Code § 1157.063; *see also* Tex. Est. Code § 1022.002.

§ 29.67:2 Deadline for Filing Suit

As with a dependent administration, a creditor has ninety days to file suit after the guardian rejects the claim in whole or in part; otherwise, the claim will be barred. Tex. Est. Code § 1157.063.

§ 29.67:3 Pleading Requirements

The suit should be filed against the guardian in that capacity and should be styled, for example, "Jane Doe, Guardian of the Estate of John Doe." See form 29-2 in this chapter for a petition. Otherwise, the pleadings should follow the form used for suing a dependent administrator. *See*

Tex. Est. Code § 1157.063. See also section 29.39:2 above.

§ 29.67:4 Cost Allocation

Costs for suits on claims are allocated as follows:

1. If the claim is allowed and approved, the guardianship estate pays.
2. If the claim is allowed but disapproved, the creditor pays.
3. If the claim is rejected but established by suit, the estate pays, unless the claim was rejected by operation of law because the guardian failed to act timely, in which instance the guardian, individually, pays (*see* Tex. Est. Code § 1157.052).
4. If the claim is rejected but not established by suit, the creditor pays.
5. In suits to establish a claim after rejection in part, if the creditor fails to recover a judgment for a greater amount than was allowed or approved, the creditor pays.

Tex. Est. Code § 1157.107.

§ 29.68 Sale of Guardianship Property

On written application of a creditor who holds a secured claim or lien that has been allowed and approved, the court may order the sale of as much of the property as necessary to satisfy the creditor's claim unless the guardian can show cause why it should not be sold. If it appears to the court that it would be advisable to discharge the lien out of the general assets of the estate or that it be refinanced, the court may so order. Tex. Est. Code ch. 1158, subch. E.

A nonjudicial foreclosure sale during the pendency of a guardianship is void. *Crowley v. Redmond*, 41 S.W.2d 274, 278 (Tex. Civ. App.—Fort Worth 1931), *aff'd*, 70 S.W.2d 1113 (Tex. 1934).

[Sections 29.69 and 29.70 are reserved for expansion.]

VI. Nonprobate Assets

§ 29.71 Multiple-Party Accounts

§ 29.71:1 Accounts Generally

Multiple-party accounts are joint accounts, convenience accounts, pay-on-death accounts, and trust accounts and include checking accounts, savings accounts, certificates of deposit, share accounts, and other similar arrangements. Tex. Est. Code §§ 113.001, 113.004.

§ 29.71:2 Joint Account

A joint account is an account payable on request to one or more parties whether there is a right of survivorship or not. Tex. Est. Code § 113.004(2). A joint account belongs to the parties, during their lifetimes, in proportion to the net contributions each party makes, unless there is clear and convincing evidence of a different intent. Tex. Est. Code § 113.102. "Net contribution" is defined at Tex. Est. Code § 113.003. If the joint account contains a written agreement for right of survivorship, the interest of the party who dies vests immediately in the surviving cosigner(s). Tex. Est. Code § 113.151.

§ 29.71:3 Convenience Account

If an account is established by one or more parties in the names of the parties and one or more convenience signers and the terms of the account provide that the amounts on deposit are paid or delivered to the parties or to the convenience signers "for the convenience" of the parties, the account is a convenience account. Tex. Est. Code § 113.004(1).

The making of a deposit in a convenience account does not affect title to the deposit. A party establishing a convenience account is not considered to have made a gift of any portion of the deposit to the convenience signer. Tex. Est. Code § 113.105. Otherwise, ownership of a convenience account is established by each account holder's net contributions, as in other joint accounts. *See* Tex. Est. Code § 113.102.

§ 29.71:4 Pay-on-Death Account

A pay-on-death (P.O.D.) account (including a transfer on death or T.O.D. account) is payable on request to one person during his lifetime, then, on that person's death, to one or more persons, called "P.O.D. payees." Tex. Est. Code § 113.004(4). The account belongs to the original payee during his lifetime and not to the P.O.D. payees. Tex. Est. Code § 113.103. If there are two or more original payees, then each payee's interest is proportional to the amount of his net contribution, as in other joint accounts. Tex. Est. Code § 113.102.

§ 29.71:5 Trust Account

A trust account, for purposes of the multiple-party account provisions of the Estates Code, is an account in the name of one or more parties as trustee for one or more beneficiaries in which the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the amounts on deposit in the account. It does not include a regular trust account under a testamentary trust or a trust agreement having significance apart from the account or a fiduciary account arising from a fiduciary relationship such as attorney and client. Tex. Est. Code § 113.004(5). Unless a contrary intent is shown by the terms of the account or deposit agreement or there is other clear and convincing evidence of an irrevocable trust, a trust account belongs beneficially to the trustee during his lifetime. If there are two or more trustees, beneficial ownership is determined by their net contributions to the account. Tex. Est. Code § 113.104.

§ 29.71:6 Rights of Creditors, Survivors, and Personal Representatives to Reach Deceased's Interest in Multiple-Party Account

A multiple-party account is not effective against the claim of a secured creditor who has a lien on the account, but it may be liable for certain estate taxes. Tex. Est. Code § 113.252(a). Except for a convenience signer, a party to a multiple-party account may pledge it without joinder of other parties with a substantial interest in the account. Tex. Est. Code § 113.251(a), (b). If a secured interest is perfected, a secured creditor that is an FDIC-insured financial institution must send written notice of the account's pledge to the other parties to the multiple-party account; however, notice does not have to be given to a P.O.D. payee, beneficiary, or convenience signer. Tex. Est. Code § 113.251(c), (d).

Generally, however, if other assets of a deceased party's estate are insufficient to pay debts, taxes, claims, and expenses of administration, including surviving spouse and minor children allowances, the deceased's interest in a multiple-party account can be recovered by the personal representative from either the account itself or the subsequent payee of the account according to the account's terms. Tex. Est. Code

§ 113.252(a), (b). Until the financial institution receives written notice from the representative stating the amounts needed to pay debts, taxes, claims, and expenses of administration, it is free to pay account proceeds according to the terms and nature of the account and agreement. Payees are liable only to the extent of funds actually received from the account. Tex. Est. Code § 113.253.

To recover these amounts, the representative must first have received a demand for payment from either a surviving spouse, a creditor of the decedent, or one acting for the decedent's minor child. No recovery proceeding may commence more than two years after death. Amounts recovered by the representative are distributed as part of the decedent's estate. Tex. Est. Code § 113.252(c), (d).

If the creditor is aware of amounts passing outside probate to payees under any of these multiple-party accounts, he should consider demanding that the personal representative take steps to recover these funds into the probate estate. The efficacy of taking this action must be balanced against the amount of money the creditor will recover after expenses of administration and statutory allowances are paid.

§ 29.71:7 Liability of and Offset to Financial Institutions

A detailed discussion of the rights and liabilities of financial institutions regarding payment of funds from multiple-party accounts to various payees is beyond the scope of this manual. In general, the financial institution will not be liable for disbursements made in good faith to parties appearing to have rights in the account. Tex. Est. Code ch. 113, subch. E. Without having to present a claim, a financial institution has a right to offset debt against the account of any amount in proportion to that to which the party was entitled. Tex. Est. Code § 113.210; *Bandy v. First State Bank*, 835 S.W.2d 609, 622 (Tex. 1992).

§ 29.72 Community Property with Right of Survivorship

Spouses may agree at any time that title to all or part of their community property, then existing or to be acquired, will vest in the surviving spouse on death. Tex. Est. Code § 112.051. A detailed discussion of how this right of survivorship is created, proved, or revoked is beyond the scope of this manual. Property passing to a surviving spouse in this manner is removed from the probate estate. *See* Tex. Est. Code §§ 112.001–.253

As with a multiple-party account, the personal representative of a deceased spouse can demand recovery of amounts paid to a surviving spouse under such a survivorship arrangement if the estate is otherwise unable to pay debts, taxes, or expenses of administration. Otherwise, the community property subject to the sole or joint management, control, or disposition of a spouse during marriage continues to be subject to the liabilities of that spouse on death without regard to a right of survivorship in the decedent's spouse. Tex. Est. Code §§ 112.252–.253.

§ 29.73 Trusts

§ 29.73:1 Generally

Although a trustee holds legal title to trust property, that property is not liable for the trustee's obligations. Tex. Prop. Code § 114.0821; *Adams v. Williams*, 248 S.W. 673 (Tex. 1923). The beneficiary holds equitable title in trust property; unless the instrument creating the trust made it a spendthrift trust, the trust property will be liable for the beneficiary's debts. *See Estes v. Estes*, 267 S.W. 709 (Tex. 1924).

§ 29.73:2 Spendthrift Trust

A spendthrift trust cannot be reached by the beneficiary's creditors unless the settlor created it with himself as beneficiary. *Bank of Dallas v.*

Republic National Bank of Dallas, 540 S.W.2d 499, 501 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.). *See also* Tex. Prop. Code § 112.035.

§ 29.73:3 Living Trust

A living trust is an inter vivos trust taking effect during the settlor's lifetime, with vesting provisions for the trust property at his death. Because the settlor no longer owns the property—the trust owns it—the property is not part of his estate at death.

§ 29.73:4 Notice to Trust Beneficiaries

In an action brought on a contract executed by a trustee or against a trustee as representative of the trust for a tort committed in the course of the trust's administration, the plaintiff must give notice to each beneficiary known to have a present or contingent interest. This notice must be given either within thirty days after the action is commenced or at any other time fixed by the court that is more than thirty days before judgment. Tex. Prop. Code § 115.015(a). It must be sent by registered or certified mail, return receipt requested. The plaintiff should make a written request to the trustee-defendant for the names and addresses of all such beneficiaries; the trustee must provide this list within ten days from the date of the request. Tex. Prop. Code § 115.015(b).

§ 29.74 Life Insurance Proceeds

Life insurance proceeds are exempt from execution, attachment, garnishment, or other process. Tex. Ins. Code §§ 1108.051–.053.

§ 29.75 Qualified Savings Plan Benefits

A person's right to the assets held in or to receive payments from a "qualified savings plan" is exempt from attachment, execution, and seizure to the extent the plan is exempt from federal income taxation under the Internal Revenue Code of 1986 or to the extent federal income tax on a person's interest in the plan is deferred until actual payment of benefits to the person. Tex. Prop. Code § 42.0021. Section 42.0021(a) contains a list of the types of pension, retirement, health or education savings, or ABLE accounts included as qualified savings plans. The exemption, however, does not apply to voluntary contributions to the plan by the beneficiary in excess of section 473 of the Internal Revenue Code of 1986 or to the accrued earnings on such excess contributions. Tex. Prop. Code § 42.0021(d). Amounts distributed from a qualified savings plan are exempt from attachment, execution, and seizure for a creditor's claim for sixty days after the date of distribution and will continue to be exempt if the debtor makes a qualified rollover contribution of the distributed amount. Tex. Prop. Code § 42.0021(e).

§ 29.76 Transfer on Death Deeds

Texas law has never recognized a right of survivorship in real property; consequently, when a person dies owning a house or land, there typically has to be an estate administration, muniment of title, or affidavit of heirship. A person owning real property may execute a transfer on death deed and file it in the deed records of the county where the real property is located. *See* Tex. Est. Code §§ 114.001–.106. In the deed, the transferor may name one or more primary beneficiaries and one or more contingent beneficiaries and state that the transfer of the property to the beneficiaries is to occur upon the transferor's death. The deed is revocable, nontestamentary, and must be recorded before the transferor's death. At the transferor's death, the property passes to the surviving beneficiary or beneficiaries subject to all encumbrances, mortgages, and liens in place against the property at the transferor's death; however, the personal representative of the transferor's estate could enforce

higher-priority claims or family allowances against the property. *See* Tex. Est. Code §§ 114.104, 114.106.

[Sections 29.77 through 29.80 are reserved for expansion.]

VII. Special Situations

§ 29.81 Debtor as Beneficiary of Estate

§ 29.81:1 Generally

A creditor may discover that a debtor is a beneficiary or an heir of an estate and has not yet received his bequest. The creditor should research the probate file to ascertain the status of the estate, what the debtor is entitled to receive, and when the bequest might be paid.

If the creditor learns that the debtor has inherited or will inherit assets, he should consider using turnover or injunctive relief as a means of reaching those assets. See part V. in chapter 27 of this manual regarding turnover and sections 8.33 through 8.40 regarding injunctions.

The debtor may offer to assign his inherited interest in order to satisfy his debt. *See* Tex. Est. Code § 122.201. The creditor should use extreme caution in deciding whether to accept any such assignment. For instance, the will may contain a "spendthrift clause" that prohibits the assignment of an inheritance expectancy or the debtor may have previously disclaimed his interest in the estate. This would present a problem to the creditor who releases the debtor from his liability only to discover that the assignment is invalid and there is no other means of recovery, although the creditor may seek to vitiate the transaction based on absence of consideration, mutual mistake, or otherwise.

§ 29.81:2 Disclaimer of Interest in Estate by Beneficiary

A beneficiary under a will, including the guardian of an incapacitated beneficiary, an heir at law, or anyone who would receive property from a decedent through other means such as right of survivorship or contract, has an absolute right to disclaim any portion of the property received through intestate succession or by will. Tex. Est. Code § 122.002; Tex. Prop. Code ch. 240. The 2015 Texas legislature removed disclaimers from the Estates Code and added a new chapter 240 to the Property Code. Acts 2015, 84th Leg., R.S., ch. 562, § 3, 15 (H.B. 2428), eff. Sept. 1, 2015. Under these rules, a person intending to disclaim an interest under a will or intestate succession must deliver the disclaimer to the personal representative of the decedent's estate; however, if no personal representative is then serving, the person may file the disclaimer in the official public records of the county in which the decedent was domiciled at his death or in which he owned real property. Tex. Prop. Code § 240.102. The effect of the disclaimer is to divest the beneficiary or heir of any liability to creditors of the estate. Tex. Prop. Code § 240.051.

§ 29.82 Effect of Death on Litigation

§ 29.82:1 Suggestion of Death

When a party to a suit dies, entry of a suggestion of death into the court record permits the suit to proceed. Tex. R. Civ. P. 151, 152. If there are

surviving defendants and no action is taken regarding the deceased defendant, the suit can proceed against the survivors, but any judgment will have no effect on the estate of the decedent and will bar any subsequent proceeding against the estate or the decedent's heirs. Tex. R. Civ. P. 155; *First National Bank v. Hawn*, 392 S.W.2d 377 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

To bring the heirs or personal representative of a deceased debtor into litigation already filed, the attorney should file a suggestion of death and request the clerk to issue a scire facias against the heirs or personal representative requiring him or them to appear. If the debtor's family has not instituted probate, the attorney should consider having a scire facias issued against the surviving spouse and any other known heirs; taking this action will either encourage the family to open probate or identify the decedent's heirs. See form 29-10 in this chapter for a suggestion of death and scire facias.

§ 29.82:2 Tolling of Limitations by Defendant's Death

The death of a person against whom there may be a cause of action suspends the running of the applicable statute of limitation for either twelve months from death or until an executor or administrator is appointed, whichever comes first. Tex. Civ. Prac. & Rem. Code § 16.062.

In a dependent administration, limitations are also tolled on the date a claim is filed or deposited with the clerk. Tex. Est. Code § 355.008. In an independent administration, limitations are tolled only by the executor's written approval of the claim, the filing of a pleading in a suit already pending at the time of the debtor's death, or the filing of a suit against the executor regarding the claim. Tex. Est. Code § 403.057.

If suit is brought against a personal representative, a successor personal representative cannot claim a limitations defense if he knows of the suit against the prior representative. *Rooke v. Jenson*, 838 S.W.2d 229 (Tex. 1992).

§ 29.83 Death or Incapacity of Creditor

If a creditor dies, the claims owned by the creditor may still be pursued. The personal representative of an estate may recover all property belonging to the estate, including all claims and debts due. Tex. Est. Code §§ 351.151, 351.054. To recover on the claim, a person interested in the creditor's estate should open administration, and the administrator or executor should file the claim. If the claim is in litigation, the petition on the claim should be amended to substitute the personal representative in place of the creditor. *See* Tex. R. Civ. P. 63. Similarly, if the creditor becomes incapacitated, the guardian of the creditor's estate may pursue the claim or continue the suit on the claim on the creditor's behalf. Tex. Est. Code §§ 1151.104–.105.

§ 29.84 Ongoing Business

If the decedent owned a farm, ranch, factory, or other business, the court may grant the personal representative the powers to operate the business that the court determines are appropriate if the disposition of the business was not specifically directed by the decedent's will, it is not necessary to sell the business for the payment of debts or other lawful purposes, and the operation of the business by the personal representative is in the best interest of the estate. Tex. Est. Code §§ 351.201–.202(a). In deciding which powers to grant the personal representative, the court will consider the condition of the estate and the business, the necessity that may exist for the future sale of the business or its assets to pay debts or claims against the estate, the effect on the speedy settlement of the estate, and the best interests of the estate. Tex. Est. Code § 351.202(b).

If the decedent was a partner in a general partnership and the articles of partnership provide that the personal representative will be entitled to the deceased partner's place, the representative may assume that position, liable only to the extent of the deceased partner's share in the partnership and the estate's assets held by the representative. Tex. Est. Code § 351.104.

Form 29-1

This form may be used to submit a claim to the personal representative of a decedent's or ward's estate. The claim may be either presented directly to the personal representative or filed with the court.

The attorney should not execute the affidavit unless he has personal knowledge of the facts asserted. See section 19.17:3 in this manual regarding attorneys executing affidavits.

No. [**cause number**]

In re Estate of	§	
[**Name of debtor**],	§	[**Court designation**]
[Deceased/Ward]	§	

Authenticated Claim of [name of creditor]

[**Name of creditor**], Claimant, presents this claim to the [executor/administrator/guardian] of the estate of [**name of debtor**], [Deceased/Ward].

1. *Basis for Claim.* This claim is based on [**state facts on which claim is based**].

Include the following if the claim is supported by a document such as a note.

A true and correct copy of the [**supporting document**] evidencing this claim is attached as Exhibit [**exhibit number/letter**] and incorporated by reference.

Continue with the following.

2. *Amount of Claim.* The amount of the claim is $[**amount**].

Include the following if the claim bears interest.

3. *Interest.* The claim bears interest at the rate of [**percent**] percent per year from [**date**].

Include the following if the contract provides for attorney's fees.

4. *Attorney's Fees.* The contract provides for recovery of attorney's fees if the account is placed with an attorney for collection. Reasonable attorney's fees for preparing, presenting, and collecting this claim are $[**amount**].

Include the following if the claim is secured by a written security agreement or other document.

5. *Security.* The claim is secured by a [**describe lien instrument**], granting [**name of creditor**] a security interest in [**describe collateral**]. A copy of the security agreement is attached as Exhibit [**exhibit number/letter**] and incorporated by reference.

Select one of the following if the claim is a secured claim.

6. *Matured Secured Claim.* Claimant elects to have the claim allowed and approved as a matured secured claim to be paid in the course of administration.

Or

6. *Preferred Debt and Lien.* Claimant elects to have the claim allowed, approved, and fixed as a preferred debt and lien against the property described above, to be paid according to the terms of the security agreement.

Continue with the following.

_____

[**Name**]
Attorney for Claimant
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Affidavit

BEFORE ME, the undersigned authority, on this day personally appeared [**name of affiant**], who swore on oath that the following facts are true:

"1. My full name is [**name of affiant**].

Select one of the following. Select the first option if the creditor is an individual. Select the second option if the creditor is a corporation or other entity.

"2. I am the owner of the claim described above.

Or

"2. I am [**representative capacity**] of [**name of creditor**]. I have made diligent inquiry and examination, and [**name of creditor**] is the owner of the claim.

Continue with the following.

"3. The claim described above is just, and all lawful offsets, payments, and credits known to me have been allowed."

_____

[**Name of affiant**]
Affiant

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

Memorandum of Allowance

This claim was presented to me on _____. I have examined it, and I ALLOW it in full according to the terms of the claim.

Date of allowance: _____.

_____

[Name of personal representative]
[Title of personal representative]

Order

This claim was presented and allowed by the personal representative, entered on the claims docket for at least ten days, and examined by the Court. The Court is satisfied that the claim is just and therefore APPROVES the claim according to its terms.

SIGNED on _____.

_____

JUDGE PRESIDING

Attach exhibit(s).

Form 29-2

This petition may be used to bring suit against either a dependent personal representative of a decedent's estate or a guardian. The form is based on the petition for suit on note at form 14-7 in this manual and assumes suit is against a dependent personal representative of a decedent's estate; it should be altered as appropriate, depending on the nature of the debt or for suit against a guardian. If foreclosure or court-supervised sale of collateral is sought, an application to sell the property must be filed after the judgment is entered on the claims docket and the secured claim is classified. See section 29.40 regarding foreclosure sales and form 29-3 for an application for sale. See also the following sections: 14.28 regarding foreclosure of a security interest, 2.111 regarding acceleration, part II. in chapter 15 regarding venue, 1.18 through 1.29 regarding attorney's fees, and 14.2 regarding exercising caution in pleading conditions precedent.

The suit should be filed in the court in which the administration of the estate or the guardianship is pending. See sections 29.39:1 and 29.67:1 regarding jurisdiction and sections 29.39:2 and 29.67:3 regarding pleading requirements. Texas Civil Practice and Remedies Code section 30.014 requires each party to include partial identification information in its initial pleading in a civil action filed in district court, county court, or statutory county court.

No. [**cause number**]

[**Name of creditor**]	§	
	§	
v.	§	[**Court designation**]
	§	
[**Name of personal representative or guardian**], [Personal Representative/ Guardian] of the Estate of [**Name of debtor**], [Deceased/Ward]	§	

Petition for Suit against Dependent Personal Representative or Guardian

1. *Parties.* Plaintiff is [**name of plaintiff**], whose address is [**address, city, state**]. Defendant is [**name of personal representative or guardian**], [**representative capacity**], who can be served with citation at [**address, city, state**].

2. *Note [and Security Agreement].* Attached to this petition as Exhibit [**exhibit number/letter**] is a true and correct copy of a note executed by Decedent. Plaintiff is the owner

and holder of this note and is entitled to receive all money due under its terms. [**Include if applicable:** Plaintiff is a holder in due course.] The note is incorporated in this petition by reference.

Include the following if foreclosure of a security interest is sought.

To secure the debt created by the note, Decedent executed a security agreement granting Plaintiff a security interest in [**describe collateral**]. The security agreement is attached as Exhibit [**exhibit number/letter**] and incorporated by reference.

Plead additional facts if required for venue; see part II. in chapter 15. Continue with the following.

3. *Default.* Decedent defaulted in paying the note. [**Include if applicable:** Plaintiff has accelerated the debt according to the terms of the note.] There is currently due the sum of $[**amount**], plus accrued interest as provided for in the note.

4. *Presentation and Rejection of Claim.* A claim for this debt against Decedent's estate was made and presented to Defendant in proper time, form, and manner. A copy of the claim is attached to this petition as Exhibit [**exhibit number/letter**] and incorporated by reference.

Select one of the following.

Defendant failed to allow or reject Plaintiff's claim within thirty days of presentation.

Or

Defendant rejected Plaintiff's claim.

Or

Defendant rejected Plaintiff's claim to the extent of $[**amount**].

Continue with the following.

5. *Suit Timely Filed.* Plaintiff is filing this suit within ninety days of Defendant's rejection of the claim.

6. *Conditions Precedent.* All conditions precedent have been performed or have occurred.

7. *Attorney's Fees.* Decedent's default has made it necessary for Plaintiff to employ the undersigned attorney to file suit.

Select one of the following.

This claim was timely presented to [Decedent/Defendant] and remains unpaid.

Or

Decedent agreed to pay reasonable attorney's fees for collection in case of default, as shown on Exhibit [**exhibit number/letter**].

Continue with the following.

Reasonable fees for the attorney's services rendered and to be rendered through trial and appeal are at least $[**amount**].

8. *Prayer.* Plaintiff prays that—

a. Defendant be cited to appear and answer;

b. Plaintiff be granted judgment for $[**amount**] as the principal amount due on the note;

c. Plaintiff be granted judgment for accrued and unpaid interest on the debt before maturity;

d. Plaintiff be granted judgment for prejudgment and postjudgment interest on the matured, unpaid debt at the highest legal or contractual rate allowed by law;

e. Plaintiff be granted judgment for at least $[**amount**] as reasonable attorney's fees, with additional contingent amounts in the event of appellate proceedings;

f. Plaintiff be granted judgment for all costs of court;

Include the following if foreclosure is sought.

g. Plaintiff be granted foreclosure of Plaintiff's security interest in the collateral;

h. the Court order that execution of the judgment issue against property of Decedent's estate in the hands of Defendant; and

Continue with the following.

[g./i.] the Court enter the judgment on the claims docket for classification and further handling as if it were originally allowed and approved in the course of administration; and

[h./j.] Plaintiff be granted all further relief to which Plaintiff may be entitled.

_____

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach exhibit(s).

Form 29-3

This form may be used to request an order to sell property of the estate held as security by the creditor. See Tex. Est. Code §§ 356.201–.203 and 1158.001–.706. See the discussion at sections 29.40:1 and 29.68 in this chapter. This form assumes the application is for sale of property of a decedent's estate; it should be modified as appropriate for sale of guardianship property.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the petition at form 29-2.

Application for Sale of Collateralized Property

[**Name of creditor**], Movant, requests that the Court enter an order to sell property of the estate of [**name of debtor**], Decedent, and shows as follows:

1. *Security Interest.* Movant has a security interest in the following property: [**describe collateral as specifically as possible**]. This security interest is evidenced by [**describe security agreement**]. A copy of this instrument is attached as Exhibit [**exhibit number/letter**] and incorporated by reference.

2. *Claim Approved and Entered.* Movant's secured claim has been [allowed/established by suit] and approved.

3. *Reason for Sale.* Movant requests the sale of this property because [**list reasons**].

4. *Method of Sale.* It is in the best interest of the estate to have the property sold at public [**include if applicable:** or private] sale [**include additional terms of sale if applicable**].

5. *Not Exempt Property.* The property is not exempt property.

6. *Prayer.* Movant requests that—

a. the personal representative of Decedent's estate be cited to appear and show cause why the property should not be sold;

b. the Court enter its order of sale of the property; and

c. the Court grant all further relief to which Movant may be entitled.

_____

[Name]
Attorney for Movant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Notice of Hearing

It is ORDERED that the clerk issue notice to [**name of personal representative**], Respondent, and Respondent is ORDERED to appear before this Court on [**date and time**], at [**address**], to show cause why [**describe collateral**] should not be sold as requested in the attached motion.

SIGNED on _____.

_____

JUDGE PRESIDING

Attach exhibit(s) and order authorizing sale of collaterized property (form 29-4).

Form 29-4

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the petition at form 29-2.

Order Authorizing Sale of Collateralized Property

On this date the Court considered [**name of creditor**]'s Application for Sale of Collateralized Property. The Court finds that citation was issued and served according to law; the property sought to be sold is not exempt property; and it is in the best interests of the estate to sell the property.

It is therefore ORDERED that the following property of the estate be sold: [**describe property as in form 29-3**]. The property is to be sold at [public/private] sale. The terms of sale are: [**describe terms of sale**].

SIGNED on _____.

_____
JUDGE PRESIDING

Form 29-5

This form may be used to request a foreclosure sale of collateral securing a debt classed as a preferred debt and lien. After the sale is ordered and completed, a report of sale must be filed with the probate court, and a decree confirming the sale must be obtained. See forms 29-6 through 29-8 in this chapter.

The affidavit included in this form should not be executed by the attorney unless he has personal knowledge of the facts asserted. See section 19.17:3 regarding execution of affidavits by attorneys.

If the property is sought to be sold at public sale, notice of the sale must be posted as in the case of original proceedings in probate unless the court directs otherwise. Tex. Est. Code § 356.103.

See section 29.40:2 for discussion of preferred debt and lien foreclosure sales.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the petition at form 29-2.

Application for Foreclosure Sale of Mortgaged Property

[**Name of creditor**], Movant, requests that the Court enter an order authorizing foreclosure of Movant's lien against property of the estate of [**name of debtor**], Decedent, and shows as follows:

1. *Security Interest.* Movant has a security interest in the following property: [**describe collateral as specifically as possible**]. This security interest is evidenced by [**describe security agreement**]. A copy of this instrument is attached as Exhibit [**exhibit number/letter**] and incorporated by reference.

2. *Claim Approved and Entered.* Movant's secured claim has been [allowed/established by suit], approved, and fixed according to law.

3. *Property Still in Estate.* The property has not been sold or distributed within six months from the date letters of administration were granted.

Select one of the following.

4. *Administrator Has Not Performed All Terms of Contract.* The Administrator has failed to perform the following terms of the debt: [**describe default(s)**].

Or

4. *Administrator Has Not Performed.* The Administrator has not paid all maturities accruing on the debt secured by the security interest described above.

Continue with the following.

5. *Method of Sale.* It is in the best interest of the estate to have the property [sold at foreclosure sale, according to the terms of the security agreement/[**describe other method of sale or disposition**]].

6. *Not Exempt Property.* The property is not exempt property.

7. *Prayer.* Movant requests that—

a. the personal representative of Decedent's estate and all other lienholders listed on the attached affidavit of [**name of affiant**] be cited to appear and show cause why the property should not be foreclosed;

b. the Court enter its order granting Movant the right to foreclosure of its lien; and

c. the Court grant all further relief to which Movant may be entitled.

[**Name**]
Attorney for Movant
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Notice of Hearing

It is ORDERED that the clerk issue notice to [**name of personal representative**], Respondent, and Respondent is ORDERED to appear before this Court on [**date and time**], at [**address**], to show cause why [**describe collateral**] should not be sold as requested in the attached motion.

SIGNED on _____.

JUDGE PRESIDING

Affidavit

BEFORE ME, the undersigned authority, on this day personally appeared [**name of affiant**], who swore on oath that the following facts are true:

"1. My full name is [**name of affiant**]. I am the [claimant/authorized representative of the claimant].

"2. The property securing the claim is described as follows: [**describe property**].

"3. The amount of the outstanding debt owed is $[**amount**].

"4. The maturities that have accrued on this debt, according to its terms, are [**describe all matured, unpaid obligations due on the debt**].

"5. I am aware of the following other liens or claims against the property: [**list other lienholders**]. I have no knowledge of the existence of any debts secured by the property other than the ones listed.

"6. [I request/Creditor requests] permission to foreclose the lien described in the attached motion."

_____

[**Name of affiant**]
Affiant

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

Attach exhibit(s).

Form 29-6

This order accompanies the application for foreclosure of mortgaged property at form 29-5 in this chapter. The order allows the creditor to conduct a foreclosure sale of the property. See section 29.40:2 for discussion of preferred debt and lien foreclosure sales.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the petition at form 29-2.

Order Authorizing Sale of Mortgaged Property

On this date the Court considered [**name of creditor**]'s application to foreclose its lien on property of the estate. The Court finds that—

1. citation was issued and served according to law on the administrator of the estate and on all persons known to [**name of creditor**] to hold a lien against the property;

2. more than six months have elapsed from the time the Court issued letters of administration to [**name of administrator**];

Select one of the following.

3. [**name of administrator**] has failed to pay all accrued maturities as they have come due;

Or

3. [**name of administrator**] has failed to perform the following terms of the debt: [**describe default(s)**];

Continue with the following.

4. the property sought to be sold is not exempt property; and

5. it is in the best interests of the estate to sell the property.

It is therefore ORDERED that [**name of creditor**] be allowed to foreclose its lien on the following property of the estate: [**describe property as in form 29-5**]. The property is to be sold at foreclosure sale according to the terms of the security agreement creating the lien and applicable law. The minimum acceptable bid at the foreclosure sale will be $_____. The property will be sold at [private sale/public auction] at [**place of sale**] on [**date and time**]. It is further ORDERED that, after the sale is made, a report of the sale be returned to this Court in accordance with law.

SIGNED on _____.

_____
JUDGE PRESIDING

Arrange with the clerk for posting of a notice of sale.

Form 29-7

After the foreclosure sale approved by the court is conducted (see form 29-6 in this chapter), this report must be filed with the court and a hearing scheduled at least five days after the report is filed to receive the court's confirmation of the sale. See form 29-8 for a decree confirming the sale.

If personal property is sold in more than one lot or unit, the price of each lot or unit should be shown. If real property is sold in more than one parcel, the price of each parcel must be shown. *See* Tex. Est. Code § 356.551(2)(E).

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the petition at form 29-2.

Report of Sale of [Personal/Real] Property

[**Name of creditor**], a secured creditor of this estate, reports as follows:

On [**date**], this Court ordered the foreclosure sale of certain [personal/real] property of the estate. This property is described as follows: [**describe property as in form 29-5**].

1. The property was sold on [**date**] at [**time**].

2. The name of the purchaser is [**name of purchaser**].

3. The sale price of the property was $[**amount**].

4. The terms of sale were [**describe terms**].

5. The sale was [at public auction/privately held].

6. The purchaser is ready to comply with the order of sale.

7. All the facts herein are true and correct.

_____

[**Name**]
Attorney for Plaintiff
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

Set a hearing for confirmation of sale at least five days after filing the report of sale.

Form 29-8

The probate court must confirm any sale of property in a dependent administration. See section 29.40:1 in this chapter for discussion of court-supervised sales.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Use the same caption as in the petition at form 29-2.

Decree Confirming Sale

On this date the Court considered the report of sale of certain [personal/real] property of the estate. The property is described as [**describe property as in form 29-7**], and the Court finds that—

1. at least five days have elapsed since the filing of the report;

2. the sale was made in accordance with applicable law; and

3. the property was sold at a fair price.

Accordingly, the sale described in the report of sale is hereby APPROVED and CONFIRMED.

SIGNED on _____.

_____
JUDGE PRESIDING

Form 29-9

This petition may be used to bring suit against an independent executor or administrator for an obligation incurred by a decedent during his lifetime. The form is based on the petition for suit on note at form 14-7 in this manual and should be altered as appropriate depending on the nature of the debt. See also the following sections: 14.28 regarding foreclosure of a security interest, 2.111 regarding acceleration, part II. in chapter 15 regarding venue, 1.18 through 1.29 regarding attorney's fees, and 14.2 regarding exercising caution in pleading conditions precedent.

Texas Civil Practice and Remedies Code section 30.014 requires each party to include partial identification information in its initial pleading in a civil action filed in district court, county court, or statutory county court.

No. [**cause number**]

[**Name of creditor**]	§	
	§	
v.	§	[**Court designation**]
	§	
[**Name of independent executor or administrator**], [Independent Executor/ Administrator] of the Estate of [**Name of debtor**], [Deceased/Ward]	§	

Petition for Suit against Independent Executor or Administrator

1. *Parties.* Plaintiff is [**name of plaintiff**], whose address is [**address, city, state**]. Defendant is [**name of independent executor or administrator**], Independent [Executor/Administrator] of the estate of [**name of debtor**], Decedent, who can be served with citation at [**address, city, state**].

2. *Note [and Security Agreement].* Attached to this petition as Exhibit [**exhibit number/letter**] is a true and correct copy of a note executed by Decedent. Plaintiff is the owner and holder of this note and is entitled to receive all money due under its terms. [**Include if applicable:** Plaintiff is a holder in due course.] The note is incorporated in this petition by reference.

Include the following if foreclosure of a security interest is sought.

To secure the debt created by the note, Decedent executed a security agreement granting Plaintiff a security interest in [**describe collateral**]. The security agreement is attached as Exhibit [**exhibit number/letter**] and incorporated by reference.

Plead additional facts if required for venue; see part II. in chapter 15. Continue with the following.

3. *Default.* Decedent defaulted in paying the note. [**Include if applicable:** Plaintiff has accelerated the debt according to the terms of the note.] There is currently due the sum of $[**amount**], plus accrued interest as provided for in the note.

4. *Conditions Precedent.* All conditions precedent have been performed or have occurred.

5. *Attorney's Fees.* Decedent's default has made it necessary for Plaintiff to employ the undersigned attorney to file suit.

Select one of the following.

This claim was timely presented to [Decedent/Defendant] and remains unpaid.

Or

Decedent agreed to pay reasonable attorney's fees for collection in case of default, as shown on Exhibit [**exhibit number/letter**].

Continue with the following.

Reasonable fees for the attorney's services rendered and to be rendered through trial and appeal are at least $[**amount**].

6. *Prayer.* Plaintiff prays that—

a. Defendant be cited to appear and answer;

b. Plaintiff be granted judgment for $[**amount**] as the principal amount due on the note;

c. Plaintiff be granted judgment for accrued and unpaid interest on the debt before maturity;

d. Plaintiff be granted judgment for prejudgment and postjudgment interest on the matured, unpaid debt at the highest legal or contractual rate allowed by law;

e. Plaintiff be granted judgment for at least $[**amount**] as reasonable attorney's fees, with additional contingent amounts in the event of appellate proceedings;

f. Plaintiff be granted judgment for all costs of court[;/; and]

Include the following if foreclosure is sought.

g. Plaintiff be granted foreclosure of Plaintiff's security interest in the collateral;

h. the Court order that execution of the judgment issue against property of Decedent's estate in the hands of Defendant; and

Continue with the following.

[g./i.] Plaintiff be granted all further relief to which Plaintiff may be entitled.

[Name]
Attorney for Plaintiff
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach exhibit(s).

Form 29-10

This form may be used if the defendant dies after suit is commenced. *See* Tex. R. Civ. P. 151–152. This form may be altered as appropriate if there is more than one defendant and the plaintiff elects to proceed against only the defendant(s) remaining alive. See section 29.82:1 in this chapter, however, regarding the consequences of electing to proceed against only the remaining defendant(s).

Also, if the plaintiff dies, this form may be used to notify the court of the substitution of the plaintiff's heirs or personal representative. In that case, replace paragraph 2. with a statement of the plaintiff's intent.

[Caption. See § 3 of the Introduction in volume 1 of this manual.]

Suggestion of Death and Scire Facias

1. Plaintiff, [**name of plaintiff**], informs the Court that Defendant, [**name of defendant**], has died. A certified copy of Defendant's death certificate is attached as Exhibit [**exhibit number/letter**] and incorporated in this suggestion by reference.

2. Plaintiff requests that this suit proceed against [**name[s] and [capacity/capacities] of heir[s] or personal representative**]. Plaintiff further requests that the clerk of the Court issue scire facias for [**name[s] of heir[s] or personal representative**] requiring [him/her/them] to appear and defend this suit.

[**Name**]
Attorney for Plaintiff
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach a certificate of service (form 19-1) and exhibit(s).

Chapter 30
Justice Courts

Chapter 30

Justice Courts

§ 30.1 Justice Courts in General

Collections cases filed in justice courts can provide attorneys an opportunity to have their causes of action heard more timely and resolved less expensively than in the county or district courts where there is competition for hearings on motions and trial time with many high-dollar, more complex cases.

§ 30.1:1 Types of Cases

The legislature in 2011 extensively revised the rules governing justice courts, effective September 2013. *See* Acts 2011, 82d Leg., 1st C.S., ch. 3, § 5.06 (HB 79), eff. Sept. 1, 2013. Rules 500–510 of the Texas Rules of Civil Procedure now govern all civil cases filed in justice courts. *See* Tex. R. Civ. P. 500.3.

Tex. R. Civ. P. 500.3 describes four types of justice court cases to which the rules apply: small claims cases, debt claims cases, repair and remedy cases, and eviction cases. A collections case is generally filed either as a small claims case or as a debt claims case.

Small Claims Cases: A small claims case is a lawsuit brought for the recovery of money damages, civil penalties, personal property, or other relief allowed by law. The claim can be for no more than $10,000, excluding statutory interest and court costs but including attorney's fees, if any. Tex. R. Civ. P. 500.3(a). *See also* Tex. Gov't Code § 27.031(a). Effective September 1, 2020, the limit increases to $20,000. Acts 2019, 86th Leg., R.S., ch. 696, § 32 (S.B. 2342).

Debt Claims Cases: Debt claims cases are defined as claims for the recovery of a debt brought by an assignee of a claim, a financial institution, a debt collector or collection agency, or a person or entity primarily engaged in the business of lending money at interest. The claim can be for no more than $10,000, excluding statutory interest and court costs but including attorney's fees, if any. Tex. R. Civ. P. 500.3(b); *see also* Tex. Gov't Code § 27.031(a); Tex. R. Civ. P. 508.1. Effective September 1, 2020, the limit increases to $20,000. Acts 2019, 86th Leg., R.S., ch. 696, § 32 (S.B. 2342). Those collections cases not covered by the debt claims definition would be filed as small claims cases. Debt claims cases do not include all suits making a claim for payment of a debt owed. Generally, most credit card cases would be filed as debt claims cases, while money owed to individuals not normally engaged in the practice of lending money would be filed as small claims cases.

Repair and Remedy Cases: A repair and remedy case is a lawsuit filed by a residential tenant under chapter 92, subchapter B, of the Texas Property Code to enforce the landlord's duty to repair or remedy a condition materially affecting the physical health or safety of an ordinary tenant. The relief sought can be for no more than $10,000, excluding statutory interest and court costs but including attorney's fees, if any. Tex. R. Civ. P. 500.3(c). *See also* Tex. Gov't Code § 27.031(a). Effective September 1, 2020, the limit increases to $20,000. Acts 2019, 86th Leg., R.S., ch. 696, § 32 (S.B. 2342). Repair and remedy cases are beyond the scope of this manual.

Eviction Cases: An eviction case is a lawsuit brought to recover possession of real property under chapter 24 of the Property Code, often by a landlord against a tenant. A claim for rent may

be joined with an eviction case if the amount of rent due and unpaid is not more than $10,000, excluding statutory interest and court costs but including attorney's fees, if any. Tex. R. Civ. P. 500.3(d). *See also* Tex. Gov't Code § 27.031(a). Effective September 1, 2020, the limit increases to $20,000. Acts 2019, 86th Leg., R.S., ch. 696, § 32 (S.B. 2342). See section 28.21 in this manual for general information about evictions and sections 28.26–.30 for procedures for evictions in justice courts.

§ 30.1:2 Application of Other Rules

The other Rules of Civil Procedure and the Rules of Evidence do not apply except when (1) the judge hearing the case determines that a particular rule must be followed to ensure that the proceedings are fair to all parties or (2) otherwise specifically provided by law or these rules. Tex. R. Civ. P. 500.3(e).

§ 30.1:3 Computation of Time; Timely Filing

To compute a time period under Tex. R. Civ. P. 500–510:

1. exclude the day of the event that triggers the period;
2. count every day, including Saturdays, Sundays, and legal holidays; and
3. include the last day of the period, but
    a. if the last day is a Saturday, Sunday, or legal holiday, the time period is extended to the next day that is not a Saturday, Sunday, or legal holiday; and
    b. if the last day for filing falls on a day during which the court is closed before 5:00 P.M., the time period is extended to the court's next business day.

Tex. R. Civ. P. 500.5(a). Any document required to be filed by a given date is considered timely filed if deposited in the U.S. mail on or before that date and received within ten days of the due date. A legible postmark affixed by the United States Postal Service is evidence of the date of mailing. Tex. R. Civ. P. 500.5(b). A judge may, for good cause shown, extend any time period under rules 500–510 except those relating to new trial and appeal. Tex. R. Civ. P. 500.5(c).

§ 30.2 Jurisdiction

Currently, the statutory limit for cases filed in justice courts is $10,000. *See* Tex. Gov't Code § 27.031(a); Tex. R. Civ. P. 500.3. Effective September 1, 2020, the limit increases to $20,000. Acts 2019, 86th Leg., R.S., ch. 696, § 32 (S.B. 2342). Practitioners should be mindful that this jurisdictional ceiling is inclusive of attorney's fees. *See Lopez v. Soto*, No. 03-12-00031-CV, 2014 WL 3055955, at *1 (Tex. App.—Austin July 2, 2014) (pet. denied) (mem. op.) ("For jurisdictional purposes, attorney's fees are included in the amount in controversy.") (*citing Johnson v. Universal Life & Accident Insurance Co.*, 94 S.W.2d 1145, 1146 (Tex. 1936)); *Long v. Fox*, 625 S.W.2d 376, 378 (Tex. App.—San Antonio 1981, writ ref'd n.r.e.) (it is "well settled that a demand for attorneys' fees in a petition constitutes a part of the amount in controversy and is considered in determining such amount for jurisdictional purposes."). *But see Mendoza v. Bazan*, 574 S.W.3d 594, 601 (Tex. App.—El Paso 2019, pet. denied) (upholding justice court's jurisdiction in eviction suit where amount of unpaid rent claimed was within court's jurisdictional limits but addition of attorney's fees would have raised entire amount claimed over court's limits).

Therefore, if an attorney seeks an award of attorney's fees and the amount in controversy is very close to the jurisdictional limit, it may be more prudent to file the case in county or district court. Additionally, it is well settled under Texas

law that a party may not have jurisdiction conferred by petitioning the court to award an amount less than the amount in controversy to keep the case within the justice court's jurisdiction. *See Rodney R. Elkins & Co. v. Immanivong*, 406 S.W.3d 777, 780 (Tex. App.—Dallas 2013, no pet.); *Bakery Equipment & Service Co. v. Aztec Equipment Co.*, 582 S.W.2d 870, 873 (Tex. App.—San Antonio 1979, no writ) (citing *Gordon v. Carver*, 409 S.W.2d 878, 879 (Tex. App.—Amarillo 1966, no writ)). For example, if a party is truly owed $11,000, that party may not reduce the debt to $10,000 in order to confer jurisdiction on the justice court.

In considering a party's plea to the jurisdiction alleging the amount in controversy is beyond the jurisdiction of the justice court, the judge will first look at the petition and attached affidavits, and, if the petition does not affirmatively demonstrate the absence of jurisdiction, it will be liberally construed in favor of jurisdiction. *Garza v. Chavarria*, 155 S.W.3d 252, 256 (Tex. App.—El Paso 2004, no pet.). If the original petition is within the court's jurisdictional limits but an amendment increases the amount in controversy above the jurisdictional limits the court continues to have jurisdiction if the additional amount accrued because of the passage of time. *Continental Coffee Products Co. v. Cazarez*, 937 S.W.2d 444, 449 (Tex. 1996). A motion to dismiss for lack of jurisdiction will fail unless the debtor proves that the creditor's pleading as to the amount in controversy was merely a sham for the purpose of wrongfully obtaining jurisdiction or that the amount in controversy did not fall within the court's jurisdictional limits when filed. *Rodney R. Elkins & Co.*, 406 S.W.3d at 780.

§ 30.3 Venue

Once the collections practitioner has determined that jurisdiction would be appropriate in a justice court, the proper court must be selected. There are 254 counties in Texas, each with at least one justice of the peace.

Proper venue for justice courts is set forth in Tex. R. Civ. P. 502.4 and Tex. Civ. Prac. & Rem. Code §§ 15.081–.100. Generally, a defendant in a small claims case as described in Tex. R. Civ. P. 500.3(a) or a debt claims case as described in Tex. R. Civ. P. 500.3(b) is entitled to be sued in one of the following venues:

1. The county and precinct where the defendant resides.
2. The county and precinct where the incident or the majority of incidents that gave rise to the claim occurred.
3. The county and precinct where the contract or agreement, if any, that gave rise to the claim was to be performed.
4. The county and precinct where the property is located, in a suit to recover personal property.

Tex. R. Civ. P. 502.4(b). If the defendant is a nonresident of Texas or if the defendant's residence is unknown, the plaintiff may file the suit in the county and precinct where the plaintiff resides. Tex. R. Civ. P. 502.4(c). See also Tex. Civ. Prac. & Rem. Code §§ 15.001–.100 for further guidance in selecting venue.

Motion to Transfer Venue: If a plaintiff files suit in an improper venue, a defendant may challenge the venue selected by filing a motion to transfer venue. The motion must be filed before trial, no later than twenty-one days after the day the defendant's answer is filed. Unlike in district and county courts, the motion does not have to be filed before or contemporaneous with an original answer. *See* Tex. R. Civ. P. 86. The motion must contain a sworn statement that the venue chosen by the plaintiff is improper and state the specific county and precinct of proper venue to which transfer is sought. If the defendant fails to name a county and precinct, the court must instruct the defendant to do so and

allow the defendant seven days to cure the defect. If the defendant fails to correct the defect, the motion will be denied and the case will proceed in the county and precinct where it was originally filed. Tex. R. Civ. P. 502.4(d).

If the defendant files a motion to transfer venue, the judge must set a hearing on the motion. The plaintiff may file a response to the defendant's motion to transfer venue. The parties may present evidence at the hearing. A witness may testify at a hearing, either in person or with permission of the court, by means of telephone or an electronic communication system. If the motion is granted, the judge must sign an order designating the court to which the case will be transferred. If the motion is denied, the case will be heard in the court in which the plaintiff initially filed suit. Motions for rehearing and interlocutory appeals of the judge's ruling on venue are not permitted. No trial may be held until at least the fourteenth day after the judge's ruling on the motion to transfer venue. An order granting a motion to transfer venue must state the reason for the transfer and the name of the court to which the transfer is made. Tex. R. Civ. P. 502.4(d)(1)(A)–(F).

When such an order of transfer is made, the judge who issued the order must immediately make out a true and correct transcript of all the entries made on the docket in the case, certify the transcript, and send the transcript, with a certified copy of the bill of costs and the original papers in the case, to the court in the precinct to which the case has been transferred. The court receiving the case must then notify the plaintiff that the case has been received and, if the case is transferred to a different county, that the plaintiff has fourteen days after receiving the notice to pay the filing fee in the new court or file a statement of inability to afford payment of court costs. The plaintiff is not entitled to a refund of any fees already paid. Failure to pay the fee or file a statement will result in dismissal of the case without prejudice. Tex. R. Civ. P. 502.4(d)(1)(G).

Fair Trial Venue Change: If a party believes it cannot get a fair trial in a specific precinct or before a specific judge, the party may file a sworn motion stating that belief, supported by the sworn statements of two other credible persons, and specifying if the party is requesting a change of location or a change of judge. Except for good cause shown, this motion must be filed no less than seven days before trial. If the party seeks a change of judge, the judge must exchange benches with another qualified justice of the peace, or, if no judge is available to exchange benches, the county judge must appoint a visiting judge to hear the case. If the party seeks a change in location, the case must be transferred to the nearest justice court in the county that is not subject to the same or some other disqualification. If there is only one justice of the peace precinct in the county, the judge must exchange benches with another qualified justice of the peace, or, if no judge is available to exchange benches, the county judge must appoint a visiting judge to hear the case. In cases where exclusive jurisdiction is within a specific precinct, as in eviction cases, the only remedy available is a change of judge. A party may apply for relief under this rule only one time in any given lawsuit. Tex. R. Civ. P. 502.4(e).

Transfer of Venue by Consent: On the written consent of all parties or their attorneys, filed with the court, venue must be transferred to the court of any other justice of the peace of the county or any other county. Tex. R. Civ. P. 502.4(f).

Judgment Valid Where Venue Not Contested: If no objection to venue is raised, a final judgment entered against a defendant residing in a county other than the county where the transaction arose would be a valid judgment. However, under the Fair Debt Collection Practices Act, a debt collector might exercise caution

in suing defendants outside their place of residence. See section 15.15:4 in this manual for a discussion of venue rules under the Fair Debt Collection Practices Act.

§ 30.4 Representation in Justice Courts

§ 30.4:1 Individuals

An individual in a justice court may represent himself, be represented by an authorized agent in an eviction case, or be represented by an attorney. Tex. R. Civ. P. 500.4(a). Additionally, unique to justice courts, pro se litigants may for good cause be "assisted" in justice courts by nonlawyers, such as family members or other individuals. Tex. R. Civ. P. 500.4(c). The intent of this 2013 change would be to make some reasonable accommodation in justice courts such as permitting an elderly or infirm party to be assisted by his children or a fairly young or unsophisticated party to be assisted by his older siblings, parents, or friends. Such pro se assistants may not receive compensation, and the judge has broad discretion as a gatekeeper in these matters to permit, deny, or limit the representation. *See* Tex. R. Civ. P. 500.4(c). A nonlawyer who attempts to assist a litigant for a fee may face unauthorized practice of law charges. *See* Tex. Penal Code §§ 38.122–.123.

§ 30.4:2 Corporations and Other Entities

Corporations no longer need to be represented by counsel. A corporation or other entity may now be represented by an employee, owner, officer, or partner of the entity who is not an attorney; a property manager or other authorized agent in an eviction case; or an attorney. Tex. R. Civ. P. 500.4(b); *see also* Tex. Gov't Code § 27.031(d). A prudent and cautious judge might request proof of authority for an officer or senior employee to act on behalf of the corporation, such as corporate minutes or a letter of authority signed by the president.

§ 30.5 Petitions

§ 30.5:1 General Requirements

The general requirements for petitions in justice courts are set forth in Tex. R. Civ. P. 502.2. An initial petition must contain—

1. the name of the plaintiff;
2. the name, address, telephone number, and fax number, if any, of the plaintiff's attorney, if applicable, or the address, telephone number, and fax number, if any, of the plaintiff;
3. the name, address, and telephone number, if known, of the defendant;
4. the amount of money, if any, the plaintiff seeks;
5. a description and claimed value of any personal property the plaintiff seeks;
6. a description of any other relief requested;
7. the basis for the plaintiff's claim against the defendant; and
8. if the plaintiff consents to e-mail service of the answer and any other motions or pleadings, a statement consenting to e-mail service and e-mail contact information.

Tex. R. Civ. P. 502.1.

Except for oral motions made during trial or when all parties are present, every pleading, plea, motion, application to the court for an order, or other form of request must be written and signed by the party or its attorney and must be filed with the court. A document may be filed with the court by personal or commercial delivery, by mail, or electronically, if the court allows

electronic filing. Electronic filing is governed by Tex. R. Civ. P. 21. Tex. R. Civ. P. 502.1.

§ 30.5:2 Petitions in Debt Claims Cases

Petitions in debt claims cases, in addition to the general information required by Tex. R. Civ. P. 502.2, must contain the following information in accordance with rule 508.2.

Credit Accounts: In a claim based on a credit card, revolving credit, or open account, the petition must state—

1. the account name or credit card name;
2. the account number (which may be masked);
3. the date of issue or origination of the account, if known;
4. the date of charge-off or breach of the account, if known;
5. the amount owed as of a date certain; and
6. whether the plaintiff seeks ongoing interest.

Personal and Business Loans: In a claim based on a promissory note or other promise to pay a specific amount as of a date certain, the petition must state—

1. the date and amount of the original loan;
2. whether the repayment of the debt was accelerated, if known;
3. the date final payment was due;
4. the amount due as of the final payment date;
5. the amount owed as of a date certain; and
6. whether the plaintiff seeks ongoing interest.

Ongoing Interest: If the plaintiff seeks ongoing interest, the petition must state—

1. the effective interest rate claimed;
2. whether the interest rate is based on contract or statute; and
3. the dollar amount of interest claimed as of a date certain.

Assigned Debt: If the debt that is the subject of the claim has been assigned or transferred, the petition must state—

1. that the debt claim has been transferred or assigned;
2. the date of the transfer or assignment;
3. the name of any prior holders of the debt; and
4. the name or a description of the original creditor.

Tex. R. Civ. P. 508.2(a). Small claims case petitions require less information than debt claims cases. See section 30.5:1 above.

Practice Note: Attach any underlying written agreements with the debtor as exhibits to the petition, along with a sworn statement from the plaintiff that the documents are true and accurate copies, the relief sought is owed, and all payments, offsets, or credits due to the defendant are accounted for. These steps will support default judgment for a debt claims case in the event the defendant fails to answer. See section 30.10:1 below.

§ 30.5:3 Amending Pleadings

A party may withdraw something from or add something to a pleading, as long as the amended pleading is filed and served as provided by Tex. R. Civ. P. 501.4 not less than seven days before trial. The court may allow a pleading to be amended less than seven days before trial if the

amendment will not operate as a surprise to the opposing party. Tex. R. Civ. P. 502.7(a).

§ 30.6 Citation and Service

§ 30.6:1 Citation

The plaintiff is responsible for obtaining service on the defendant of the citation and a copy of the petition with any documents filed with the petition. Tex. R. Civ. P. 501.1(a). The citation must include the following notice in boldface type:

> **You have been sued. You may employ an attorney to help you in defending against this lawsuit. But you are not required to employ an attorney. You or your attorney must file an answer with the court. Your answer is due by the end of the 14th day after the day you were served with these papers. If the 14th day is a Saturday, Sunday, or legal holiday, your answer is due by the end of the first day following the 14th day that is not a Saturday, Sunday, or legal holiday. Do not ignore these papers. If you do not file an answer by the due date, a default judgment may be taken against you. For further information, consult Part V of the Texas Rules of Civil Procedure, which is available online and also at the court listed on this citation.**

Tex. R. Civ. P. 501.1(c). The plaintiff must provide enough copies to be served on each defendant. Tex. R. Civ. P. 501.1(d).

§ 30.6:2 Service of Citation

No person who is a party to or interested in the outcome of the suit may serve citation in that suit, and, unless otherwise authorized by written court order, only a sheriff or constable may serve a citation in an eviction case, a writ that requires the actual taking of possession of a person, property, or thing, or process requiring that an enforcement action be physically enforced by the person delivering the process. Other citations may be served by—

1. a sheriff or constable;
2. a process server certified under order of the supreme court;
3. the clerk of the court, if the citation is served by registered or certified mail; or
4. a person authorized by court order who is eighteen years of age or older.

Tex. R. Civ. P. 501.2(a). Citation must be served by (1) delivering a copy of the citation with a copy of the petition attached to the defendant in person, after endorsing the date of delivery on the citation, or (2) mailing a copy of the citation with a copy of the petition attached to the defendant by registered or certified mail, restricted delivery, with return receipt or electronic return receipt requested. Tex. R. Civ. P. 501.2(b). A citation cannot be served on a Sunday except in attachment, garnishment, sequestration, or distress proceedings. Tex. R. Civ. P. 501.2(d).

§ 30.6:3 Alternate Service; Service by Publication

Alternative Service of Citation: If the methods under Tex. R. Civ. P. 501.2(b) are insufficient to serve the defendant, the plaintiff, the constable, the sheriff, the process server certified under order of the supreme court, or other person authorized to serve process, may make a request for alternative service. This request must include a sworn statement describing the methods attempted under rule 501.2(b) and stating the defendant's usual place of business or residence or other place where the defendant can probably be found. The court may authorize the following types of alternative service:

1. Mailing a copy of the citation with a copy of the petition attached by first-class mail to the defendant at a specified address and also leaving a copy of the citation with petition attached at the defendant's residence or other place where the defendant can probably be found with any person found there who is at least sixteen years of age.
2. Mailing a copy of the citation with a copy of the petition attached by first-class mail to the defendant at a specified address and also serving by any other method that the court finds is reasonably likely to provide the defendant with notice of the suit.

Tex. R. Civ. P. 501.2(e).

Service by Publication: In the event that service of citation by publication is necessary, the process is governed by the rules in county and district court. Tex. R. Civ. P. 501.2(f).

§ 30.7 Answer

A defendant must file with the court a written answer to a lawsuit as directed by the citation and must also serve a copy of the answer on the plaintiff. The answer must contain—

1. the name of the defendant;
2. the name, address, telephone number, and fax number, if any, of the defendant's attorney, if applicable, or the address, telephone number, and fax number, if any, of the defendant; and
3. a statement consenting to e-mail service, if the defendant consents to e-mail service, and e-mail contact information.

Tex. R. Civ. P. 502.5(a). An answer that denies all of the plaintiff's allegations without specifying the reasons is sufficient to constitute an answer or appearance and does not bar the defendant from raising any defense at trial. Tex. R. Civ. P. 502.5(b).

The answer is due by the end of the fourteenth day after the day the defendant was served with the citation and petition. If the fourteenth day is a Saturday, Sunday, or legal holiday, the answer is due on the next day that is not a Saturday, Sunday, or legal holiday. If the fourteenth day falls on a day during which the court is closed before 5:00 P.M., the answer is due on the court's next business day. Tex. R. Civ. P. 502.5(d). If the defendant was served by publication, the answer is due by the end of the forty-second day after the day the citation was issued. Tex. R. Civ. P. 502.5(e). Computation of time and timely filing rules are addressed in Tex. R. Civ. P. 500.5. See section 30.1:3 for computation of time and timely filing rules in justice courts.

If the defendant files an answer or otherwise appears in a case before a default judgment is signed by the judge, the judge must not render a default judgment and must set the case for trial. Tex. R. Civ. P. 508.3(d).

Practice Note: Under rule 508.3(d), an unsworn general denial is sufficient to avoid a default judgment in a debt claim in justice court. However, if a debt claim suit is appealed de novo to the county court as a suit on a sworn account, the defendant's denial will need to be under oath and specific. See section 14.21:5 in this manual.

§ 30.8 Discovery

§ 30.8:1 Pretrial Discovery

Pretrial discovery is limited to that which the judge considers reasonable and necessary. Any requests for pretrial discovery must be presented to the court for approval by written motion. The motion must be served on the responding party. Unless a hearing is requested, the judge may

rule on the motion without a hearing. Failure to comply with a discovery order can result in sanctions, including dismissal of the case or an order to pay the other party's discovery expenses. Tex. R. Civ. P. 500.9(a).

In contrast to other trial courts, rule 500.9 prohibits plaintiffs from attaching any discovery, admissions, interrogatories, disclosures, production, depositions on written questions, or oral deposition requests to plaintiff's petition. Some judges may be amenable to the parties' submitting agreed orders of discovery and dispense with an oral hearing on the matter. It is a good idea to check with the clerk of the individual court to see how the court prefers to set discovery matters. Practitioners should inquire whether the judge prefers that specific proposed discovery be propounded and provided to the court in advance of a hearing or whether the judge will likely grant permission to conduct discovery without reviewing particular discovery requests in advance of their being presented to the other party. Often, judges may admonish parties conducting discovery to be sure that their discovery is easily understandable where the opposing party is acting pro se.

Subpoenas: Subpoenas may be used by parties or the judge to command a person or entity to attend and give testimony at a hearing or trial. A person may not be required by subpoena to appear in a county that is more than 150 miles from where the person resides or is served. Tex. R. Civ. P. 500.8(a). The clerk of the justice court or an attorney authorized to practice in Texas, as an officer of the court, may issue a subpoena, which must meet the requirements of rule 500.8. Tex. R. Civ. P. 500.8(b), (c). A subpoena may be served at any place within the state of Texas by any sheriff or constable of the state of Texas or by any person who is not a party and is eighteen years of age or older. If the witness is represented by an attorney of record in the proceeding, the subpoena may be served on that attorney. Proof of service must be made by filing either—

1. the witness's signed written memorandum attached to the subpoena showing that the witness accepted the subpoena; or
2. a statement by the person who made the service stating the date, time, and manner of service and the name of the person served.

Tex. R. Civ. P. 500.8(d). If a subpoena commanding testimony is directed to a corporation, partnership, association, governmental agency, or other organization and the matters on which examination is requested are described with reasonable particularity, the organization must designate one or more persons to testify on its behalf as to matters known or reasonably available to the organization. Tex. R. Civ. P. 500.8(e).

§ 30.8:2 Postjudgment Discovery

Postjudgment discovery is not required to be filed with the court. The party requesting discovery must give the responding party at least thirty days to respond to a postjudgment discovery request. The responding party may file a written objection with the court within thirty days of receiving the request. If an objection is filed, the judge must hold a hearing to determine if the request is valid. If the objection is denied, the judge must order the party to respond to the request. If the objection is upheld, the judge may reform the request or dismiss it entirely. Tex. R. Civ. P. 500.9(b).

§ 30.9 Other Preliminary Motions

The intent of the 2013 changes in the rules of procedure for justice courts was to provide a less cumbersome and less hypertechnical forum for parties to resolve less complex and lower dollar cases more quickly and with less cost than in county and district courts. A major concern was

to prevent unrepresented parties from feeling ambushed by procedures employed by legal counsel on the other side. Wise counsel for the plaintiff or defendant might be more judicious in filing preliminary motions in justice courts than they would in other trial courts. While it might be advisable always to raise the issue of a defect in parties or motions to clarify or correct insufficient pleadings (the justice court version of special exceptions), motions should be used sparingly. Courts may be reluctant to have a pro se party replead when it is clear what the basic damages are and what relief is being sought or what the defense is—even where legal terms are not clearly invoked.

Nevertheless, a party may file a motion with the court asking that another party be required to clarify a pleading. The court must determine if the pleading is sufficient to place all parties on notice of the issues in the lawsuit and may hold a hearing to make that determination. If the court determines a pleading is insufficient, the court must order the party to amend the pleading and set a date by which the party must amend. If a party fails to comply with the court's order, the pleading may be stricken. Tex. R. Civ. P. 502.7(b).

Parties may amend their pleadings up to seven days before trial. If the matter raised in the amendment would not be a surprise to the other side, the court, at its discretion, could allow an amendment offered less than seven days before trial. Tex. R. Civ. P. 502.7(a).

Parties in justice court civil suits, as in other trial courts, can file cross-claims, counter claims, and third party claims. *See* Tex. R. Civ. P. 502.6.

§ 30.10 Default Judgment

Probably a majority of collections cases in justice court are resolved by default judgments. However, it is prudent to thoroughly inspect your file prior to seeking judgment.

- Before filing suit, check to make sure you have a copy of the demand letter sent; check the spelling of names; verify dates of birth, addresses, account information, and affidavits; and check the amount pled in the petition with all supporting documents.
- After filing suit, verify that the filing was received by the court either electronically, by mail, by messenger, or in person.
- Once service is made, confirm that the proper person was served and that the citation return is accurate.

§ 30.10:1 Failure to Answer

If the defendant fails to file an answer by the date stated in Tex. R. Civ. P. 502.5, the judge must ensure that service was proper and may hold a hearing for this purpose. If it is determined that service was proper, the judge must render a default judgment in the following manner:

1. *Claim Based on Written Document.* If the claim is based on a written document signed by the defendant and a copy of the document has been filed with the court and served on the defendant, along with a sworn statement from the plaintiff that this is a true and accurate copy of the document and the relief sought is owed and all payments, offsets, or credits due to the defendant have been accounted for, the judge must render judgment for the plaintiff in the requested amount, without any necessity for a hearing. The plaintiff's attorney may also submit affidavits supporting an award of attorney fees to which the plaintiff is entitled, if any.
2. *Other Cases.* Except as provided in the above paragraph, a plaintiff who

> seeks a default judgment against a defendant must request a hearing, orally or in writing. The plaintiff must appear at the hearing and provide evidence of its damages. If the plaintiff proves its damages, the judge must render judgment for the plaintiff in the amount proven. If the plaintiff is unable to prove its damages, the judge must render judgment in favor of the defendant. With the permission of the court, a party may appear at a hearing by means of telephone or an electronic communication system.

Tex. R. Civ. P. 503.1(a). If a defendant files an answer or otherwise appears in a case before a default judgment is signed by the judge, the judge must not enter a default judgment and the case must be set for trial as described in rule 503.3.

§ 30.10:2 Failure to Appear

If a defendant who has answered fails to appear for trial, the court may proceed to hear evidence on liability and damages and render judgment accordingly. Tex. R. Civ. P. 503.1(c).

§ 30.10:3 Notice of Default Judgment

The plaintiff requesting a default judgment must provide to the clerk in writing the last known mailing address of the defendant at or before the time the judgment is signed. When a default judgment is signed, the clerk must immediately mail written notice of the judgment to the defendant at the address provided by the plaintiff and note the fact of such mailing on the docket. The notice must state the number and style of the case, the court in which the case is pending, the names of the parties in whose favor and against whom the judgment was rendered, and the date the judgment was signed. Failure to comply with the provisions of rule 503.1(d) does not affect the finality of the judgment. Tex. R. Civ. P. 503.1(d).

§ 30.10:4 Additional Requirements for Debt Claims

Default judgments in debt claim cases have additional requirements beyond what is required in other collections cases. Those rules are clearly outlined in rule 508.3. Generally, if the defendant does not file an answer to a claim by the answer date or otherwise appear in the case, the judge must promptly render a default judgment on the plaintiff's proof of the amount of damages. Tex. R. Civ. P. 508.3(a).

Proving Damages: Evidence of plaintiff's damages must either be attached to the petition and served on the defendant or submitted to the court after the defendant's failure to answer by the answer date. Tex. R. Civ. P. 508.3(b)(1). Evidence of plaintiff's damages may be offered in a sworn statement or in live testimony. The evidence offered may include documentary evidence. Tex. R. Civ. P. 508.3(b)(2). The amount of damages is established by evidence—

1. that the account or loan was issued to the defendant and the defendant is obligated to pay it;
2. that the account was closed or the defendant breached the terms of the account or loan agreement;
3. of the amount due on the account or loan as of a date certain after all payment credits and offsets have been applied; and
4. that the plaintiff owns the account or loan and, if applicable, how the plaintiff acquired the account or loan.

Tex. R. Civ. P. 508.3(b)(3).

Practice Note: Include as much information about damages as possible in the initial petition, including the elements listed in rule 508.3(b)(3).

A petition detailed enough to support summary disposition should support a default judgment. Additionally, information about the initial owner of the debt and all assignees and transferees can help the debtor recall the original debt arrangement that supports the claim.

Documentary evidence may be considered if it is attached to a sworn statement made by the plaintiff or its representative, a prior holder of the debt or its representative, or the original creditor or its representative, that attests that—

1. the documents were kept in the regular course of business;
2. it was the regular course of business for an employee or representative with knowledge of the act recorded to make the record or to transmit information to be included in such record;
3. the documents were created at or near the time or reasonably soon thereafter; and
4. the documents attached are the original or exact duplicates of the original.

Tex. R. Civ. P. 508.3(b)(4).

A judge is not required to accept a sworn statement if the source of information or the method or circumstances of preparation indicate lack of trustworthiness. But a judge may not reject a sworn statement only because it is not made by the original creditor or because the documents attested to were created by a third party and subsequently incorporated into and relied on by the business of the plaintiff. Tex. R. Civ. P. 508.3(b)(5).

Hearing: The judge may enter a default judgment without a hearing if the plaintiff submits sufficient written evidence of its damages and should do so to avoid undue expense and delay. Otherwise, the plaintiff may request a default judgment hearing at which the plaintiff must appear, in person or by telephonic or electronic means, and prove its damages. If the plaintiff proves its damages, the judge must render judgment for the plaintiff in the amount proved. If the plaintiff is unable to prove its damages, the judge must render judgment in favor of the defendant. Tex. R. Civ. P. 508.3(c).

Appearance: If the defendant files an answer or otherwise appears in a case before a default judgment is signed by the judge, the judge must not render a default judgment and must set the case for trial. Tex. R. Civ. P. 508.3(d).

Postanswer Default: If a defendant who has answered fails to appear for trial, the court may proceed to hear evidence on liability and damages and render judgment accordingly. Tex. R. Civ. P. 508.3(e).

§ 30.11 Summary Disposition

Rule 166a no longer applies in justice courts. In place of summary judgment, the summary disposition procedure is set out in rule 503.2. Summary disposition is in some ways similar to the summary judgment procedures outlined in rule 166a, but there are significant differences. First, a motion for summary disposition may be heard as soon as fourteen days after filing with the court. Tex. R. Civ. P. 500.3(c). Second, a response to a summary disposition may be filed at any time—including on the day of hearing. Tex. R. Civ. P. 503.2(b). Third, the hearing on summary disposition must be an oral hearing unless both parties agree to dispense with the hearing and allow it to be done by submission. Tex. R. Civ. P. 500.3(c). Fourth, and probably most significant, a respondent may make an appearance at the summary disposition hearing and for the first time raise defenses and facts which had not been raised previously, and the judge may consider that evidence in determining whether or not to grant summary disposition.

Recognizing these distinctions between summary judgments and summary dispositions,

movants in summary disposition matters nonetheless should probably treat the drafting of the motion the same as a motion for summary judgment. All pertinent affidavits, documents, and records should be attached to support the motion to prove that there are no material fact issues and that movant is entitled to judgment as a matter of law. The motion must be granted if it shows that—

1. there are no genuinely disputed facts that would prevent a judgment in favor of the party;
2. there is no evidence of one or more essential elements of a defense which the defendant must prove to defeat the plaintiff's claim; or
3. there is no evidence of one or more essential elements of the plaintiff's claim.

Tex. R. Civ. P. 503.2(a). Respondents, although not required, should file a written response raising fact issues or indicating which elements of movant's claim are omitted or insufficient. See Tex. R. Civ. P. 503.2(b). It is better to file the response before hearing, but if that is not practical, have courtesy copies available for the court and opposing parties at the oral hearing. The court may require respondents who fail to file a written response to a summary disposition and raise new facts or defenses at the hearing to file that additional testimony in writing.

The judge may enter judgment as to the entire case or may specify the facts that are established and direct such further proceedings in the case as are just. Tex. R. Civ. P. 503.2(d).

§ 30.12 Pretrial Conference

The rules permit judges to set cases for pretrial conferences. Some judges, particularly in lower volume courts, view pretrial conferences as a productive use of court time and regularly schedule pretrial conferences for every case prior to placing it on the court's trial docket. Other judges view pretrial conferences as a waste of time, citing that the frequent changing and discharging of attorneys in justice court cases make it difficult to hold individuals to pretrial conference agreements in which they were not present.

If all parties have appeared in a lawsuit, the court, at any party's request or on its own, may set a case for a pretrial conference. Reasonable notice must be sent to all parties at their addresses of record. Appropriate issues for the pretrial conference include—

1. discovery;
2. the amendment or clarification of pleadings;
3. the admission of facts and documents to streamline the trial process;
4. a limitation on the number of witnesses at trial;
5. the identification of facts, if any, which are not in dispute between the parties;
6. mediation or other alternative dispute resolution services;
7. the possibility of settlement;
8. trial setting dates that are amenable to the court and all parties;
9. the appointment of interpreters, if needed;
10. the application of a Texas Rule of Civil Procedure not in Part V or a Texas Rule of Evidence; and
11. any other issue that the court deems appropriate.

Tex. R. Civ. P. 503.4(a).

§ 30.13 Alternative Dispute Resolution

The Texas Rules of Civil Procedure encourage the peaceable resolution of disputes through alternative dispute resolution, including mediation, and the early settlement of pending litigation through voluntary settlement procedures. For that purpose, the judge may order any case to mediation or another appropriate and generally accepted alternative dispute resolution process. The court must not order mediation or any other alternative dispute resolution process in an eviction case if it would delay trial. Tex. R. Civ. P. 503.5.

Many justice courts make extensive use of mediation to resolve collection matters. Some courts arrange mediation as a free or low cost service for litigants. Some courts arrange for mediation in advance of setting the trial date and may, through settlement, avoid having to place those matters on a trial docket.

Other courts set cases for mediation and trial on the same date, understanding that they will go to trial immediately if the matter is not settled in mediation. It is a good idea to contact the particular court where your collections case is filed to ascertain whether the judge permits or requires mediation.

§ 30.14 Trial

The trial of a collections case in justice court is similar to trial in county courts. At trial, the judge can summon and question witnesses. Tex. R. Civ. P. 500.6. A previously filed and completed sworn business record affidavit may reduce the court time needed to try a collection matter. It is important to remember in debt claim cases that all the elements required for debt claim outlined in Tex. R. Civ. P. 508.2 must be proved at trial either through affidavit properly filed or through live testimony. If handling a transferred or acquired credit card debt case, the practitioner should be prepared to identify the original creditor and the dates and names of all subsequent transfers and/or assignments and verify that the account was closed or the defendant breached the terms of the contract. While justice court cases by definition involve smaller amounts than in other trial courts, counsel should always confer in advance of trial with any witnesses intended to be called. It is a waste of time for everyone when a business sends a representative to court who is not familiar with the company's records and no sworn business affidavit was previously filed.

The judge may set the case for trial with at least forty-five days' notice to all parties that states the date, time, and place of the setting. Trial may be set with less notice if the judge determines that an earlier setting is required in the interest of justice. Tex. R. Civ. P. 503.3(a).

On the day of the trial setting, the judge must call all of the cases set for trial that day. If the plaintiff fails to appear when the case is called for trial, the judge may postpone or dismiss the suit. If the defendant fails to appear when the case is called for trial, the judge may postpone the case or may proceed to take evidence. If the plaintiff proves its case, judgment must be awarded for the relief proved. If the plaintiff fails to prove its case, judgment must be rendered against the plaintiff. Tex. R. Civ. P. 503.6.

Any of the parties who want to proceed to trial by jury must file a request in writing and make payment in the amount of $22. Tex. R. Civ. P. 504.1(a), (b). The jury panel consists of six jurors selected similarly to jury trials in county courts. Tex. R. Civ. P. 504.2(f); *see also* Tex. R. Civ. P. 234. The only major difference from other trial courts is the judge cannot charge the jury in a justice court trial. Tex. R. Civ. P. 504.3; *see also* Tex. R. Civ. P. 271.

§ 30.15 Motions for New Trial, to Set Aside Default Judgment, or to Reinstate

Movants have fourteen days from judgment or dismissal to file any of these motions, and the judge has twenty-one days to rule. Tex. R. Civ. P. 505.3. After the twenty-first day after judgment or dismissal if the judge has not ruled, the motion is denied by operation of law. Tex. R. Civ. P. 505.3(e).

§ 30.16 Appeals

A party has a right to appeal a judgment—even an agreed judgment—from a justice court. The appeal is timely if done within twenty-one days from the date of signing of the judgment or twenty-one days after the denial of a motion for new trial, a motion setting aside a default judgment, or a motion to reinstate. Tex. R. Civ. P. 506.1(a). For plaintiffs appealing a judgment granted for defendant, the appeal bond amount is $500. For a defendant appealing a judgment the amount is calculated at twice the amount of the judgment. The appeal bond needs to be "payable to the appellee and conditioned on the appellant's prosecution of the appeal to effect and payment of any judgment and all costs rendered against it on appeal." Tex. R. Civ. P. 506.1(b).

In lieu of a surety bond, the appellant can appeal by depositing a cash bond with the court or file a sworn affidavit of inability to pay. A cash deposit must be payable to the appellee and must be conditioned on the appellant's prosecution of its appeal to effect and payment of any judgment and all costs rendered against it on appeal. Tex. R. Civ. P. 506.1(c).

An appellant who cannot furnish a bond or pay a cash deposit in the amount required may instead file a statement of inability to afford payment of court costs. The statement must be on the form approved by the supreme court or include the information required by the court-approved form and may be the same one that was filed with the petition. The statement may be contested as provided in Tex. R. Civ. P. 502.3(d) within seven days after the opposing party receives notice that the statement was filed. If the contest is sustained, the appellant may appeal that decision by filing notice with the justice court within seven days of that court's written order. The justice court must then forward all related documents to the county court for resolution. The county court must set the matter for hearing within fourteen days and hear the contest de novo, as if there had been no previous hearing, and, if the appeal is granted, must direct the justice court to transmit to the clerk of the county court the transcript, records, and papers of the case, as provided in these rules. If the appellant does not appeal the ruling sustaining the contest or if the county court denies the appeal, the appellant may, within five days, post an appeal bond or make a cash deposit in compliance with this rule. Tex. R. Civ. P. 506.1(d).

If a statement of inability to afford payment of court costs is filed, the court must provide notice to all other parties that the statement was filed no later than the next business day. Within seven days of filing a bond or making a cash deposit, an appellant must serve written notice of the appeal on all other parties using a method approved under Tex. R. Civ. P. 501.4. Tex. R. Civ. P. 506.1(e).

Appeals from justice courts to county courts are by trial de novo. Tex. R. Civ. P. 506.3. After a case is appealed or after twenty-one days from the signing of a judgment that is not appealed, the justice court loses plenary jurisdiction over the case. Tex. R. Civ. P. 507.1.

Chapter 31

Attorney's Fees

Chapter 31

Attorney's Fees

§ 31.1 Authorities for Award of Attorney's Fees

The general rule regarding attorney's fees is that, absent a contractual or statutory provision to the contrary, each party bears the cost of its own attorney's fees. *Harrison v. Gemdrill International, Inc.*, 981 S.W.2d 714, 719 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). This rule is called the "American Rule," in contrast to the practice in England, where the loser pays the prevailing party's attorney's fees. *See Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310–11 (Tex. 2006).

There are two exceptions to the American Rule. The first is when an award of attorney's fees is allowed by statute or in equity. Statutes that allow for recovery of attorney's fees include the following:

1. Tex. Civ. Prac. & Rem. Code ch. 38—recovery of attorney's fees
2. Tex. Civ. Prac. & Rem. Code § 37.009—declaratory judgments
3. Tex. Bus. & Com. Code § 27.01(e)—statutory fraud
4. Tex. Civ. Prac. & Rem. Code § 31.002(e)—turnover
5. Tex. Bus. & Com. Code § 17.50(c), (d)—the Deceptive Trade Practices–Consumer Protection Act (DTPA)
6. Tex. Fin. Code § 392.403—the Texas Debt Collection Act
7. Tex. Bus. & Com. Code §§ 9.607(d), 9.608—nonjudicial foreclosure of a security interest in personal property

In total, there are more than two hundred statutory exceptions that allow attorney's fees awards to a prevailing party.

Attorney's fees may also be recovered "in equity," that is, in certain cases in which there is no statute or contract providing for attorney's fees. *Nationwide Mutual Insurance Co. v. Holmes*, 842 S.W.2d 335, 341 (Tex. App.—San Antonio 1992, writ denied). The two equitable grounds for recovery are (1) the common-fund doctrine found in *Knebel v. Capital National Bank*, 518 S.W.2d 795, 798–99 (Tex. 1974) (distributing burden of expenses among those who share in an accomplished benefit); and (2) attorney's fees as damages, found in *Lesikar v. Rappeport*, 33 S.W.3d 282, 306 (Tex. App.—Texarkana 2000, pet. denied) (attorney's fees available under equity when defendant's wrongful acts made necessary prior litigation with third party).

The second exception allowing for recovery of attorney's fees is when a contract provides for recovery by a prevailing party. Such provisions are commonly found in promissory notes as well as in invoices and other contracts. To prevail means to "obtain actual and meaningful relief, something that materially alters the parties' legal relationship." *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 485–86 (Tex. 2019). Where there is a prevailing-party contract clause, a party defending a claim may obtain relief for attorney's fees for successfully defending against a claim and securing a take-nothing judgment. The party does not necessarily need to obtain monetary relief to be a prevailing party. *See Rohrmoos Venture*, 578 S.W.3d at 486. While no monetary relief is required to be a prevailing party under a contract

with a prevailing-party clause, the law is different with regard to Texas Civil Practice and Remedies Code chapter 38, which requires that money damages be awarded to support a claim for attorney's fees. *Rohrmoos Venture*, 578 S.W.3d at 484. See section 31.2:3 below.

§ 31.2 Texas Civil Practice and Remedies Code Section 38.001

§ 31.2:1 Permitted Claims under Section 38.001

An often-used statutory basis for recovery of attorney's fees is Tex. Civ. Prac. & Rem. Code § 38.001, which specifically allows for recovery of attorney's fees for the following claims:

1. rendered services;
2. performed labor;
3. furnished materials;
4. freight or express overcharges;
5. lost or damaged freight or express;
6. killed or injured stock;
7. sworn accounts; and
8. oral or written contracts.

See section 31.11 below for information about judicial notice of attorney's fees in Code chapter 38 claims.

§ 31.2:2 Claims Not Permitted

Certain claims for attorney's fees do not fall within the purview of Tex. Civ. Prac. & Rem. Code ch. 38, and thus cannot serve as a basis for recovering attorney's fees.

Recovery is not allowed for a defendant who successfully defeats a plaintiff's claim, because "[c]hapter 38 does not provide for the recovery of attorney's fees by a defendant who only defends against a plaintiff's contract claim and presents no contract claim of its own." *Energen Resources Maq v. Dalbosco*, 23 S.W.3d 551, 558 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

Recovery is not allowed in a suit to rescind a contract. *See American Apparel Products v. Brabs*, 880 S.W.2d 267, 270 (Tex. App.—Houston [14th Dist.] 1994, no writ).

Finally, chapter 38 applies to recovery of attorney's fees only from individuals and corporations. It does not provide for recovery from limited liability companies, partnerships, or limited partnerships. *First Cash, Ltd. v. JQ-Parkdale, LLC*, 538 S.W.3d 189, 194 (Tex. App.—Corpus Christi–Edinburg 2018, no pet.) (citing *Alta Mesa Holdings, LP v. Ives*, 488 S.W.3d 438, 453–55 (Tex. App.—Houston [14th Dist.] 2016, pet. denied)).

§ 31.2:3 Requirements for Seeking Attorney's Fees under Section 38.001

To recover attorney's fees under Tex. Civ. Prac. & Rem. Code § 38.001, three statutory requirements must be met:

1. the claimant must be represented by an attorney;
2. the claimant must present the claim to the opposing party or to a duly authorized agent of the opposing party; and
3. payment for the just amount owed must not have been tendered before the expiration of the thirtieth day after the claim is presented.

Tex. Civ. Prac. & Rem. Code § 38.002; *Harrison v. Gemdrill International, Inc.*, 981 S.W.2d 714, 719 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); *Panizo v. Young Men's Christian Ass'n*, 938 S.W.2d 163, 168 (Tex. App.—Houston [1st Dist.] 1996, no writ).

In addition, any award of attorney's fees under chapter 38 requires recovery of monetary damages. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 484 (Tex. 2019) (citing *Green International, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997)).

§ 31.2:4 Presentment of Claim

Recovery of attorney's fees under chapter 38 requires that the claim be presented to the opposing party. Tex. Civ. Prac. & Rem. Code § 38.002(2). Oral presentment is acceptable, and the demand need not be sent by an attorney. No particular form of presentment is required. *See France v. American Indemnity Co.*, 648 S.W.2d 283, 285–86 (Tex. 1983) (sending invoices as well as making telephone call sufficient to prove presentment); *Jones v. Kelley*, 614 S.W.2d 95, 100 (Tex. 1981). An invoice to the debtor before referral to the attorney constitutes presentment. *See Adams v. Petrade International, Inc.*, 754 S.W.2d 696, 719 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (sending invoice sufficient); *Gensco, Inc. v. Transformaciones Metalurgicias Especiales, S.A.*, 666 S.W.2d 549, 554 (Tex. App.—Houston [14th Dist.] 1984, writ dism'd) (sending invoice sufficient). Whatever form it takes, the demand should disclose what is claimed to be owed with reasonable accuracy. *See Lewis v. Deaf Smith Electric Cooperative, Inc.*, 768 S.W.2d 511, 513 (Tex. App.—Amarillo 1989, no writ); *Seureau v. Mudd*, 515 S.W.2d 746, 749 (Tex. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.); *W.G. Tufts & Son v. Herider Farms, Inc.*, 485 S.W.2d 300, 303–04 (Tex. App.—Tyler 1972, writ ref'd n.r.e.). Furthermore, the presentment can be made after suit is filed as long as the three requirements of section 38.002 are met. Texas courts have long held that "[p]resentment may be made either before or after filing suit, provided it is made at least thirty days before judgment, and no particular form of presentment is required." *McDowell v. Bier*, No. 2-09-231-CV, 2010 WL 1427244, at *6 (Tex. App.—Fort Worth Apr. 8, 2010, no pet.) (mem. op.) (citing *Harrison v. Gemdrill International, Inc.*, 981 S.W.2d 714, 719 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); *Sterling Construction Co. v. West Texas Equipment Co.*, 597 S.W.2d 515, 518 (Tex. App.—Amarillo 1980, no writ)).

The filing of a lawsuit by itself does not suffice as a means of presentment of the claim. *Huff v. Fidelity Union Life Insurance Co.*, 312 S.W.2d 493, 500 (Tex. 1958); *Jim Howe Homes, Inc. v. Rogers*, 818 S.W.2d 901, 904 (Tex. App.—Austin 1991, no writ). A defendant's offer to settle does not defeat a creditor's right to attorney's fees. *Commercial Union Insurance Co. v. La Villa Independent School District*, 779 S.W.2d 102, 107 (Tex. App.—Corpus Christi–Edinburg 1989, no writ).

§ 31.2:5 Excessive Demands

Practitioners should be aware that presenting excessive demands can create problems. Generally, "[a] creditor who makes an excessive demand upon a debtor is not entitled to attorney's fees for subsequent litigation required to recover the debt." *Findlay v. Cave*, 611 S.W.2d 57, 58 (Tex. 1981); *Panizo v. Young Men's Christian Ass'n*, 938 S.W.2d 163, 169 (Tex. App.—Houston [1st Dist.] 1996, no writ). However, Texas courts have held that a demand is not excessive simply because it is greater than the amount later determined to be due by the fact finder. The test for excessiveness is not purely mathematical. For example, in *Panizo* a demand for $125,000 was not found to be excessive even though the jury awarded only $1,000. According to the *Panizo* court, the "dispositive inquiry for determining whether a demand is excessive is whether the claimant acted unreasonably or in bad faith." *Panizo*, 938 S.W.2d at 169 (citing *Findlay*, 611 S.W.2d at 58). *See also Standard Constructors, Inc. v. Chevron Chemical Co.*, 101 S.W.3d 619, 627–28 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (no bad faith when

initial demand was $531,424 and amount claimed at trial was only $97,784).

Two cases have been identified where courts found that demands seeking twice the amount actually due were excessive. *See Mossler v. Nouri*, No. 03-08-00476, 2010 WL 2133940, at *8 (Tex. App.—Austin May 27, 2010, pet. denied) (mem. op.) (plaintiff through attorney demanded twice what plaintiff admitted at trial was owed, and plaintiff's attorney told defendants an amount that would satisfy their payment obligations but plaintiff later refused the tender of that amount by defendants); *Wayne v. A.V.A. Vending, Inc.*, 52 S.W.3d 412, 418 (Tex. App.—Corpus Christi–Edinburg 2001, pet. denied) (demand of double holdover rent excessive when contract clause regarding such rent "had been manifestly waived").

Thus, an attorney should evaluate the documentation supporting the claim before sending a demand letter, especially where the amount owed is set forth in a document such as a lease or promissory note. Such evaluation is required for consumer debts covered by the federal Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p. *Clomon v. Jackson*, 988 F.2d 1314, 1321 (2d Cir. 1993) (interpreting section 1692e(3) and (10) to require attorney participation). See section 2.16:5 in this manual for additional information regarding attorney participation in debt collection efforts.

§ 31.2:6 Pleading and Proof

The plaintiff must plead and prove that presentment of a contract claim was made to the opposing party and that the party failed to tender performance. *Ellis v. Waldrop*, 656 S.W.2d 902, 905 (Tex. 1983); *see also Paramount Pipe & Supply Co. v. Muhr*, 749 S.W.2d 491, 496 (Tex. 1988) (no need to plead particular evidence as long as fair notice is given that plaintiff is seeking recovery of attorney's fees; any defects should be addressed by special exceptions); *Panizo v. Young Men's Christian Ass'n*, 938 S.W.2d 163, 168 (Tex. App.—Houston [1st Dist.] 1996, no writ) (burden of proof on claimant to plead and prove presentment and failure to tender performance) (citing *Ellis*, 656 S.W.2d at 905). For a discussion of sufficiency of the evidence, see *Aquila Southwest Pipeline, Inc. v. Harmony Exploration, Inc.*, 48 S.W.3d 225, 240–41 (Tex. App.—San Antonio 2001, pet. denied); *see also Svoboda v. Thai*, No. 01-17-00584-CV, 2019 WL 1442434, at *7 (Tex. App.—Houston [1st Dist.] Apr. 2, 2019, no pet.) (presentment requirement not met when amount demanded in demand letter included attorney's fees but did not specify how much of amount was damages and how much was attorney's fees).

§ 31.2:7 Oral and Written Contracts

Statutory attorney's fees are available for a claim on a contract, oral or written. Tex. Civ. Prac. & Rem. Code § 38.001(8). There is no need for an attorney's fee provision in a contract to recover attorney's fees under this statute. *First City Bank v. Guex*, 677 S.W.2d 25, 30 (Tex. 1984); *Dickerson v. DeBarbieris*, 964 S.W.2d 680, 687 n.11 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

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

§ 31.2:8 Rendered Services

For the purposes of Texas Civil Practice and Remedies Code chapter 38, "rendered services" include generally any act performed for the benefit of another under some arrangement or agreement to perform the service. *Van Zandt v. Fort Worth Press*, 359 S.W.2d 893, 895 (Tex.

1962) (interpreting predecessor statute); *Mathews Construction Co. v. Jasper Housing Construction Co.*, 528 S.W.2d 323, 326–27 (Tex. App.—Beaumont 1975, writ ref'd n.r.e.). Rendered services include the following:

1. Ground preparation work performed by a dirt contractor. *Mathews Construction Co.*, 528 S.W.2d at 327.

2. Utility company's furnishing of electricity to owners of apartment houses. *Caston v. Texas Power & Light Co.*, 501 S.W.2d 472, 473 (Tex. App.—Texarkana 1973, no writ).

3. Advertising and promotional services provided by the plaintiff, including those provided by third parties retained by the plaintiff for the defendant's benefit. *Clark Advertising Agency, Inc. v. Tice*, 490 F.2d 834, 837–38 (5th Cir. 1974).

4. Architect's services. *Allison v. Douglas*, 531 S.W.2d 445, 447–48 (Tex. App.—Waco 1975, no writ).

5. Engineer's services. *Mitchell v. M.M.M., Inc.*, 261 S.W.2d 472, 475 (Tex. App.—Galveston 1953), *rev'd on other grounds*, 265 S.W.2d 584 (Tex. 1954).

6. Accountant's services. *Williams v. Milliger*, 352 S.W.2d 794, 796 (Tex. App.—Houston 1961, writ ref'd n.r.e.).

7. Attorney's services. *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1487–88 (5th Cir. 1990); *see also Youngblood v. Wilson & Cureton*, 321 S.W.2d 887, 888 (Tex. App.—Fort Worth 1959, writ ref'd n.r.e.) (applying predecessor statute).

§ 31.2:9 "Labor Done"

For purposes of Texas Civil Practice and Remedies Code chapter 38, a claim for "labor done" is a claim for a physical-exertion type of personal service arising out of toil or manual labor for the direct benefit of the defendant. *See Tenneco Oil Co. v. Padre Drilling Co.*, 453 S.W.2d 814, 819–20 (Tex. 1970) (interpreting predecessor statute). The toil or manual labor may be performed by employees of a business, and the business may bring the action. *Maxwell Lumber Co. v. Merle Greer Co.*, 501 S.W.2d 454, 456–57 (Tex. App.—Tyler 1973, no writ).

There must be a contractual relationship between the person performing the labor (or his employer) and the person against whom the claim is asserted. *First National Bank v. Sledge*, 653 S.W.2d 283, 288 (Tex. 1983), *superseded by statute on other grounds as recognized in Morrell Masonry Supply, Inc. v. Lupe's Shenandoah Reserve, LLC*, 363 S.W.3d 901, 906 (Tex. App.—Beaumont 2012, no pet.) (subcontractors not entitled to attorney's fees from property owner).

§ 31.2:10 "Material Furnished"

The "material" referred to in Tex. Civ. Prac. & Rem. Code § 38.001 is the substance or substances or the part, goods, stock, or the like of which anything is composed or may be made. *Pacific Coast Engineering Co. v. Trinity Construction Co.*, 481 S.W.2d 406, 407 (Tex. 1972); *Ferrous Products Co. v. Gulf States Trading Co.*, 332 S.W.2d 310, 313 (Tex. 1960). If the item furnished is the final or end product, not to be used as a component of a further or larger product, it is not "material." *See Pacific Coast Engineering Co.*, 481 S.W.2d at 407. Texas courts have held the following to be materials:

1. Water control gates furnished by a subcontractor to a general contractor to be used by the latter in a dam proj-

ect. *Pacific Coast Engineering Co.*, 481 S.W.2d at 408.

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

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

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

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

§ 31.3 Award of Attorney's Fees Based on Contract

Contracting parties may include fee-award provisions in their agreements. Such provisions need not necessarily comply with Texas Civil Practice and Remedies Code chapter 38's requirements governing oral and written contracts. *See Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 484–85 (Tex. 2019) (citing *Intercontinental Group Partnership v. KB Home Lone Star LP*, 295 S.W.3d 650, 653 (Tex. 2009)). The main difference is that, under chapter 38, a plaintiff must recover damages, whereas under a contract prevailing-party provision, the party seeking attorney's fees is not required to prove damages. For example, in *Rohrmoos*, the parties' lease agreement allowed for a fee award to the "prevailing party" in "any action to enforce the terms of [the] Lease." Noting that the lease did not explicitly require the prevailing party to recover damages in order to be awarded attorney's fees, the court determined that chapter 38's requirement that a prevailing party recover damages did not control. *Rohrmoos Venture*, 578 S.W.3d at 484–85 (citing *Green International, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997)).

§ 31.3:1 Guarantor Liability Based on Contract

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

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

§ 31.3:2 Liability of Endorser

The endorser of a note that provides for recovery of attorney's fees is liable for those fees even in the absence of an express agreement by the endorser to pay attorney's fees. *Dewey v. C.I.T. Corp.*, 374 S.W.2d 298, 299–300 (Tex. App.—Amarillo 1963, writ ref'd n.r.e.).

§ 31.4 Proving Attorney's Fees in State Court

§ 31.4:1 Amount Determined by Fact Finder

The Texas Supreme Court has held that "[t]he reasonableness of attorney's fees is ordinarily left to the fact finder, and a reviewing court may not substitute its judgment for the jury." *Smith v. Patrick W.Y. Tam Trust*, 296 S.W.3d 545, 547 (Tex. 2009) (remanding for lack of evidence) (citing *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 881 (Tex. 1990) (per curiam) (jury case)).

§ 31.4:2 Proof of Reasonableness and Necessity

Any award of attorney's fees must be supported by evidence that the fees are both reasonable and necessary. *Powell Electrical Systems, Inc. v. Hewlett Packard Co.*, 356 S.W.3d 113, 127–28 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (citing *Stewart Title Guaranty Co. v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991)). To prove reasonable attorney's fees, expert testimony is needed, most often in the form of an interested witness. *Powell*, 356 S.W.3d at 128 (citing *Garcia v. Gomez*, 319 S.W.3d 638, 642 (Tex. 2010)). An interested witness can be the attorney seeking the fees or another attorney hired to opine on the reasonableness and necessity of the fees requested. See sections 31.8 and 31.9 below for a detailed discussion about proving the reasonableness and necessity of attorney's fees.

§ 31.5 Historical Tests Applied before 2019

Historically, five separate tests have been applied to prove up attorney's fees.

The "Contingent Fee" Method: A contingent fee is "[a] fee charged for a lawyer's services only if the lawsuit is successful or is favorably settled out of court. Contingent fees are usu[ally] calculated as a percentage of the client's net recovery . . . ." *Black's Law Dictionary* 399 (11th ed. 2019); *see Mid-Continent Casualty Co. v. Kipp Flores Architects, L.L.C.*, 602 F. App'x 985, 999–1000 (5th Cir. 2015) (citing Texas and Fifth Circuit cases); *McDonald v. Fox*, No. 13-11-00479-CV, 2012 WL 5591795, at *4 (Tex. App.—Corpus Christi–Edinburg Nov. 15, 2012, no pet.) (mem. op.); *VingCard A.S. v. Merrimac Hospitality Systems, Inc.*, 59 S.W.3d 847, 869–70 (Tex. App.—Fort Worth 2001, pet. denied) (op. on reh'g).

The "Traditional Lump Sum" Method: This method relies on simple testimony that the fees are reasonable and necessary and allows for the presumption of reasonableness found in Tex. Civ. Prac. & Rem. Code § 38.003. This test allows a court to take judicial notice of reasonable and necessary fees to support and uphold a fee award. *See* Tex. Civ. Prac. & Rem. Code § 38.004; *Gill Savings Ass'n v. Chair King*, 797 S.W.2d 31, 32 (Tex. 1990). Moreover, this method was applied in *Garcia v. Gomez*, 319 S.W.3d 638, 641–43 (Tex. 2010), and often upheld in opinions from the Dallas, Fort Worth, San Antonio, and Houston (first district) courts of appeals as well as the Fifth Circuit. *See In re Pirani*, 824 F.3d 483, 501 (5th Cir. 2016) (evidence of attorney's experience, time taken from other work, total amount of fees, and reasonableness of fees charged is sufficient). This test was applied as recently as 2018 in *Propel Financial Services, LLC v. Perez*, No. 01-17-00682-CV, 2018 WL 3580935, at *6 (Tex. App.—Houston [1st Dist.] July 26, 2018, no pet.) (mem. op.).

The "Stringent Light" Method: This method requires only testifying to a lump sum of money and possibly other evidence such as a lump sum of hours, the hourly rate, and reference to some or all eight factors set out in *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 818 (Tex. 1997). *See Ferrant v. Graham Associ-*

ates, Inc., No. 02-12-00190-CV, 2014 WL 1875825, at *7–8 (Tex. App.—Fort Worth May 8, 2014, no pet.) (mem. op.); *Paez v. Trent Smith Custom Homes, LLC*, No. 04-13-00394-CV, 2014 WL 1089751, at *4–5 (Tex. App.—San Antonio Mar. 19, 2014, no pet.); *Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821, 846 (Tex. App.—Dallas 2014, no pet.).

The "Stringent Heavy Duty" or Lodestar Method: This method emphasizes contemporaneous time records, as exemplified by the supreme court's holdings in *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 760 (Tex. 2012), and *Long v. Griffin*, 442 S.W.3d 253, 255 (Tex. 2014). (Note that *Long* also allowed for the contingent fee arrangement to be used, but held that since the plaintiff recovered no money, the contingent fee arrangement could not be used, and the plaintiff had to rely on the lodestar (i.e., stringent heavy duty) method to prove up the requested fees.) In 2019, the Texas Supreme Court adopted the lodestar method as its preferred method in *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019). See section 31.6 below.

The "Ultra Stringent" or Ultra Lodestar Method: This method requires compliance with the lodestar approach but emphasizes that the most important factor is the result obtained. *See, e.g., Smith v. Patrick W.Y. Tam Trust*, 296 S.W.3d 545, 548 (Tex. 2009); *Ware v. United Fire Lloyds*, No. 09-12-00061-CV, 2013 WL 1932812, at *3 (Tex. App.—Beaumont May 9, 2013, no pet.) (mem. op.). Note that the Fifth Circuit has affirmed this test in *Gurule v. Land Guardian, Inc.*, 912 F.3d 252, 257–58 (5th Cir. 2018).

§ 31.6 Lodestar Test Prevails in 2019

On April 26, 2019, the Texas Supreme Court declared the lodestar method described at section 31.5 above to be the law in Texas. *See Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019). *Rohrmoos Venture* involved a dispute over a commercial lease that permitted the prevailing party to collect reasonable attorney's fees from the nonprevailing party. Testifying in support of the claim for $800,000 in fees, the attorney for the prevailing party stated that his hourly rate was $430 and that similar disputes would normally involve 750 to 1,000 hours of work. He then explained that this particular case required more time and effort due to the unnecessary actions of opposing counsel, which caused the case to be protracted and unnecessarily complicated. The attorney finally pointed to specific *Arthur Andersen* factors to justify the reasonableness of the fees—the amount in controversy, the complexity of the case, and his knowledge and experience. However, he presented no details regarding the work done (such as contemporaneous time records) and failed to show who performed the work, when the work was done, what work was performed, and how much time was spent on specific tasks. Consequently, the court reversed the attorney's fee award for failing to comply with the lodestar method. *Rohrmoos Venture*, 578 S.W.3d at 503–05.

The *Rohrmoos* opinion addressed the conflicting appellate court holdings regarding which test applied in awarding attorney's fees. *Rohrmoos Venture*, 578 S.W.3d at 496–97. In *El Apple I, Ltd. v. Olivas*, the supreme court had applied the lodestar method of proving attorney's fees in a case involving the Texas Commission on Human Rights Act (TCHRA). *El Apple I, Ltd.*, 370 SW.3d 757 (Tex. 2012). After *El Apple I*, however, many lower courts continued to apply methods other than the lodestar analysis in cases involving statutes other than the TCHRA. *See, e.g., Propel Financial Services, LLC v. Perez*, No. 01-17-00682-CV, 2018 WL 3580935, at *4 (Tex. App.—Houston [1st Dist.] July 26, 2018, no pet.) (mem.op.) (traditional method applied using *Arthur Andersen* factors plus contract

arrangement with client); *Ferrant v. Graham Associates, Inc.*, No. 02-12-00190-CV, 2014 WL 1875825, at *9 (Tex. App.—Fort Worth May 8, 2014, no pet.) (mem. op.) (traditional method applied; attorney stated that fees were reasonable and necessary and referred to *Arthur Andersen* factors); *Metroplex Mailing Services, LLC v. R.R. Donnelley & Sons Co.*, 410 S.W.3d 889, 900 (Tex. App.—Dallas 2013, no pet.) (traditional method applied).

The *Rohrmoos Venture* opinion unequivocally rejected the holdings in these cases:

> After *El Apple*, questions surfaced regarding whether the lodestar method applies in cases where the request for attorney's fees is not based on the TCHRA or other state statutes that require application of the lodestar method. But any doubt as to the lodestar method's applicability should have been resolved when we applied *El Apple*'s holding to a $339,000 award under a different fee-shifting statute that did not "require that attorney's fees be determined under a lodestar method."

Rohrmoos Venture, 578 S.W.3d at 495 (quoting *City of Laredo v. Montano*, 414 S.W.3d 731, 736 (Tex. 2013) (per curiam)). The court was emphatic that many lower courts were in error, noting that even after its three opinions in *El Apple I*, *City of Laredo*, and *Long v. Griffin*, 442 S.W.3d 253, 255 (Tex. 2014) (per curiam), lower courts were still upholding attorney's fees awards that did not apply the lodestar method. *Rohrmoos Venture*, 578 S.W.3d at 495–96. In the court's words, "We have clearly held . . . that generalities . . . are not sufficient to support a fee-shifting award under the lodestar method, which applies in fee-shifting situations." *Rohrmoos Venture*, 578 S.W.3d at 496.

One source of confusion was *Garcia v. Gomez*, 319 S.W.3d 638, 642–44 (Tex. 2010), where the supreme court upheld a fee award based on the traditional lump sum method. The *Rohrmoos Venture* opinion limited *Garcia* to no-evidence challenges, as opposed to legal sufficiency challenges: "*Garcia* is confined to a no-evidence challenge and should not be read, in any way, as a guiding statement on the standard for whether evidence is legally sufficient to support a fee-shifting award of attorney's fees." *Rohrmoos Venture*, 578 S.W.3d at 497. In the court's own words: "To summarize, the lodestar method as we presented it in *El Apple* applies for determining the reasonableness and necessity of attorney's fees in a fee-shifting situation . . . ." *Rohrmoos Venture*, 578 S.W.3d at 501. In short, the court declared, "It should have been clear from our opinions in *El Apple*, *Montano*, and *Long* that we intended the lodestar analysis to apply to any situation in which an objective calculation of reasonable hours worked times a reasonable rate can be employed." *Rohrmoos Venture*, 578 S.W.3d at 497–98.

In the court's words, the lodestar method has "become the guiding light" in fee-shifting jurisprudence. *Rohrmoos Venture*, 578 S.W.3d at 493 (citing *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 551–57 (2010)).

§ 31.7 Lodestar Method Generally: A Two-Step Analysis

Determining an attorney's fee award using the lodestar method requires a two-step analysis, first set forth in 2012 by the Texas Supreme Court in *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 760 (Tex. 2012):

> Under the lodestar method, the determination of what constitutes a reasonable attorney's fee involves two steps. First, the court must determine the reasonable hours spent by counsel in the case and a reasonable hourly rate for such work. The court then multiplies the number of such hours

> by the applicable rate, the product of which is the base fee or lodestar. The court may then adjust the base lodestar up or down (apply a multiplier), if relevant factors indicate an adjustment is necessary to reach a reasonable fee in the case.

Rohrmoos Venture v. UTSW DVA Healthcare, LLP, 578 S.W.3d 469, 494 (Tex. 2019) (citing *El Apple I, Ltd.*, 370 S.W.3d at 760).

Thus, the lodestar method's two steps are—

1. multiply the reasonable hours worked by the reasonable hourly rate to calculate the "base lodestar figure," and
2. adjust the base lodestar figure up or down based on relevant factors.

Rohrmoos Venture, 578 S.W.3d at 498–500.

The amount obtained by step 1 is presumptively reasonable because it reflects most of the *Arthur Andersen* factors. *Rohrmoos Venture*, 578 S.W.3d at 496. *See also Rohrmoos Venture*, 578 S.W.3d at 499 ("base lodestar figure is presumed reasonable if the claimant 'has carried his burden of showing that the claimed rate and number of hours are reasonable'") (quoting *Blum v. Stenson*, 465 U.S. 886, 897 (1984)).

Possible Additional Requirements: Note that at least one court of appeals has modified the lodestar method since the *Rohrmoos* opinion by requiring the fees to be "moderate or fair" and to bear some relationship to the amount in controversy. *See Toledo v. KBMT Operating Co., LLC*, 581 S.W.3d 324, 333 (Tex. App.—Beaumont 2019, pet. filed) (under Texas law, reasonable attorney's fee calculation results in award that is "not excessive or extreme, but rather moderate or fair") (quoting *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016)); *see also Garcia v. Gomez*, 319 S.W.3d 638, 642 (Tex. 2010)) (award of attorney's fees under Texas Medical Liability Act for failure to timely serve expert report; "a reasonable fee is one that is not excessive or extreme, but rather moderate or fair"). The *Rohrmoos Venture* opinion did not address the additional test of whether a reasonable fee is "moderate or fair."

§ 31.7:1 Advantages of Lodestar Method

The court in *Rohrmoos Venture* identified four advantages to applying the lodestar method:

1. the method relies on "the prevailing market rates in the relevant community";
2. the method produces a fee award that roughly approximates the fee the attorney would have received if the attorney were paid on an hourly basis;
3. the calculation is "objective," thus limiting the discretion of trial judges; and
4. the method permits meaningful judicial review and produces "reasonably predictable results."

Rohrmoos Venture v. UTSW DVA Healthcare, LLP, 578 S.W.3d 469, 493 (Tex. 2019) (quoting *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 551–52 (2010)). The court was also concerned with preventing "grossly excessive" fee awards. *Rohrmoos Venture*, 578 S.W.3d at 496.

§ 31.7:2 Lodestar Method as Shorthand Version of *Arthur Andersen* Factors

In *Rohrmoos Venture*, the supreme court considered the lodestar method to be a "short hand version" of the *Arthur Andersen* factors. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 496 (Tex. 2019). As noted at section 31.5 above, some courts have allowed proof of reasonable and necessary attorney's fees by

reference to the eight factors listed in *Arthur Andersen & Co. v. Perry Equipment Corp.*:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly;

(2) the likelihood . . . that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

Arthur Andersen & Co. v. Perry Equipment Corp., 945 S.W.2d 812, 818 (Tex. 1997) (quoting Tex. Disciplinary R. Prof'l Conduct R. 1.04(b) (listing these eight factors but not excluding other relevant factors)).

The *Rohrmoos Venture* opinion discussed these factors but explained that the 2012 *El Apple I* opinion "provided additional guidelines for determining reasonableness and necessity by introducing the lodestar calculation to Texas jurisprudence." *Rohrmoos Venture*, 578 S.W.3d at 494. Moreover, the court, relying on its federal counterpart, recognized "that the base lodestar figure accounts for most of the relevant *Arthur Andersen* considerations." *Rohrmoos Venture*, 578 S.W.3d at 500 (citing *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 553 (2010)). In particular, the court wrote that the base lodestar calculation includes consideration of factors 1, 3, 4, 7, and 8. *Rohrmoos Venture*, 578 S.W.3d at 500–01. The court thus referred to the lodestar method as a shorthand version of the *Arthur Andersen* factors. *Rohrmoos Venture*, 578 S.W.3d at 496.

§ 31.7:3 Terms of Fee Agreement or Amount of Fees Paid Not Relevant

The fee agreement between the client and attorney is not controlling. As the supreme court explained, "[A] client's agreement to a certain fee arrangement or obligation to pay a particular amount does not necessarily establish that fee as reasonable and necessary." *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 488 (Tex. 2019). Furthermore, a client's testimony as to the amount of fees paid is not legally sufficient evidence of reasonable and necessary attorney's fees. *See Jones v. Patterson*, No. 11-17-00112-CV, 2019 WL 2051301, at *9 (Tex. App.—Eastland May 9, 2019, no pet.) (mem. op.).

§ 31.8 Step One: Determining Lodestar Figure

§ 31.8:1 Five Minimum Requirements for Sufficient Evidence of Attorney's Fees

As noted above, step one of the lodestar method requires the fact finder to multiply the reasonable hours worked by the reasonable hourly rate to calculate the "base lodestar figure." *Rohr-*

moos Venture v. UTSW DVA Healthcare, LLP, 578 S.W.3d 469, 498 (Tex. 2019).

Evidence sufficient to support the step-one calculation includes, at a minimum: (1) the particular services performed, (2) who performed the services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services. *Rohrmoos Venture*, 578 S.W.3d at 498 (citing *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 762–63 (Tex. 2012)). *See, e.g., USAA Texas Lloyd's Co. v. Griffin*, No. 13-17-00337-CV, 2019 WL 2611015, at *14 (Tex. App.—Corpus Christi–Edinburg June 26, 2019, no pet.) (mem. op.); *Air Jireh Service Corp. v. Weaver & Jacobs Constructors, Inc.*, No. 13-15-00180-CV, 2019 WL 3023315, at *5 (Tex. App.—Corpus Christi–Edinburg July 11, 2019, no pet. h.) (per curiam) (mem. op.).

For example, the fee application described in *Memon v. Pinnacle Credit Services, LLC*, fared well under the lodestar method. No. 4:07-cv-3533, 2009 WL 6825243, at *2–4 (S.D. Tex. May 21, 2009). The court methodically examined all aspects of the application, including whether it met the billing judgment rule (i.e., did not include unproductive, excessive, or redundant hours) and whether the hourly rates were in line with market rates.

Two examples of cases where courts applied the lodestar method and where proper billing methods were introduced into evidence to justify awards exceeding the amount in controversy are *Cordova v. Southwestern Bell Yellow Pages, Inc.*, 148 S.W.3d 441, 448–49 (Tex. App.—El Paso 2004, no pet.) ($7,092.18 in damages with a $20,885 attorney's fee award), and *Sibley v. RMA Partners, L.P./Sixth RMA Partners, L.P.*, 138 S.W.3d 455, 458–59 (Tex. App.—Beaumont 2004, no pet.) (per curiam) ($19,342.82 in principal debt with an $82,748.50 attorney's fee award). In both cases the defendants mounted significant defenses that caused the attorney's fees to exceed the amount in controversy. Even so, the billing records were legally sufficient to show the fees were justified under Texas law.

§ 31.8:2 Use of Contemporaneous Billing Records Strongly Encouraged

In regard to billing records, the *Rohrmoos Venture* opinion initially states that contemporaneous time records "are not required to prove that the requested fees are reasonable and necessary." *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 502 (Tex. 2019). But the court goes on to strongly encourage the use of time records and billing records:

> Nevertheless, billing records are *strongly* encouraged to prove the reasonableness and necessity of requested fees when those elements are contested. In *El Apple*, we acknowledged the value of contemporaneous records for lodestar calculations: "An attorney could, of course, testify to these details, but in all but the simplest cases, the attorney would probably have to refer to some type of record or documentation to provide this information. Thus, when there is an expectation that the lodestar method will be used to calculate fees, attorneys should document their time much as they would for their own clients, that is, contemporaneous billing records or other documentation recorded reasonably close to the time when the work is performed."

Rohrmoos Venture, 578 S.W.3d at 502 (quoting *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 763 (Tex. 2012)); *see also Rohrmoos Venture*, 578 S.W.3d at 502 (observing that hours "'not properly billed to one's client also are not properly billed to one's adversary' under a fee-shifting

statute") (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)). "Creating the documents makes them available for production, provides a basis for testifying as to the reasonableness and necessity of the requested fees, and permits cross-examination." *Rohrmoos Venture*, 578 S.W.3d at 502. This follows the practice in federal courts, which require fee applications to include "contemporaneously created time records that specify, for each attorney, the date, the hours expended, and the nature of the work done." *Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 173 (2d Cir. 1998).

Practice Tip: Client billing records should be either initially created in a way that protects client confidentiality and attorney-client privilege or redacted appropriately before submission in support of a claim for attorney's fees. *See generally* Tex. Disciplinary Rules Prof'l Conduct R. 1.05, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (Tex. State Bar R. art X, § 9).

§ 31.8:3 Step One of Lodestar Method: The Billing Judgment Rule

The "billing judgment rule" requires the fact finder to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, "just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 498–99 (Tex. 2019); *see also Toledo v. KBMT Operating Co., LLC*, 581 S.W.3d 324, 329 (Tex. App.—Beaumont 2019, pet. filed) (fact finder should exclude "[c]harges for duplicative, excessive, or inadequately documented work") (quoting *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 762 (Tex. 2012)).

Federal courts have for years applied an analysis similar to the billing judgment rule. In determining whether an attorney's fee is reasonable, a federal court will consider (1) whether the hourly rate is reasonable and (2) whether the hours worked were excessive, redundant, or otherwise unnecessary. *See, e.g., Vanderbilt Mortgage & Finance, Inc. v. Flores*, No. C-09-312, 2011 WL 2160928, at *3 (S.D. Tex. May 27, 2011) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433–34 (1983)).

Factor One: Is Hourly Rate Reasonable?
In *Vanderbilt*, lead counsel charged $800 per hour and co-counsel charged $200 per hour. Relying on *Memon v. Pinnacle Credit Services, LLC*, No. 4:07-CV-3533, 2009 WL 6825243 (S.D. Tex. May 21, 2009), the court found that the $800 rate exceeded the prevailing market rate. *Vanderbilt*, 2011 WL 2160928, at *3. In reducing lead counsel's hourly rate to $350, the court took judicial notice of—

> [T]he Texas State Bar's "Hourly Rates in 2009 Report," the most recent such report. This report states that the median hourly rate for Creditor-Debtor attorneys in Texas was $197 per hour. For Securities Law attorneys, the median is $309 per hour. The median hourly rate for attorneys in the Corpus Christi region was $198 per hour. The high and low rates are not provided in the 2009 report, but in the 2005 report, the high for Creditor-Debtor attorneys was $350 per hour.

Vanderbilt, 2011 WL 2160928, at *3 n.4. (Note that the last State Bar report on attorney's fees was published in 2015 and is no longer published.) Thus, one can see that judges may look at objective data to determine what fees are usual and customary. Therefore, a testifying attorney may have to conduct independent research to opine on reasonable rates. Having this case law and other objective data may help one prove up attorney's fees or, conversely, provide a solid basis to attack a requested award.

Factor Two: Were Hours Worked Excessive or Redundant? In *Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 173 (2d Cir. 1998), the Second Circuit, following the U.S. Supreme Court's 1983 *Hensley* opinion, addressed the issue of excessive hours as well as redundant and unnecessary hours. *See Hensley*, 461 U.S. at 433–34. Such hours are to be deducted by, among other methods, calculating "a reasonable percentage of the number of hours claimed 'as a practical means of trimming fat from a fee application.'" *Kirsch*, 148 F.3d at 173 (quoting *New York Ass'n for Retarded Children v. Carey*, 711 F.2d 1136, 1146 (2d Cir. 1983)).

Hours that are not properly documented may also be deducted. *See Kirsch*, 148 F.3d at 172; *see also Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 324 (5th Cir. 1995) (per curiam) (attorneys were required to provide contemporaneous time and billing records or other documents for the court to examine to determine which hours are compensable and which are not).

§ 31.8:4 Examples of Proper and Improper Billing; Federal Cases Employing Lodestar Method

In words with profound consequences, the *Vanderbilt* opinion warned attorneys what was not acceptable documentation in a fee application:

> Litigants "take their chances" in submitting fee applications without adequate information for the court to determine the reasonableness of the hours expended or with vaguely described tasks such as "review pleadings," "correspondence," or documents [sic].

Vanderbilt Mortgage & Finance, Inc. v. Flores, No. C-09-312, 2011 WL 2160928, at *5 (S.D. Tex. May 27, 2011) (citing *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 327 (5th Cir. 1995).

The items criticized by the court included—

1. sending on one day no fewer than six consecutive e-mails to opposing counsel regarding "discovery";
2. having each e-mail take twelve minutes, costing $160 each;
3. sending on one day seven consecutive e-mails regarding the deposition of the same individual; and
4. billing the full fee of $800 per hour for travel (billing at half the hourly rate would be better).

Vanderbilt, 2011 WL 2160928, at *5. The court, relying on multiple authorities, noted that—

1. repetitive billing is an example of a lack of billing judgment. *Vanderbilt*, 2011 WL 2160928, at *5 (citing *Mississippi State Chapter Operation Push v. Mabus*, 788 F. Supp. 1406, 1416 n.22 (N.D. Miss. 1992)); and
2. attorney travel time should be at fifty percent of an attorney's rate in the absence of documentation showing actual legal work done. *Vanderbilt*, 2011 WL 2160928, at *6 (citing *Watkins v. Fordice*, 7 F.3d 453, 459 (5th Cir. 1993), and other opinions).

For such improper billing judgment, courts have imposed reductions from 10 percent (*see Saizan v. Delta Concrete Products, Co., Inc.*, 448 F.3d 795, 801 (5th Cir. 2006)) to 30 percent (*Leroy v. City of Houston*, 831 F.2d 576, 586 (5th Cir. 1987)). In *Vanderbilt*, the court lowered the requested fees by 10 percent for poor billing judgment. *Vanderbilt*, 2011 WL 2160928, at *6.

§ 31.8:5 Application of Lodestar Method after *Rohrmoos*: A Texas Court's Analysis of Step One of Lodestar Method

Rohrmoos makes clear that the lodestar method is the preferred method for proving up attorney's fees in any fee-shifting case. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 495–96 (Tex. 2019). See section 31.11 below for a discussion of the judicial-notice exception to this rule for claims made under Tex. Civ. Prac. & Rem. Code § 38.001.

It is instructive to look at a recent case applying *Rohrmoos* to an attorney's fee request. In *Toledo v. KBMT Operating Co., LLC*, 581 S.W.3d 324, 333 (Tex. App.—Beaumont 2019, pet. filed), the party seeking attorney's fees supplied billing records, yet the court of appeals reversed the award of $256,689 because the billing records failed to pass the billing judgment rule and the scrutiny that rule brings to all fee requests. See section 31.8:3 above. The court warned that trial judges are not mere rubber stamps and must not accept "carte blanche the amount appearing on the bill." *Toledo*, 581 S.W.3d at 330.

The court noted many improper billing practices in reversing the attorney's fee award. Among them were (1) a duplication of work by attorneys (sometimes called "wolf packing"); (2) over-researching legal issues by having multiple attorneys do research on the same topic, thus performing essentially the same legal research (for example, the law firm conducted research on issues already argued in prior motions); (3) billing paralegal and attorney rates for clerical and ministerial work (copying, mailing, and organizing files do not justify attorney billing rates); and (4) inadequate or vague descriptions that did not adequately describe the tasks performed. *Toledo*, 581 S.W.3d at 331. For specific examples of improper or vague descriptions, see the discussion of the *Vanderbilt* case at section 31.8:4 above. In reversing the attorney's fee award, the *Toledo* court emphasized that counsel had failed to adequately explain why so many attorneys on the case appeared to work on the same documents and briefs. *Toledo*, 581 S.W.3d at 331.

§ 31.9 Step Two of Lodestar Method: Adjustments to Lodestar Figure

Once the lodestar calculation is determined, a court must still consider adjusting the calculated amount based on other considerations.

§ 31.9:1 Results Obtained

The "amount involved and result obtained" factor was key to the *Vanderbilt* court's decision to reduce the fee award. See section 31.8:4 above. The district court, citing the U.S. Supreme Court, wrote that the most important consideration in determining the propriety of an attorney's fee award is the degree of success obtained. *Vanderbilt Mortgage & Finance, Inc. v. Flores*, No. C-09-312, 2011 WL 2160928, at *4 (S.D. Tex. May 27, 2011) (citing *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (if only partial or limited success is achieved, lodestar calculation may be excessive)). *See also Gurule v. Land Guardian, Inc.*, 912 F.3d 252, 257–58 (5th Cir. 2018) (emphasizing results-obtained factor).

In *Vanderbilt*, one party to the suit recovered only $120,000, but the requested legal fees exceeded $1,500,000. With little discussion, the court found this request excessive. *Vanderbilt*, 2011 WL 2160928, at *4 (citing *Barker v. Eckman*, 213 S.W.3d 306, 313–14 (Tex. 2006) (holding when damages award reduced to one-seventh of original amount, remand of attorney's fees request required)). In short order, the court reduced the lodestar calculation by 60 percent. *Vanderbilt*, 2011 WL 2160928, at *4. (Note that the ratio of attorney's fees to damages in *Vanderbilt* was more than twelve to one. The practitioner should be aware that since *El Apple I*,

courts have scrutinized attorney's fee awards that are greater than a two-to-one ratio of fees to damages.)

§ 31.9:2 Awards in Similar Cases

Although federal courts have superior staffing and thus are able to research similar cases, a diligent attorney may be able to find useful analogous fee-award cases. In *Vanderbilt*, the court reviewed various Texas cases regarding the fraudulent lien statute. *Vanderbilt Mortgage & Finance, Inc. v. Flores*, No. C-09-312, 2011 WL 2160928, at *4–5 (S.D. Tex. May 27, 2011). The range of awards for a fraudulent lien violation was from $655 to $132,000. Because the court could find only two cases that awarded more than $50,000, it reduced the lodestar by 20 percent. *Vanderbilt*, 2011 WL 2160928, at *5.

For additional case law regarding the application of both step one and step two of the lodestar method, see *Memon v. Pinnacle Credit Services, LLC*, No. 4:07-CV-3533, 2009 WL 6825243, at *2 (S.D. Tex. May 21, 2009).

§ 31.10 Contingent Fee Method after *Rohrmoos*

Citing numerous U.S. Supreme Court holdings, the court in *Rohrmoos Venture* rejected any adjustment to the lodestar calculation for results obtained or even the contingent nature of the attorney's fee agreement. *See Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 492–93, 500 n.12 (Tex. 2019). The opinion quotes the U.S. Supreme Court:

> We note at the outset that an enhancement for contingency would likely duplicate in substantial part factors already subsumed in the [base] lodestar. The risk of loss in a particular case (and, therefore, the attorney's contingent risk) is the product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits. The second factor, however, is ordinarily reflected in the lodestar—either in higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so. Taking account of it again through lodestar enhancement amounts to double counting.
>
> The first factor (relative merits of the claim) is reflected in the [base] lodestar, but there are good reasons why it should play no part in the calculation of the award. It is, of course, a factor that *always* exists (no claim has 100% chance of success), so that computation of the lodestar would never end the court's inquiry in contingent-fee cases.

Rohrmoos Venture, 578 S.W.3d at 492–93 (quoting *City of Burlington v. Dague*, 505 U.S. 557, 562–63 (1992) (citations omitted)).

§ 31.10:1 Contingent Fee Arrangement and *Rohrmoos*: An Area of Ambiguity

As noted above, the Texas Supreme Court has clearly adopted the lodestar method in fee-shifting cases. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 501 (Tex. 2019) ("To summarize, the lodestar method as we presented it in *El Apple* applies for determining the reasonableness and necessity of attorney's fees . . . .") (quoting *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 760 (Tex. 2012)). The court rejected any reliance on a fee agreement between a client and attorney to prove what are reasonable and necessary legal fees. *Rohrmoos Venture*, 578 S.W.3d at 498. In dicta, the court also rejected reliance on a contingent fee arrangement, quoting *Arthur Andersen*:

> [A]lthough "[a] contingent fee may indeed be a reasonable fee from the standpoint of the parties to the contract," it is not "in and of itself reasonable for purposes of shifting that fee to the defendant"; the fact finder is still required to "decide the question of attorney's fees specifically in light of the work performed in the very case for which the fee is sought."

Rohrmoos Venture, 578 S.W.3d at 498 (quoting *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 818–19 (Tex. 1997)). "Therefore, the base lodestar calculation should reflect hours reasonably expended for services necessary to the litigation." *Rohrmoos Venture*, 578 S.W.3d at 498 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)).

The above statements seemingly dismiss contingent fee arrangements entirely and require the fact finder to determine the attorney's fee issue "specifically in light of the work performed in the very case." *Rohrmoos Venture*, 578 S.W.3d at 498 (quoting *Arthur Andersen*, 945 S.W.2d at 818). The court would not allow any adjustment in step two of the lodestar method for any factor that is subsumed in the lodestar calculation, such as the contingent compensation arrangement. *Rohrmoos Venture*, 578 S.W.3d at 500–01. The court found that the risk of loss in a lawsuit, such as the contingent risk, is ordinarily reflected in the lodestar—either in a higher number of hours worked or in a higher hourly rate for the attorney. *Rohrmoos Venture*, 578 S.W.3d at 501 (citing *City of Burlington v. Dague*, 505 U.S. 557, 562–63 (1992)). *See also Sharma v. Khan*, No. 14-17-00322-CV, 2018 WL 3911180, at *8 (Tex. App.—Houston [14th Dist.] Aug. 16, 2018, no pet.) (mem. op.) (closely examining evidence of work performed and upholding trial court's award of fees that were less than 10 percent of contracted contingent fee).

Although this analysis appears to completely preclude contingency arrangements as a method to prove that a request for attorney's fees is reasonable and necessary, footnote 10 in the opinion suggests, in an awkward fashion, that contingent fee arrangements could possibly be relevant in establishing the reasonableness of the requested fees:

> We recognize that when fee agreements provide for arrangements other than hourly billing, the attorney will not be able to present evidence of a particular hourly rate billed or paid for the services performed. In those instances, the fee claimant, through its expert, has the burden of showing that the rate claimed for purposes of the base lodestar calculation reflects a reasonable market rate given considerations in *Arthur Andersen*, including the attorney's experience and expertise, the novelty and complexity of the questions involved, any special skill required for the representation, the attorney's risk in accepting such representation, which may be reflected in a contingent fee agreement, and any other considerations that would factor into an attorney's fee negotiations if the attorney were to bill hourly. *See Burlington*, 505 U.S. at 566 (noting that "attorneys factor in the particular risks of a case in negotiating their fee"); [*Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 566 (1986)] (recognizing that "considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate"); *Arthur Andersen*, 945 S.W.2d at 818–19 (explaining that for contingent fee cases, the jury must decide reasonable and necessary fees in light of the

> work performed in that case, and reflecting the non-exclusive list of factors, arriving at a specific dollar amount). In this way, the contingent nature of a fee agreement, or the nature of an alternative fee arrangement, is taken into account in calculating the presumptively reasonable fee in the first step of the analysis, prior to any potential adjustments for *Arthur Andersen* factors that have not yet been considered, as discussed [further in the opinion].

Rohrmoos Venture, 578 S.W.3d at 499 n.10. Thus, it appears that it may be possible to adjust one's hourly rate based on a contingent fee arrangement. But the court gave no guidance about how this should be done, therefore reference to federal jurisprudence will likely be necessary until Texas courts address this issue in detail. Notably, in a contingent fee case that reversed the enhancement of attorney's fees for the straightforward but time-consuming enforcement of a settlement where no new and novel issues or similar factors were identified, the U.S. Supreme Court commented that "[t]he risk of nonpayment should be determined at the beginning of the litigation." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 729–730 (1987).

§ 31.10:2 Options for Proving Attorney's Fees when Arrangement Is Contingent

To support an award of attorney's fees based on a contingent fee agreement, it is recommended that the attorney keep proper and complete contemporaneous time records and exercise good billing judgment (i.e., avoid excessive, redundant, duplicative, and unnecessary work or hours). In other words, always follow the lodestar method and the billing judgment rule. See section 31.8:3 above. However, the attorney may also rely on the Texas Supreme Court's language in footnote 10 of *Rohrmoos* and provide testimony of the risk factor associated with the stated hourly rate as well as the results-obtained factor. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 499 n.10 (Tex. 2019). See section 31.10:1 above. Likewise, if possible, the attorney can classify the case as one of "the simplest cases," in which documentation of fees is not required, as mentioned in the *Rohrmoos Venture* opinion's discussion of billing records. *Rohrmoos Venture*, 578 S.W.3d at 502 (quoting *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 763 (Tex. 2012)). *But see Ramirez v. Coca-Cola*, No. 01-13-00278-CV, 2013 WL 5761315, at *4 (Tex. App.—Houston [1st Dist.] Oct. 22, 2013, no pet.) (mem. op.) (summary judgment reversed on attorney's fees; issue of fact raised in "simple" suit on sworn account, where plaintiff's summary judgment affidavit did not itemize hours worked or describe time case took or whether it prevented attorney from taking other cases). The *Rohrmoos Venture* court specifically noted that, although contemporaneous billing records are not required, they are *strongly* encouraged. In the event the attorney has not kept time records, the court may allow the attorney to "recreate" the billing records based on repeated experience with similar cases. *See Rohrmoos Venture*, 578 S.W.3d at 502.

Practice Tip: If the attorney is performing work for a client on a volume basis that consists of repeated, identical tasks, consider creating a form affidavit that outlines the steps undertaken to fulfill each task and, when preparing for prove up, fill in the dates and amount of time spent on each task from the attorney's records.

§ 31.11 One Exception to *Rohrmoos*: Judicial Notice under Texas Civil Practice and Remedies Code Chapter 38

Section 38.004 of the Texas Civil Practice and Remedies Code, which allows a court to take judicial notice of reasonable and necessary legal

fees, is still alive under *Rohrmoos Venture*. However, courts strictly limit the application of section 38.004 to cases in which attorney's fees are properly sought under chapter 38, that is, where the claims are for services rendered, labor performed, materials furnished, sworn accounts, and oral or written contracts. *See Jones v. Patterson*, No. 11-17-00112-CV, 2019 WL 2051301, at *9–10 (Tex. App.—Eastland May 9, 2019, no pet.) (mem. op.) (courts may not take judicial notice that usual and customary fees are reasonable unless the claim is enumerated in Tex. Civ. Prac. & Rem. Code § 38.001) (citing *Scott v. Spalding*, No. 11-07-00264-CV, 2009 WL 223459, at *5 (Tex. App.—Eastland Jan. 30, 2009, no pet. (mem. op.)). See section 31.2 above for further general discussion of chapter 38 claims. See sections 6.31, 7.1:6, 14.29:3, 19.52, and 28.28:3 in this manual for discussions of judicial notice and various section 38.001 claims.

In a case in which recovery of attorney's fees is allowed by Tex. Civ. Prac. & Rem. Code § 38.001, the court may take judicial notice of the usual and customary attorney's fees and the contents of the case file without receiving further evidence, in either a proceeding before the court or in a jury trial in which the amount of attorney's fees is submitted to the court by agreement. Tex. Civ. Prac. & Rem. Code § 38.004. If the court makes a determination under section 38.004, there is a rebuttable presumption that the usual and customary fees are reasonable and necessary. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 490 n.9 (Tex. 2019).

Note that, while a trial court may take judicial notice of reasonable and necessary legal fees, the court may not act as a rubber stamp for what an attorney requests in fees. *Toledo v. KBMT Operating Co., LLC*, 581 S.W.3d 324, 330 (Tex. App.—Beaumont 2019, pet. filed). As noted at section 31.2:5 above, the fees cannot be excessive but must be fair and moderate in light of the amount in controversy.

The attorney should be cautioned that, if there is testimony as to an hourly rate and a total sum, then the attorney has elected to use the lodestar method and must provide proper proof under the lodestar test for an award of attorney's fees. *See City of Laredo v. Montano*, 414 S.W.3d 731, 736–37 (Tex. 2013) (per curiam) (senior attorney's fees reversed for failure to keep billing records, but associate's fees upheld where associate kept contemporaneous records).

Statutes providing for claims other than those enumerated in Tex. Civ. Prac. & Rem. Code § 38.001, such as the Texas Deceptive Trade Practices–Consumer Protection Act (DTPA), the Texas Declaratory Judgment Act (TDJA), or the Texas Theft Liability Act (TTLA), are not governed by Tex. Civ. Prac. & Rem. Code § 38.004. Consequently, courts may not take judicial notice of reasonable and necessary attorney's fees for those claims. *See Rohrmoos Venture*, 578 S.W.3d at 490 n.9.

§ 31.12 Controverting Attorney's Fees Evidence

§ 31.12:1 Need to Controvert

When defending against a claim for attorney's fees, it is good practice to show contrary evidence or show contradictions within the movant's evidence. *See Haden v. David J. Sacks, P.C.*, 332 S.W.3d 503, 512 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). ("Consequences follow from the Haden's and the company's lack of response to Sacks's motion for traditional summary judgment seeking attorney's fees pursuant to chapter 38 of the Civil Practice and Remedies Code.").

In *Haden*, counsel requesting fees provided no information about hours worked or hourly rate but gave the court only a list of certain tasks per-

formed. *Haden*, 332 S.W.3d at 510–11. The court held that counsel's affidavit complied with the requirements of Tex. R. Civ. P. 166a(c), because although the facts in the affidavit "could have been readily controverted, but were not, . . . we conclude that the affidavit constitutes legally competent evidence that the $75,887.50 sought . . . was both reasonable and necessary." *Haden*, 332 S.W.3d at 514–15.

As noted in *Haden*:

> Well-settled law recognizes that the affidavit of the attorney representing a claimant constitutes expert testimony that will support an award of attorney's fees in a summary judgment proceeding. *See* [*Tesoro Petroleum Corp. v. Coastal Refining & Marketing, Inc.*, 754 S.W.2d 764, 767 (Tex. App.—Houston [1st Dist.] 1988, writ denied)]. Sacks is an interested party in this lawsuit, but that status does not defeat his affidavit. *See* TEX. R. CIV. P. 166a(c) ("A summary judgment may be based on uncontroverted testimonial evidence *of an interested witness, or of an expert witness* . . . if the evidence is clear, positive, direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.") (emphasis added); *see* [*Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999)].

Haden, 332 S.W.3d at 513.

In 2017 the Fort Worth court of appeals similarly found the failure to controvert fatal to the defendant's attack on the attorney's fee award. *Huey-You v. Huey-You*, No. 02-16-00332-CV, 2017 WL 4053943, at *3 (Tex. App.—Fort Worth Sept. 14, 2017, no pet.) (mem. op.). But at least one court has held that a party may attack the legal sufficiency of the attorney's fee evidence for the first time on appeal without having filed a controverting affidavit. *See Auz v. Cisneros*, 477 S.W.3d 355, 359 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

§ 31.12:2 How to Controvert

Tesoro Petroleum Corp. v. Coastal Refining & Marketing, Inc., demonstrates the proper way to controvert or contest a fee request. 754 S.W.2d 764, 766–67 (Tex. App.—Houston [1st Dist.] 1988, no writ). When attacking a fee request as unreasonable, one must establish a firm basis for the controverting opinion. In *Tesoro Petroleum*, the nonmovant's counsel testified—

1. as to his own experience as an attorney;
2. that he was personally involved in the case and knew what had happened in the case;
3. that there was no itemized bill to reflect the work done;
4. that the hours worked were not shown;
5. that the movant's hourly rate was not shown; and
6. that the movant's fees were unreasonable under the circumstances.

Tesoro Petroleum, 754 S.W.2d at 766. When possible, controverting testimony should also include evidence as to a contrary reasonable number of hours worked and contrary reasonable rates, as well as show redundancies, "wolf packing," or other examples of poor billing practices. It is best for the nonmovant to be as specific as possible in opposing the movant's fee application. The attorney must describe the basis for the contrary opinion and not merely testify that the movant's requested fees are unreasonable. *See Basin Credit Consultants, Inc. v. Obregon*, 2 S.W.3d 372, 373 (Tex. App.—San Antonio 1999, pet denied).

Showing inconsistencies in billing records or examples of overbilling or unnecessary billings,

such as having two or more attorneys attend a hearing or deposition, is another way to attack a movant's affidavit. *See Pavlow v. Jensen*, No. 14-04-00750-CV, 2005 WL 3310015, at *6 (Tex. App.—Houston [14th Dist.] Dec. 8, 2005, no pet.) (mem. op.) (controverting affidavit alleging unreasonableness of movant's fee request not competent summary judgment evidence because it contained no factual support) (citing *Houston v. Houston*, No. 13-02-00142-CV, 2004 WL 351850, at *5 (Tex. App.—Corpus Christi–Edinburg Feb. 26, 2004, no pet.) (mem. op.) (nonmovant failed to state that movant's hourly fee was unreasonable and did not identify unnecessary billable time)). Opposing counsel may use his own time records as a basis to contest the attorney's fee request. *See El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 766 (Tex. 2012) (Hecht, J., concurring).

§ 31.12:3 How Not to Controvert

The court in *Pavlow* found the following affidavit inadequate to controvert the plaintiff's evidence. The affidavit, in its entirety, read:

> I, [attorney's name], am a capable person to make this affidavit. I have never been convicted of a felony in Texas or in any other state. I am licensed to practice law in the state of Texas. I am in good standing with the State Bar. I have reviewed the Plaintiff's pleadings and request for attorney[']s fees. The attorney[']s fees requested are not reasonable nor [sic] necessary.

Pavlow v. Jensen, No. 14-04-00750-CV, 2005 WL 3310015, at *5 (Tex. App.—Houston [14th Dist.] Dec. 8, 2005, no pet.) (mem. op.). The court found this affidavit to be a mere legal conclusion because it contained no factual basis for the attorney's opinion. *Pavlow*, 2005 WL 3310015, at *6 (citing *Basin Credit Consultants, Inc. v. Obregon*, 2 S.W.3d 372, 373 (Tex. App.—San Antonio 1999, pet. denied) ("An affidavit filed by non-movant's counsel that simply criticizes the fees sought by the movant as unreasonable without setting forth the affiant's qualifications or basis for his opinion will not be sufficient to defeat summary judgment.")).

§ 31.13 Duty to Segregate Fees

If multiple causes of action are brought, some of which permit recovery of attorney's fees while others do not (e.g., breach of contract versus fraud), the attorney must be cognizant of the duty to segregate the attorney's fees related to the causes of action for which attorney's fees are recoverable from those in which fees are not recoverable. Evidence of segregation may be presented by specifying on the attorney's invoices which times were attributable to which causes of action. *State Farm Lloyds v. Hanson*, 500 S.W.3d 84, 102 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *see also Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 314 (Tex. 2006) (detailing evidence sufficient to show segregation). Alternatively, the attorney may testify as to what percentage of the time worked on the case would have been necessary even if the nonrecoverable claim had not been asserted. *Chapa*, 212 S.W.3d at 314.

In 1991, the Texas Supreme Court recognized an exception to the requirement to segregate fees. In *Stewart Title Guaranty Co. v. Sterling*, the court held that fees do not need to be segregated if the claims arose from the same transaction and were "so interrelated that their prosecution or defense entails proof or denial of essentially the same facts." 822 S.W.2d 1, 11–12 (Tex. 1991).

The supreme court further modified the "interrelated rule" in *Chapa*, stating:

> Accordingly, we reaffirm the rule that if any attorney's fees relate solely to a claim for which such fees are unrecoverable, a claimant must segregate

> recoverable from unrecoverable fees. Intertwined facts do not make tort fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated. We modify *Sterling* to that extent.

Chapa, 212 S.W.3d at 313–14. This new requirement emphasizes that segregation must be based on the legal services provided or work done, not the facts of the case. Furthermore, the duty to segregate relates "solely to a claim for which . . . fees are unrecoverable." *Chapa*, 212 S.W.3d at 313–14.

Further, the court explained:

> Requests for standard disclosures, proof of background facts, depositions of the primary actors, discovery motions and hearings, *voir dire* of the jury, and a host of other services may be necessary whether a claim is filed alone or with others. To the extent such services would have been incurred on a recoverable claim alone, they are not disallowed simply because they do double service.

Chapa, 212 S.W.3d at 313.

The attorney is not required to keep two time records. As noted, the attorney may provide a percentage of the hours worked advancing the claim on which attorney's fees may be recovered. *Chapa*, 212 S.W.3d at 314.

The court in *Chapa* also clarified that the work performed to overcome affirmative defenses on a recoverable claim does not need to be segregated. "To prevail on a contract claim," wrote the court, "a party must overcome any and all affirmative defenses (such as limitations, *res judicata*, or prior material breach), and the opposing party who raises them should not be allowed to suggest to the jury that overcoming those defenses was unnecessary." Finally, if segregation is not properly made, the proper remedy is remand, not a denial of attorney's fees completely. *Chapa*, 212 S.W.3d at 314.

Courts have also permitted evidence of segregation based on testimony as to a percentage or dollar amount for work done on claims for which attorney's fees are not recoverable. *See Gluck v. Hadlock*, No. 02-09-00411-CV, 2011 WL 944439, at *6 (Tex. App.—Fort Worth Mar. 17, 2011, no pet.).

The law regarding when to object is inconsistent. A docket control order may set a deadline to designate expert witnesses, produce expert reports, and object to expert witnesses. *See also* Tex. R. Civ. P. 194. Absent a docket control order, opportunities to object to the lack of segregation include—

1. when the attorney's fees evidence is offered;
2. at a jury charge conference;
3. before the trial court rules or the issue is presented to the trier of fact; and
4. in a postjudgment motion.

The best practice is to object timely pursuant to a docket control order or otherwise before the case is submitted to the fact finder. *See Home Comfortable Supplies, Inc. v. Cooper*, 544 S.W.3d 899, 908–11 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (citing various cases but concluding that objecting before the case is submitted to the fact finder preserves the error of failing to segregate).

§ 31.14 Discovery Sanctions

Awards of attorney's fees for discovery abuse are discussed at sections 18.83 and 18.84 in this manual.

§ 31.15 Attorney's Fees for Postjudgment Collection Efforts

The availability of attorney's fees for postjudgment collection efforts depends on the type of action. See section 27.66 in this manual regarding attorney's fees awarded to the garnishee's counsel in postjudgment garnishment and section 27.92 regarding attorney's fees in turnover actions.

§ 31.16 Attorney's Fees and Default Judgment

If attorney's fees are sought other than under chapter 38 of the Texas Civil Practice and Remedies Code, some proof of attorney's fees, either by affidavit or by live testimony, will be needed to sustain an award of attorney's fees for a default judgment. *Nettles v. Del Lingco of Houston*, 638 S.W.2d 633, 635–36 (Tex. App.—El Paso 1982, no writ). If hourly fees are sought, the fees are best proved by attorney time records. Proof of contemporaneous time records may be made by the attorney's affidavit with the attorney's itemized bills attached as an exhibit or with the detailed time descriptions by date, description, and hours per item set out in the affidavit. *See Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 502, 505 (Tex. 2019). If judgment is sought under Tex. Civ. Prac. & Rem. Code § 38.001, the court can take judicial notice of the usual and customary attorney's fees and the contents of the case file without receiving further evidence. Tex. Civ. Prac. & Rem. Code § 38.004. In such a case, there is a rebuttable presumption that the usual and customary fees are reasonable and necessary. *Rohrmoos Venture*, 578 S.W.3d at 490 n.9. See section 31.11 above for discussion of judicial notice of attorney's fees.

§ 31.17 Attorney's Fees and Sanctions

The Texas Supreme Court applied the *Rohrmoos Venture* opinion's requirement for time records and compliance with the lodestar method in the sanctions context in *Nath v. Texas Children's Hospital*, 576 S.W.3d 707, 710 (Tex. 2019) (per curiam). Citing *Rohrmoos Venture*, the court pointed out that a party seeking a fee award must prove the reasonableness and necessity of the requested fees in all fee-shifting situations. *Nath*, 576 S.W.3d at 710 (citing *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 492 (Tex. 2019)).

§ 31.18 Appellate Fees

The trial court's award of attorney's fees may include appellate attorney's fees if there is evidence of the reasonableness of fees for appellate work. The reasonableness of attorney's fees is a fact issue that must be passed on by the trier of fact. The appellate court may not initiate an award for work done in the appellate process, because doing so would involve the exercise of original rather than appellate jurisdiction. *International Security Life Insurance Co. v. Spray*, 468 S.W.2d 347, 349 (Tex. 1971). An award of appellate fees is a matter of discretion for the trier of fact, not a requirement. *Hunsucker v. Fustock*, 238 S.W.3d 421, 431 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citing *Neal v. SMC Corp.*, 99 S.W.3d 813, 818 (Tex. App.—Dallas 2003, no pet.)).

A general pleading seeking recovery of "reasonable attorney's fees" has been held to authorize the award of appellate attorney's fees. *Superior Ironworks, Inc. v. Roll Form Products, Inc.*, 789 S.W.2d 430, 431 (Tex. App.—Houston [1st Dist.] 1990, no writ); *Ledisco Financial Services, Inc. v. Viracola*, 533 S.W.2d 951, 958 (Tex. App.—Texarkana 1976, no writ).

The principles for supporting an award of appellate fees appear to be identical to those of trial fees. *See generally Hunsucker*, 238 S.W.3d at 431–32. *Rohrmoos Venture* did not address the issue of appellate fees. *See Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019). Earlier opinions have been inconsistent. For example, in 2013, one court applied *El Apple I* to overturn a conditional appellate attorney's fee award for not being supported by the lodestar method. *Sentinel Integrity Solutions, Inc. v. Mistras Group, Inc.*, 414 S.W.3d 911, 930 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). In 2016, the lump sum method of proving appellate fees by stating a dollar amount for each appellate stage was approved. *See Lawry v. Pecan Plantation Owners Ass'n*, No. 02-15-00079-CV, 2016 WL 4395777, at *8–9 (Tex. App.—Fort Worth Aug. 18, 2016, no pet.) (mem. op.).

If the testimony for attorney's fees is uncontroverted and the opposing party had "the means and opportunity of disproving the testimony and fails to do so, the testimony will be taken as true as a matter of law." *Hunsucker*, 238 S.W.3d at 431 (citing *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 882 (Tex. 1990) (per curiam)). Furthermore, in the face of uncontroverted evidence, an award of zero fees on appeal is an abuse of discretion. *Hunsucker*, 238 S.W.3d at 431–32 (citing *Ragsdale*, 801 S.W.2d at 882); *Lee v. Perez*, 120 S.W.3d 463, 469–70 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

Appellate fee awards should be conditioned on success at the appellate level, though if they are not, courts may reform a judgment to make them conditional on success, so this is not the basis for a reversible error. An award of appellate attorney's fees may be couched in remittitur language to avoid objections of lack of finality, lack of definiteness, and the existence of a conditional judgment. *Failing v. Equity Management Corp.*, 674 S.W.2d 906, 909 (Tex. App.—Houston [1st Dist.] 1984, no writ); *see also Goebel v. Brandley*, 76 S.W.3d 652, 658–59 (Tex. App.—Houston [14th Dist.] 2002, no pet.), *disapproved on other grounds by Martin v. Amerman*, 133 S.W.3d 262 (Tex. 2004) (remittitur language permissible). See Form 20-6 in this manual for sample remittitur language. Alternatively and more commonly, the judgment may recite specific amounts to be awarded in the event of an unsuccessful appeal to the court of appeals and the supreme court by the opposing party. *See Vaughn v. DAP Financial Services, Inc.*, 982 S.W.2d 1, 9 (Tex. App.—Houston [1st Dist.] 1997, no pet.); *Pao v. Brays Village East Homeowners Ass'n*, 905 S.W.2d 35, 38–39 (Tex. App.—Houston [1st Dist.] 1995, no writ).

§ 31.19 Paralegal Fees

Texas law allows for recovery of paralegal fees, but the tasks must be described in sufficient detail for a court to determine if the work is substantive legal work or clerical work. *See El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 763 (Tex. 2012); *Gill Savings Ass'n v. International Supply Co.*, 759 S.W.2d 697, 705 (Tex. App.—Dallas 1988, writ denied); *Clary Corp. v. Smith*, 949 S.W.2d 452, 469–70 (Tex. App.—Forth Worth 1997, pet. denied). According to *El Apple I*, an award for paralegal or legal-assistant work requires testimony of (1) the qualifications of the legal assistant to perform substantive legal work; (2) that the legal assistant performed substantive legal work under the direction and supervision of an attorney; (3) the nature of the legal work performed; (4) the legal assistant's hourly rate; and (5) the number of hours expended by the legal assistant. *El Apple I, Ltd.*, 370 S.W.3d at 763.

Chapter 35

Bankruptcy

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Chapter 35

Bankruptcy

I. Overview

§ 35.1 Bankruptcy in General

§ 35.1:1 Federal Bankruptcy Code

Title 11 of the United States Code governs bankruptcies and is generally referred to as the Bankruptcy Code. Chapters 1, 3, and 5 of the Bankruptcy Code apply to all bankruptcies; Chapter 7 governs liquidation bankruptcies; Chapter 11 applies to reorganization or liquidation for businesses and is also available for certain individuals who do not qualify under Chapter 13; and Chapter 13 applies to reorganization for individuals with limited debts and regular income and is not available for businesses. Chapters 9 and 12 of the Code, which are not dealt with specifically in this chapter, cover municipal debt and family farm debt.

§ 35.1:2 Bankruptcy Courts in Texas

Texas has four federal bankruptcy districts: the Northern District (covering Dallas, Fort Worth, Amarillo, Abilene, Lubbock, San Angelo, and Wichita Falls), the Southern District (covering Houston, Galveston, Victoria, Corpus Christi, Brownsville, McAllen, and Laredo), the Eastern District (covering Tyler, Plano, Texarkana, Beaumont, and Lufkin), and the Western District (covering Austin, El Paso, Midland, San Antonio, and Waco). Each district has its own local rules governing such issues as the format of pleadings, deadlines for certain filings, and the procedure for requesting a hearing. The practitioner should check the local rules and practice guides for each district and each court before filing any document in bankruptcy court. The websites for each district are **www.txnb.uscourts.gov** (Northern District), **www.txs.uscourts.gov** (Southern District), **www.txwb.uscourts.gov** (Western District), and **www.txeb.uscourts.gov** (Eastern District).

§ 35.1:3 Property of Estate

Commencement of a case under the Bankruptcy Code creates an estate composed of all legal or equitable interests of the debtor in property as of the commencement of the case. *See* 11 U.S.C. § 541(a). The estate includes all interests of the debtor and the debtor's spouse in community property to the extent that the interest is under the sole, equal, or joint management and control of the debtor or is liable for an allowable claim against the debtor or the debtor's spouse. 11 U.S.C. § 541(a)(2).

Among other exceptions, the estate does not include a power that the debtor may exercise solely for the benefit of an entity other than the debtor. 11 U.S.C. § 541(b)(1). And property in which the debtor holds legal title but not an equitable interest becomes property of the estate only to the extent of the debtor's legal title to the property. 11 U.S.C. § 541(d).

§ 35.1:4 Debtor and Debtor-in-Possession

The Bankruptcy Code sets forth who qualifies to be a debtor under each bankruptcy chapter. *See* 11 U.S.C. § 109. A person who does not meet

the requirements set forth cannot be a debtor. For instance, only an individual, not an entity, can be a debtor under Chapter 13. 11 U.S.C. § 109(e).

For cases under Chapter 11, the debtor is also a "debtor-in-possession" or "DIP" unless a trustee is appointed. 11 U.S.C. § 1101(1). The DIP is not just the old debtor now in bankruptcy. The DIP is a fiduciary to the debtor's bankruptcy estate. The DIP is given the rights and powers and duties imposed on it that a trustee would have, except the right to trustee compensation and except the duty to investigate the debtor itself. 11 U.S.C. § 1107.

§ 35.1:5 Role and Duties of United States Trustee

The United States Trustee Program is a component of the U.S. Department of Justice charged with the administrative oversight of bankruptcy cases. The U.S. trustee is the entity charged with policing the bankruptcy system, that is, monitoring the activities and reporting of the debtor or debtor-in-possession, appointing various official committees and overseeing their operation, and managing the debtor's trip through bankruptcy using a series of guidepost measurements designed to keep the case on track. The U.S. trustee is required to supervise the trustees and the administration of bankruptcy cases under Chapters 7, 11, 12, 13, and 15. 28 U.S.C. § 586. These duties are administrative in nature as they relate to the panel trustee. In Chapter 11 cases, the U.S. trustee appoints and monitors the operation of the official committees and appoints examiners or trustees as directed by the court. 11 U.S.C. §§ 1102, 1104; *see also* 28 U.S.C. § 586. Additionally, the U.S. trustee reviews and objects to fee applications, disclosure statements, and plans that fail to meet the minimum standards under the Bankruptcy Code. *See In re Parsley*, 384 B.R. 138, 146 (Bankr. S.D. Tex. 2008). The U.S. trustee has standing to appear and be heard on any issue. 11 U.S.C. § 307. A U.S. trustee is not authorized to promulgate rules or impose substantive or administrative requirements on bankruptcy debtors. *In re Johnson*, 106 B.R. 623, 624 (Bankr. D. Neb. 1989).

§ 35.1:6 Official Committees

The official committees are created by statute. 11 U.S.C. § 1102. The Bankruptcy Code authorizes the U.S. trustee to appoint committees of creditors or of equity security holders as the U.S. trustee deems appropriate. 11 U.S.C. § 1102(a)(1). Committee members have a fiduciary responsibility to act on behalf of the entire class of creditors represented. Among the duties assumed by committee members are fiduciary duties of undivided loyalty and impartial service to all creditors. *See In re Pierce*, 237 B.R. 748, 758 (Bankr. E.D. Cal. 1999).

§ 35.1:7 Role and Duties of Bankruptcy Trustee

Except in Chapter 11 cases where there is a debtor-in-possession, the bankruptcy trustee is generally the central figure in the bankruptcy case. The bankruptcy trustee is separate and distinct from the U.S. trustee. It is the bankruptcy trustee with whom the debtor has the most contact during the course of the case. The trustee examines the debtor, verifies and evaluates exemptions, gathers property of the estate, liquidates such property, and ultimately distributes such property to the creditors. The trustee makes sure the debtor complies with the requirements of the Bankruptcy Code. The duties of a Chapter 7 trustee are set forth in 11 U.S.C. § 704.

Generally, a trustee has a fiduciary duty to conserve the assets of the estate and to maximize distribution to creditors. *In re Rigden*, 795 F.2d 727, 730 (9th Cir. 1986). He also has the equitable responsibility to act with the care and diligence of an ordinary prudent person. *In re Rigden*, 795 F.2d at 730. Trustees, in their official capacity, are officers of the court and as

such are held to high fiduciary standards of conduct. *In re Topco, Inc.*, 894 F.2d 727, 739 n.16 (5th Cir. 1990).

In addition to statutory duties, under rule 2015(a) of the Federal Rules of Bankruptcy Procedure, a trustee must—

1. in a Chapter 7 or, in some cases, a Chapter 11 case, file and transmit to the U.S. trustee a complete inventory of the property of the debtor within thirty days after qualifying as a trustee or debtor-in-possession, unless such an inventory has already been filed;
2. keep a record of receipts and the disposition of money and property received;
3. file the reports and summaries required by section 704(a)(8) of the Bankruptcy Code, which shall include a statement, if payments are made to employees, of the amounts of deductions for all taxes required to be withheld or paid for and on behalf of employees and the place where these amounts are deposited;
4. as soon as possible after the commencement of the case, give notice of the case to every entity known to be holding money or property subject to withdrawal or order of the debtor, including every bank, savings or building and loan association, public utility company, and landlord with whom the debtor has a deposit, and to every insurance company that has issued a policy having a cash surrender value payable to the debtor, except that notice need not be given to any entity who has knowledge or has previously been notified of the case; and
5. in a Chapter 11 reorganization case, on or before the last day of the month after each calendar quarter until a plan is confirmed or the case is converted or dismissed, file and transmit to the U.S. trustee a statement of disbursements made during the calendar quarter and a statement of the amount of the fee required pursuant to 28 U.S.C. § 1930(a)(6) that has been paid for such calendar quarter.

Additionally, the local rules of the bankruptcy court may impose other duties that the trustee must perform. In any bankruptcy case, it is crucial to review the local bankruptcy rules that apply to that jurisdiction.

§ 35.1:8 Party in Interest

The Bankruptcy Code defines "party in interest" to include "the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee." 11 U.S.C. § 1109(b). This list is nonexclusive. *See, e.g., In re Sullivan Central Plaza I, Ltd.*, 935 F.2d 723, 726 (5th Cir. 1991). And courts have broadly interpreted the term to include "any other person with a sufficient stake in [the] outcome of a proceeding so as to require representation." *International Transactions, Ltd. v. Embotelladora Agral Regiomontana, S.A. de C.V.*, 347 F.3d 589, 595 (5th Cir. 2003). Put another way, "persons whose pecuniary interests are directly affected by the bankruptcy proceedings" are parties in interest. *In re Orchard at Hansen Park, LLC*, 347 B.R. 822, 825 (Bankr. N.D. Tex. 2006) (quoting *In re E.S. Bankest*, 321 B.R. 590, 594 (Bankr. S.D. Fla. 2005)).

§ 35.1:9 Rooker-Feldman Doctrine

The Rooker-Feldman doctrine is a rule of civil procedure enunciated by the U.S. Supreme Court in two cases, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). The doctrine holds that lower U.S. federal courts other than the Supreme Court have

no subject-matter jurisdiction to sit in direct review of state court decisions unless Congress has enacted legislation that specifically authorized such relief. *Feldman*, 460 U.S. at 476 (citing *Rooker*, 263 U.S. at 415). Put more basically, a federal court, other than the U.S. Supreme Court, has no jurisdiction to set aside a state court judgment.

In 2005, the Supreme Court revisited the doctrine in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005). The Court noted that the U.S. Supreme Court has exclusive appellate jurisdiction to reverse or modify a state-court judgment based on the certiorari jurisdiction statute, 28 U.S.C. § 1257. The Court also confined the Rooker-Feldman doctrine to cases "brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments. . . . [The Rooker-Feldman doctrine] does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions." *Exxon Mobil Corp.*, 544 U.S. at 283–85.

The Rooker-Feldman doctrine, although mentioned often, usually is inapplicable. Rather, claim and issue preclusion doctrines, or res judicata and collateral estoppel, are generally more helpful to litigants in bankruptcy. The Rooker-Feldman doctrine generally arises in the context of a creditor seeking its debt to be nondischargeable based on prior state court judgment.

§ 35.2 Bankruptcy Procedure

§ 35.2:1 Local Procedural Rules

In addition to the Federal Rules of Bankruptcy Procedure, each of the four federal districts in Texas has its own local rules (and sometimes each judge in the district has rules specific to that judge's court). Each federal district maintains a website that includes the local rules for that district as well as other instructions and requirements. The practitioner should check a court's website before filing any documents in an unfamiliar court. See section 35.1:2 above for the Web addresses for each federal district. See also section 35.2:2 below concerning local rules regarding negative notice.

§ 35.2:2 Motion Practice

Under the Federal Rules of Bankruptcy Procedure (found in title 11 of the U.S. Code), a request for an order from the bankruptcy court must be made by written motion unless an application is authorized by the rules or unless the motion is made during a hearing. *See* Fed. R. Bankr. P. 9013. The motion must state with particularity the grounds and set forth the relief or order sought. Fed. R. Bankr. P. 9013. Unless the motion is one that may be considered ex parte, it must be served by the moving party on the trustee or debtor-in-possession and on those entities specified by the Rules of Bankruptcy Procedure or on the entities that the court directs. Fed. R. Bankr. P. 9013.

When the Bankruptcy Code indicates that an action must be taken "after notice and hearing," it means after notice that is appropriate in the particular circumstances and after the opportunity for a hearing. 11 U.S.C. § 102(1)(A). The court may act without an actual hearing if notice is properly given and a hearing is not timely requested by a party in interest. 11 U.S.C. § 102(1)(B)(i). To fulfill the notice requirement, the motion must contain certain specific language alerting the debtor to the period within which he must respond to the motion. This language is commonly referred to as "negative notice." *See In re Stogsdill*, 102 B.R. 587, 588 (Bankr. W.D. Tex. 1989). The time frame for responding to the motion varies depending on the type of motion and the local rules. Each district has specific negative-notice language that is

required in that district. The practitioner should consult the local rules for the specific language required and the applicable time frame before filing any motion. See form 35-18 in this chapter for sample notice language. See also section 35.2:1 above regarding the local rules for each district.

§ 35.3 PACER

Public Access to Court Electronic Records (PACER) is an electronic public access service that allows users to obtain case and docket information from federal appellate, district, and bankruptcy courts and from the U.S. Party/Case Index. PACER is a service of the U.S. Judiciary. The PACER Service Center is run by the administrative office of the U.S. courts. Currently, most courts have their own websites, and links to these sites are provided on the PACER website at **www.pacer.gov**. Electronic access is available for most courts by registering with the PACER Service Center, the judiciary's centralized registration, billing, and technical support center.

A user can request information about a particular individual or case through the PACER system. The data is displayed directly on the user's computer. Training on using the PACER system is available through the PACER website. All registered agencies and individuals are charged a user fee for access to the site. Users are also charged on a per-page or per-minute basis for each search. A schedule of fees is available on the PACER website.

§ 35.4 Admission to Practice before Bankruptcy Court

To practice before a particular bankruptcy court, the attorney must be admitted in such court. An attorney generally may obtain admission *pro hac vice* to appear for a specific case if the attorney does not otherwise regularly appear before the court. The courts have a form motion and order available on their websites for admission *pro hac vice*. For the Northern District of Texas, even if admitted, an attorney is required to have local counsel unless the attorney obtains leave from the court to proceed without local counsel. N.D. Tex. L.B.R. 2090-4.

Practice Note: To receive notice of all matters in a case, the attorney needs to appear in the case. See form 35-4 for a sample notice of appearance.

§ 35.5 Electronic Filing

The bankruptcy courts for all districts in Texas require that all documents be filed electronically as Adobe PDF files. The practice generally requires participation in a training course. On completion of the training course, the court issues the practitioner a login ID and a password, which is an electronic "signature." All the bankruptcy courts in the four federal districts in Texas have adopted Appendix 5005, the "Administrative Procedures for the Filing, Signing, and Verifying of Documents by Electronic Means in Texas Bankruptcy Courts." A copy can be located online at **http://www.txeb.uscourts.gov/sites/txeb/files/TXEB_Appendix_5005.pdf**.

Posting a credit card for filing documents requiring a fee may also be part of the procedure in some courts. The practitioner should consult the specific court for filing requirements. See section 35.1:2 above for a list of the official Web addresses for the bankruptcy courts in Texas.

Practice Note: Registration for electronic filing constitutes consent to receive notices electronically. The practitioner is advised to check frequently for filings involving matters in which the practitioner has an interest. Once an appearance has been entered in a case, copies of all documents filed in the case will automatically be sent to the practitioner by e-mail.

[Sections 35.6 through 35.10 are reserved for expansion.]

II. Automatic Stay

§ 35.11 Scope

On the filing of a bankruptcy petition, the debtor receives automatic injunctive relief that broadly prohibits creditors from taking further action against the debtor, the property of the debtor, or the property of the estate to collect their claims or enforce their liens. 11 U.S.C. § 362.

The stay arises at the time of filing, not when notice is given to or received by the creditor. 11 U.S.C. § 362(a); *In re Sumpter*, 171 B.R. 835, 841–42 (Bankr. N.D. Ill. 1994). The stay is often effective before creditors learn of it. A creditor may innocently obtain a default judgment or hold a foreclosure sale in violation of the automatic stay. *See, e.g., In re Abusaad*, 309 B.R. 895 (Bankr. N.D. Tex. 2004). The Fifth Circuit Court of Appeals has held that an action taken in violation of the automatic stay is voidable. *See In re Coho Resources, Inc.*, 345 F.3d 338, 344 (5th Cir. 2003); *contra In re Elder*, 12 B.R. 491 (Bankr. M.D. Ga. 1981) (action is void).

The scope of the automatic stay is extremely broad. The stay prohibits—

1. commencing or continuing an action or proceeding that was or could have been commenced before the bankruptcy case began;
2. commencing or continuing an action to recover a claim that arose prebankruptcy;
3. enforcing a judgment obtained prebankruptcy;
4. obtaining possession of property of or from the estate or exercising control over such property;
5. creating, perfecting, or enforcing against the property of the debtor any lien to the extent that the lien secures a claim that arose prebankruptcy;
6. collecting, assessing, or recovering a prebankruptcy claim against the debtor;
7. setting off any prebankruptcy debt owing to the debtor against any claim against the debtor; or
8. commencing or continuing a proceeding before the U.S. Tax Court concerning a corporate debtor's tax liability for a taxable period that may be determined by the bankruptcy court or concerning the tax liability of an individual debtor for a taxable period ending before the date of the order for relief.

11 U.S.C. § 362(a).

However, a counterclaim asserted by the debtor is not an action "against the debtor" under 11 U.S.C. § 362(a) and, therefore, is not subject to the automatic stay. *In re United States Abatement Corp.*, 39 F.3d 563, 568 (5th Cir. 1994); *see also In re Voluntary Purchasing Groups, Inc.*, 205 B.R. 80, 80–81 (Bankr. E.D. Tex. 1996).

§ 35.12 Codebtor's Stay

The codebtor stay refers to a stay of collection against codebtors who are not in bankruptcy if they are codebtors with a debtor filed bankruptcy. Except for consumer debt in a Chapter 12 or 13 case, the automatic stay of section 362 of the Bankruptcy Code does not prohibit demands, suits, or any other action by the credi-

tor against guarantors or other codebtors of the bankrupt debtor. *See Winters ex rel. McMahon v. George Mason Bank*, 94 F.3d 130, 133 (4th Cir. 1996); *Lynch v. Johns-Manville Sales Corp.*, 710 F.2d 1194 (6th Cir. 1983); *Pitts v. Unarco Industries, Inc.*, 698 F.2d 313 (7th Cir. 1983); *In re Devine Ripe, LLC*, 538 B.R. 300, 302 (Bankr. S.D. Tex. 2015).

In a Chapter 13 case, a codebtor's stay applies. 11 U.S.C. § 1301. The codebtor's stay under Chapter 13 stays enforcement of consumer debts against a codebtor. It does not stop the creditor from pursuing the codebtor if the codebtor became liable on or secured the debt in the ordinary course of the codebtor's business or if the Chapter 13 case is closed, dismissed, or converted to a case under Chapter 7 or 11. 11 U.S.C. § 1301(a).

Streamlined provisions are added for a creditor to obtain relief from the codebtor's stay. A motion for relief of the codebtor's stay should be granted if—

1. the codebtor received the consideration for the creditor's claim;
2. the debtor's plan proposes not to pay the claim; or
3. the creditor's interest would be irreparably harmed by the continuation of the codebtor's stay.

11 U.S.C. § 1301(c). Unless a written opposition is filed to the motion within twenty days after it is filed, the codebtor's stay lifts without the necessity of a court order. 11 U.S.C. § 1301(d).

Practice Note: If the stay does not apply to a nonbankrupt codebtor automatically by statute as discussed above, the debtor could file a motion seeking extension of the stay by court order. As a court of equity, the court can order to extend the stay or enjoin action against a codebtor. A creditor needs to object to such motion if the creditor wants to pursue the nonbankrupt codebtor. In general, the court should not protect any nonbankrupt codebtor unless the debtor can show that protecting the codebtor will provide a benefit to the bankruptcy estate and its creditors.

§ 35.13 Exceptions to Automatic Stay

Despite the broad reach of the automatic stay, there are exceptions. Some of the exceptions are—

1. the commencement or continuation of a criminal action or proceeding against the debtor (11 U.S.C. § 362(b)(1));
2. the commencement or continuation of an action for paternity, modification of domestic support obligations, child custody or visitation, dissolution of marriage (unless the action seeks to determine division of property), domestic violence, collection of a domestic support obligation from property that is not included in the bankruptcy estate, or the withholding of income that is property of the estate or of the debtor for payment of a domestic support obligation (11 U.S.C. § 362(b)(2)(A)–(C));
3. certain acts as specified in the Social Security Act (11 U.S.C. § 362(b)(2)(D)–(G));
4. certain acts to perfect or maintain the perfection of an interest in property (11 U.S.C. § 362(b)(3));
5. the commencement or continuation of proceedings under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction and pursuant police and regulatory powers (11 U.S.C. § 362(b)(4));

6. certain contractual rights exercised by commodity brokers, forward contract merchants, stockbrokers, financial institutions, or securities clearing agencies (11 U.S.C. § 362(b)(6));
7. certain contractual rights exercised by repo participants or financial participants (11 U.S.C. § 362(b)(7));
8. action by the secretary of Housing and Urban Development to foreclose a mortgage or deed of trust covering property consisting of five or more living units (11 U.S.C. § 362(b)(8));
9. certain actions by tax authorities, including—
    a. an audit to determine tax liability;
    b. issuance of a notice of tax deficiency;
    c. a demand for tax returns; and
    d. a tax assessment and issuance of a notice and demand for payment of such an assessment (11 U.S.C. § 362(b)(9));
10. an act by a lessor under a lease of nonresidential real property that has terminated by expiration of the stated term of the lease to obtain possession of the property (11 U.S.C. § 362(b)(10));
11. presentment of a negotiable instrument and giving notice of and protesting dishonor of a negotiable instrument (11 U.S.C. § 362(b)(11));
12. certain acts by the U.S. secretary of education regarding the eligibility of the debtor to participate in education loan programs (11 U.S.C. § 362(b)(16));
13. certain contractual rights exercised by swap participants or financial participants (11 U.S.C. § 362(b)(17));
14. the creation or perfection of a statutory lien for an ad valorem property tax or other special tax or special assessment on real property imposed by a government unit if the tax comes due after the petition was filed (11 U.S.C. § 362(b)(18)); and
15. the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant if the lessor has obtained before the date of the filing of the bankruptcy petition a judgment for possession of the property (11 U.S.C. § 362(b)(22)).

§ 35.14 Termination of Automatic Stay

The stay of an act against property of the estate continues until such property is no longer property of the estate. 11 U.S.C. § 362(c)(1). The stay also terminates automatically against all other actions and proceedings subject to the automatic stay when the bankruptcy proceeding is closed or dismissed or when the debtor receives or is denied a discharge. 11 U.S.C. § 362(c)(2). While the automatic stay in a Chapter 7 case has a limited duration, the automatic stay in a Chapter 12 or Chapter 13 case may not terminate for years. However, it is possible to obtain an earlier termination of the automatic stay.

If the debtor is an individual and the debtor was a debtor in a prior bankruptcy case that was pending within the preceding one year but was dismissed, the automatic stay expires thirty days after the filing of the subsequent case unless the debtor files a motion to continue the stay and obtains an order from the court continuing the stay. 11 U.S.C. § 362(c)(3). A presumption exists that a filing is not in good faith, and the debtor must rebut the presumption with clear and convincing evidence when seeking the stay

to be extended past the thirty days. 11 U.S.C. § 362(c)(3)(C). If two or more cases were pending for an individual debtor within the previous year but were dismissed, the automatic stay does not go into effect. 11 U.S.C. § 362(c)(4)(A).

Relief from Automatic Stay for Secured Creditors: A secured party or a mortgagee may obtain relief from the automatic stay if he can establish that the debtor does not have equity in the encumbered property and the property is not necessary for an effective reorganization. 11 U.S.C. § 362(d)(2).

A secured creditor may also obtain relief from the bankruptcy stay by showing that the creditor's interest in the property is not adequately protected. 11 U.S.C. § 362(d)(1). See section 35.15 below for a discussion of adequate protection.

The party requesting relief from the stay has the burden of establishing the debtor's lack of equity in the encumbered property. The party opposing the relief from the stay has the burden of proof on all other issues. 11 U.S.C. § 362(g).

§ 35.15 Adequate Protection

"Adequate protection" is a critical issue in controversies under Bankruptcy Code sections 362 (relief from the automatic stay), 363 (use, sale, or lease of property), and 364 (obtaining credit). Unfortunately, the Code does not define adequate protection.

When adequate protection is required under Bankruptcy Code sections 362, 363, and 364, the three nonexclusive methods of providing adequate protection are—

1. requiring the trustee to make periodic cash payments to the lien creditor equal to the decrease in value of the creditor's interest in the collateral;
2. providing to the entity an additional or replacement lien; and
3. granting such other relief (except allowing the creditor to claim an administrative expense under section 503(b)(1)) as will compensate the creditor for the decrease in value of the creditor's interest in the collateral.

11 U.S.C. § 361.

§ 35.16 Prepetition Repossession

An important issue that has generated sharp controversy is whether a creditor that has lawfully repossessed a debtor's property prepetition violates the automatic stay simply by retaining possession of that property postpetition until adequate protection is assured. Most courts have held that the repossessing secured creditor must turn over the lawfully repossessed property on demand, even without adequate protection, or be in violation of the stay. *See, e.g., Thompson v. General Motors Acceptance Corp.*, 566 F.3d 699, 701–03 (7th Cir. 2009); *In re Bunton*, 246 B.R. 851 (Bankr. N.D. Ohio 2000); *In re Zaber*, 223 B.R. 102 (Bankr. N.D. Tex. 1998); *In re Bersheidt*, 223 B.R. 579 (Bankr. D. Wyo. 1998); *but see In re Fitch*, 217 B.R. 286 (Bankr. S.D. Cal. 1998) (refusal of creditor to return vehicle without adequate protection did not violate automatic stay).

§ 35.17 Consequences of Violating Stay

An individual injured by a willful violation of the automatic stay is entitled to recover actual damages, including costs and attorney's fees, and, in appropriate circumstances, may recover punitive damages. 11 U.S.C. § 362(k)(1). If, however, the violation was made in good faith, the damages may be limited to actual damages. 11 U.S.C. § 362(k)(2). "Individual" in this context includes only human beings, not other entities. *In re LATCL&F*, Nos. 3:99-CV-2953-R,

398-35100-HCA, 2001 WL 984912 (N.D. Tex. Aug. 14, 2001); *but see In re Freemyer Industrial Pressure, Inc.*, 281 B.R. 262 (Bankr. N.D. Tex. 2002).

Typically, the debtor or other party must bear the damages unless the violation is, in fact, willful. Willfulness is proven if the violator knew of the automatic stay and his actions were intentional. *Mitchell v. BankIllinois*, 316 B.R. 891, 901 (S.D. Tex. 2004). Willfulness may also occur even if the stay is violated before notice of the bankruptcy if the violator does not act to restore the status quo when he does receive notice. *In re Wariner*, 16 B.R. 216, 218 (Bankr. N.D. Tex. 1981); *see also In re Zaber*, 223 B.R. 102, 107 (Bankr. N.D. Tex. 1998).

Actual damages are not necessary to bring and maintain a violation of the stay. *See In re Hill*, 19 B.R. 375 (Bankr. N.D. Tex. 1982). Damages for emotional distress and relational injuries are part of "actual damages." If property of the debtor is taken and held, actual damages may be measured by the value of the property at the time it is taken plus a rate per day for every day the property was out of the debtor's possession. Further, the court must award attorney's fees in a successful action for violation of the stay, and such fees are not limited to the amount of the debtor's damages. *See* 11 U.S.C. § 362(k).

[Sections 35.18 through 35.20 are reserved for expansion.]

III. Claims

§ 35.21 Types of Claims

General Unsecured Claims: The Bankruptcy Code determines the order in which unsecured claims will be paid if there is not enough money to pay all unsecured claims in full. *See* 11 U.S.C. §§ 502, 507.

Priority Claims: A priority claim is an unsecured claim that is entitled to be paid ahead of other unsecured claims that are not entitled to priority status. 11 U.S.C. § 507.

Secured Claims: A creditor may have a secured claim either through a security interest in property in the bankruptcy estate or because of a lien or a right of setoff. "Security interest" means a lien created by an agreement. 11 U.S.C. § 101(51). A lien is a charge against or interest in property to secure payment of a debt or performance of an obligation. 11 U.S.C. § 101(37). A judicial lien is a lien obtained by judgment, levy, sequestration, or another legal or equitable process or proceeding. 11 U.S.C. § 101(36).

A claim is secured only to the extent of the value of the collateral securing the claim. *See* 11 U.S.C. § 506(a).

Practice Note: If the collateral's value is less than the claim amount, the claim is bifurcated into a secured claim up the amount of the collateral and an unsecured claim for the remainder. If the collateral exceeds the value of the claim, then the claim is "oversecured" and the secured claimant is entitled to interest and costs and attorney's fees if allowed by agreement or state law. *See* 11 U.S.C. § 506(b).

Practice Note: Determining and proving "value" of collateral requires evidence. An expert witness is helpful to prove value. Review 11 U.S.C. § 506(a) as to the type of "value" that is considered depending on the case, such as replacement value or value for proposed disposition or use of collateral.

Administrative Expense Claims: Claims incurred in the administration of a bankruptcy

case are considered administrative expense claims that are paid before priority and general unsecured claims. 11 U.S.C. § 503. These claims include actual and necessary expenses of preserving the estate, professional fees for the estate, and value of goods received by the debtor within 20 days prior to the bankruptcy filing. 11 U.S.C. § 503.

A party that agrees to postpetition financing of the debtor may seek priority status on such financing, including—

1. credit with priority over any or all administrative expenses of the kind specified in 11 U.S.C. §§ 503(b), 507(b);
2. credit secured by a lien on property of the estate that is not otherwise subject to a lien; or
3. credit secured by a junior lien on property of the estate that is subject to a lien.

See 11 U.S.C. § 364(c).

The bankruptcy court may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if the trustee is unable to obtain such credit otherwise, and there is adequate protection of the interest of the holder of the lien on the property of the estate on which the senior or equal lien is proposed to be granted. 11 U.S.C. § 364(d).

§ 35.22 Proof of Claim

The proof of claim is a written statement describing the reason a debtor owes a creditor money. There is an official form for this purpose (*see* Fed. R. Bankr. P. 3001, 3003, and 3005 and Official Bankruptcy Form No. 10), which is reproduced at form 35-6 in this chapter. A creditor or its lawyer can file a proof of claim without being admitted to the particular bankruptcy court.

For Chapter 7, 12, or 13 cases, the proof of claim must be filed within ninety days after the first date set for the creditors meeting; however, some exceptions apply:

1. A governmental unit has 180 days after the entry of the order for relief to file a proof of claim.
2. An infant or incompetent may have the deadline extended at the court's discretion.
3. An unsecured claim that is the result of a judgment may be filed within thirty days after the judgment becomes final.
4. A claim arising from the rejection of an executory contract or lease "may be filed within such time as the court may direct."
5. If a no-asset notice was served, and thereafter a notice of distribution is served, parties have ninety days after the mailing of the notice of distribution to file proofs of claim.

Fed. R. Bankr. P. 3002(c).

Several courts have held that the bankruptcy court does not have authority in a case under Chapter 7, 12, or 13 to allow a late-filed proof of claim outside the exceptions listed in Fed. R. Bankr. P. 3002(c). *See, e.g., In re McLarry*, 273 B.R. 753 (Bankr. S.D. Tex. 2002); *In re Kelley*, 259 B.R. 580 (Bankr. E.D. Tex. 2001); *In re Duarte*, 146 B.R. 958 (Bankr. W.D. Tex. 1992). A debtor or trustee may file a proof of claim for a creditor that fails to timely file within thirty days after the rule 3002(c) deadline passes. Fed. R. Bankr. P. 3004.

The filing of a proof of claim in a case under Chapter 9 or 11 of the Bankruptcy Code is gov-

erned by Fed. R. Bankr. P. 3003. In cases under Chapter 9 or 11, the court may extend the time to file a proof of claim for cause. Fed. R. Bankr. P. 3003(c)(3); *see also In re Eagle Bus Manufacturing, Inc.*, 62 F.3d 730, 737 (5th Cir. 1995) (creditor's late-filed proof of claim was allowed where there was no evidence of bad faith and neither other creditors nor debtor would be prejudiced by allowing claim); *In re AMWC, Inc.*, 109 B.R. 210, 214 (Bankr. N.D. Tex. 1989) (court reviewed motion to file late proof of claim under "excusable neglect" test). See form 35-7 for a sample creditor's motion to allow late filing of proof of claim.

Practice Note: In a no-asset case, many practitioners will file a proof of claim on receipt of the initial notice of the bankruptcy in the event that assets are later discovered.

Practice Note: Effective December 1, 2015, the Official Bankruptcy Forms were superseded with new forms with new numbering and format. The forms and instructions can be found at **http://www.uscourts.gov/forms/bankruptcy-forms**.

Practice Note: The filing of a proof of claim for a claim outside of limitations might be a violation of the Federal Debt Collection Practices Act (FDCPA). The court of appeals for the Fifth Circuit has not yet ruled, and other circuits are split on the issue. *See Trevino v. HSBC Mortgage Services, Inc. (In re Trevino)*, 535 B.R. 110, 137 n.7 (Bankr. S.D. Tex. 2015).

§ 35.23 Objections to Claim

A proof of claim is deemed "allowed" unless a party objects to the claim. 11 U.S.C. § 502(a). At any time before the case is closed, the trustee, the debtor-in-possession, or a party in interest may file an objection to a proof of claim. 11 U.S.C. § 502. To oppose an objection to its claim, the creditor must file a written response to the objection with the bankruptcy court. At the hearing, the creditor will need to prove the validity of his claim.

§ 35.24 Setoffs

A creditor may offset a mutual debt owing by the creditor to the debtor that arose before the commencement of the case against a claim the creditor has against the debtor that arose before the commencement of the case. However, a setoff will not be allowed if—

1. the claim of the creditor against the debtor is disallowed;
2. the claim was transferred, by an entity other than the debtor, to the creditor after commencement of the case;
3. the claim was transferred, by an entity other than the debtor, to the creditor after ninety days before the date the petition was filed and while the debtor was insolvent; or
4. the debt owed to the debtor by the creditor was incurred by the creditor after ninety days before the date of filing, while the debtor was insolvent, and for the purpose of obtaining a right of setoff against the debtor.

11 U.S.C. § 553(a).

Practice Note: The setoff of a claim is automatically stayed. 11 U.S.C. § 362(a)(7). The attorney needs to seek relief from the stay to exercise setoff rights.

§ 35.25 Executory Contracts and Unexpired Leases

The bankruptcy trustee is authorized to assume or reject executory contracts and unexpired leases; the decision to assume or reject a contract or lease must be approved by the court. 11 U.S.C. § 365(a). The statute does not define the term *executory contract*, but legislative history

indicates that the term generally includes contracts on which performance remains due to some extent on both sides. *See* H.R. Rep. No. 95-595, at 347 (1977); S. Rep. No. 95-989, at 58 (1978) (quoted in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984) superseded by statute on other grounds, 11 U.S.C. § 1113.). Section 365 contains provisions allowing the trustee to cure certain defaults before assumption and to provide adequate assurance of future performance of contracts that are in default. *See* 11 U.S.C. § 365(b). Section 365 permits not only the assumption but also the assignment of most contracts, notwithstanding contractual provisions that might otherwise limit assumption or assignment. *See* 11 U.S.C. § 365(f).

For a more detailed discussion of executory contracts and unexpired leases, see part VII. in this chapter.

[Sections 35.26 through 35.30 are reserved for expansion.]

IV. Chapter 7 Bankruptcy

§ 35.31 Introduction

A bankruptcy under Chapter 7 of the Bankruptcy Code is often referred to as liquidation bankruptcy. The goal is straightforward: to allow an individual debtor to obtain a discharge, keep exempt property allowed by law, and provide an orderly liquidation. The typical debtor in a Chapter 7 bankruptcy is one who has primarily unsecured debts, who does not have significant problems with secured creditors, and who does not have potential problems with discharge, dischargeability, or substantial abuse.

A debtor who filed a Chapter 7 bankruptcy and received a discharge within the previous eight years is ineligible for Chapter 7 relief. 11 U.S.C. § 727(a)(8); *see also* 11 U.S.C. § 727(a)(9).

Under the federal Fair Credit Reporting Act, a bankruptcy under Chapter 7 remains on an individual's credit record for ten years. 15 U.S.C. § 1681c(a)(1).

§ 35.32 Exemptions

Under Chapter 7, the individual debtor selects exempt property on Official Bankruptcy Form 106C, better known as Schedule C. If no one objects to the claim of exemptions within thirty days after the conclusion of the first meeting of creditors, the debtor keeps the property listed on Schedule C. *See Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992). In Texas, the debtor may choose between two potential lists of exempt property: the Texas state exemptions and the federal exemptions. See section 35.32:1 below for discussion of the Texas state exemptions and section 35.32:3 for discussion of the federal exemptions.

§ 35.32:1 Texas State Exemptions

When the Bankruptcy Code was passed in 1979, states were given the option to "opt out" of the federal exemptions and prohibit their citizens from claiming the list of federal exemptions. Texas is one of sixteen states that chose not to opt out; therefore, debtors in Texas may choose between the Texas state exemptions and the federal exemptions. In most cases, the Texas state exemptions are more generous than the federal exemptions.

Homestead Exemption: The Texas homestead exemption allows unlimited value as long as the homestead is located on not more than ten acres in the city or not more than 200 acres for a family in the country. Tex. Prop. Code § 41.002.

In contrast, the federal exemption allows equity not to exceed $23,675 per spouse as of April 1, 2016, with slight readjustment for inflation every three years. 11 U.S.C. § 522(d). A million-dollar house on ten urban acres would be exempt under Texas law, while only $47,350 in equity would be available to a couple under the federal exemptions. For a more detailed discussion of the Texas homestead exemption, see sections 27.35 through 27.40 in this manual. Some limits, however, are placed on the amount of the state homestead exemption that may be allowed to a debtor in bankruptcy. A debtor electing state exemptions may not exempt any interest in real or personal property that the debtor or a dependent of the debtor uses as a residence that was acquired by the debtor during the 1,215-day period (three years plus 120 days) preceding the date of the filing of the petition that exceeds, in the aggregate, $160,375 in value. This limit does not include any interest transferred from the debtor's previous principal residence. 11 U.S.C. § 522(p)(2)(B).

Personal Property Exemptions: See sections 27.41 and 27.42 for a full discussion of the Texas personal property exemptions.

§ 35.32:2 Federal Exemptions

Most of the federal exemptions place strict limits on each type of property and, in some cases, the value of each specific item under a type of property. 11 U.S.C. § 522(d). The federal exemptions have some aspects, however, that benefit a small class of debtors who do not have to worry about excess equity in their homestead.

"Wild Card" Exemption: The exemptions include what is known as the "wild card." With this exemption, each debtor can claim $1,250 plus up to $11,850 of any unused amount of the homestead exemption for any property. 11 U.S.C. § 522(d)(5). In contrast, cash is not exempt under Texas law. Tex. Prop. Code § 42.002.

Crime Victim's Awards: The federal exemptions include provisions for awards under crime victim's reparation laws, payment on account of wrongful death, and personal injury awards. 11 U.S.C. § 522(d)(11). None of these is exempt under Texas law.

§ 35.32:3 Objecting to Exemptions

It is the duty of the trustee to review the debtor's claim of exempt property and to file an objection if the claimed exemptions exceed the lawful items or amount.

§ 35.33 Discharge

The bankruptcy discharge makes certain debts unenforceable. The discharge has the effect of an injunction prohibiting enforcement of the discharged debt. Any attempt to collect on a discharged debt can be subject to penalty by civil contempt under a "no fair ground of doubt" standard or objective standard that looks at whether the creditor had an unreasonable understanding of the discharge order. *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1804 (2019). Any judgments against the debtor with respect to discharged debts become void. 11 U.S.C. § 524(a).

Section 727 of the Bankruptcy Code defines which debtors are entitled to a discharge. *See* 11 U.S.C. § 727. Discharge under this section is an all-or-nothing proposition; either the debtor receives a discharge, or he does not. Whereas under section 523, specific claims can be excepted from discharge as discussed below.

Certain debtors are not entitled to a Chapter 7 discharge regardless of the debtor's culpability. A debtor is not eligible for discharge under Chapter 7 if—

1. the debtor is not an individual (corporations and partnerships may receive a discharge only under Chapter 11 or 12) (11 U.S.C. § 727(a)(1));

2. the debtor has been granted a discharge under Chapter 7 or 11 in a case filed within the preceding eight years (11 U.S.C. § 727(a)(8)); or

3. the debtor received a discharge under Chapter 12 or 13 in a case commenced within the preceding six years that paid less than 70 percent of the debts (although in some instances the debtor may be eligible to receive a discharge under Chapter 13) (11 U.S.C. § 727(a)(9)).

A debtor may also be ineligible for discharge because of an infraction against the bankruptcy system. These infractions often constitute criminal offenses as well. *See* 18 U.S.C. § 152. Grounds for denying discharge based on the debtor's culpability include—

1. the transfer, removal, mutilation, or concealment of the debtor's property with intent to hinder, delay, or defraud a creditor or the trustee within one year before filing for bankruptcy (11 U.S.C. § 727(a)(2)(A));

2. the transfer, removal, mutilation, or concealment of property of the estate with intent to hinder, delay, or defraud a creditor or the trustee (11 U.S.C. § 727(a)(2)(B));

3. the concealment, destruction, mutilation, falsification, or failure to keep or preserve financial records sufficient to determine the debtor's financial condition (11 U.S.C. § 727(a)(3));

4. knowingly and fraudulently making a false oath or account or presenting a false claim in connection with the case (11 U.S.C. § 727(a)(4)(A), (a)(4)(B));

5. bribery (11 U.S.C. § 727(a)(4)(C));

6. withholding recorded information, books, documents, records, and papers relating to the debtor's property or financial affairs from the trustee or a court officer (11 U.S.C. § 727(a)(4)(D));

7. failure to satisfactorily explain any loss of assets or deficiency of assets to meet the debtor's liabilities (11 U.S.C. § 727(a)(5));

8. refusal to obey any lawful order of the court or refusal to answer a question (except where there is a proper claim of the privilege against self-incrimination and no immunity is granted) (11 U.S.C. § 727(a)(6)); and

9. commission of any act prohibited under 11 U.S.C. § 727(a)(2)–(6) in another case concerning an insider during the year before bankruptcy (11 U.S.C. § 727(a)(7); *see also* 11 U.S.C. § 101(31)).

No action is required to deny discharge under 11 U.S.C. § 727(a)(1), (a)(8), or (a)(9); these provisions are self-executing. *See* Fed. R. Bankr. P. 4004(c)(1). A timely filed complaint is necessary, however, to deny discharge under 11 U.S.C. § 727(a)(2)–(7). *See* Fed. R. Bankr. P. 4004(a), (b). A complaint objecting to discharge must be filed not later than sixty days following the first date set for the meeting of creditors pursuant to section 341(a). Fed. R. Bankr. P. 4004(a). In a Chapter 11 case, the complaint must be filed not later than the first date set for the hearing on confirmation. Fed. R. Bankr. P. 4004(a). The court may extend this deadline as long as the request is made before the deadline. Fed. R. Bankr. P. 4004(b).

See form 35-16 in this chapter for a sample complaint to determine dischargeability.

A discharge may be revoked in some instances. Within one year of discharge, the discharge can be revoked if the debtor obtains his discharge through fraud and the party requesting revocation did not know of the fraud until after the discharge was granted. 11 U.S.C. § 727(d)(1),

(e)(1). The discharge may be revoked before the later of one year after granting the discharge or the date the case is closed if—

1. the debtor knowingly and fraudulently acquires or becomes entitled to acquire property of the estate and fails to disclose it;

2. the debtor fails to obey a lawful order or respond to a material question; or

3. the debtor fails to explain satisfactorily a material misstatement in an audit or fails to make records and documents available for inspection, as referred to in section 586(f) of title 28.

11 U.S.C. § 727(d)(2)–(4), (e)(2).

The trustee, a creditor, or the U.S. trustee may request revocation of a discharge. The discharge may be revoked only after notice and a hearing. 11 U.S.C. § 727(d).

Waiver of Discharge: The debtor may choose to waive his discharge under 11 U.S.C. § 727(a)(10).

Time between Successive Cases: A debtor cannot receive a discharge under Chapter 7 if the debtor has received a discharge under Chapter 7 or Chapter 11 during the preceding eight years or under Chapter 13 during the preceding six years. 11 U.S.C. § 727(a)(8), (a)(9). A debtor cannot receive a discharge under Chapter 13 if the debtor received a discharge under Chapter 13 during the previous two years or under Chapter 7, 11, or 12 during the previous four years. 11 U.S.C. § 1328(f).

Practice Tip: The deadline for a Chapter 7 dischargeability complaint runs from the date set for the first meeting of creditors. If the meeting of creditors is rescheduled, it does not affect the deadline; the deadline is still from the *first* date set for the meeting of creditors.

§ 35.34 Nondischargeability of Specific Debts

Automatically Nondischargeable: Certain debts require no action to ensure their nondischargeability. A creditor may attempt to enforce these debts long after the bankruptcy is discharged without seeking permission from the bankruptcy court. Some debts that are automatically nondischargeable include—

1. most debts for taxes, although some income taxes may be discharged under certain circumstances (11 U.S.C. § 523(a)(1));

2. debts that are neither listed nor scheduled if they were not listed in time to file a proof of claim or in time to file a timely nondischargeability complaint (11 U.S.C. § 523(a)(3));

3. a domestic support obligation (including some debts for attorney's fees used to establish the obligation) (11 U.S.C. § 523(a)(5); *see also In re Hudson*, 107 F.3d 355 (5th Cir. 1997); *In re Fulton*, 236 B.R. 626 (Bankr. E.D. Tex. 1999));

4. most debts for fines, penalties, or forfeitures payable to and for the benefit of a governmental unit (11 U.S.C. § 523(a)(7));

5. student loans, unless the debtor obtains a determination that failure to discharge the debt would impose an undue hardship on the debtor and the debtor's dependents (11 U.S.C. § 523(a)(8); *see also In re Gerhardt*, 348 F.3d 89 (5th Cir. 2003) (outlining test for "undue hardship"));

6. debts for death or personal injury caused by the debtor's operation of a motor vehicle or boat while intoxicated from using alcohol, a drug, or another substance (although a debt for

property damage caused while intoxicated may be dischargeable) (11 U.S.C. § 523(a)(9));

7. debts the debtor waived or was denied a discharge for in a prior case (11 U.S.C. § 523(a)(10));

8. instances of fiduciary fraud against an insured bank or savings and loan (11 U.S.C. § 523(a)(11));

9. malicious or reckless failure to maintain a commitment to maintain the capital of an insured depository institution (11 U.S.C. § 523(a)(12));

10. restitution orders issued under title 18 of the United States Code (11 U.S.C. § 523(a)(13));

11. debts incurred to pay a nondischargeable tax (11 U.S.C. § 523(a)(14)); and

12. condominium fees and homeowners association dues incurred after filing the bankruptcy case as long as the debtor received an actual benefit (such as residing there or renting the property out to a tenant) (11 U.S.C. § 523(a)(16)).

In some instances, the debtor or the creditor may want to obtain a determination that the debt is or is not dischargeable. This is absolutely necessary to establish a hardship discharge of a student loan. *In re Gerhardt*, 348 F.3d 89. There also may be questions concerning the nature of domestic support obligations or fact issues surrounding a hardship discharge that require litigation in the bankruptcy proceeding. Because the rules relating to dischargeability of tax debts are quite complicated, it may be preferable to obtain a ruling from the bankruptcy court than to bring the issue before a state court. Except for dischargeability under section 523(a)(2), (4), and (6), state courts share concurrent jurisdiction with bankruptcy courts to determine dischargeability issues. *In re Bingham*, 163 B.R. 769, 772 (Bankr. N.D. Tex. 1994).

There may be questions concerning the nature of domestic support obligations or fact issues surrounding a hardship discharge that require litigation in the bankruptcy proceeding.

Debts that Must Be Timely Proven to Be Nondischargeable: Three categories of nondischargeable debt require the creditor to file a timely complaint in the bankruptcy court seeking a determination of nondischargeability. 11 U.S.C. § 523(c). The bankruptcy court has exclusive jurisdiction for these three categories. The creditor's failure to file a timely complaint could result in the loss of the ability to collect the debt. The three categories of debt are—

1. debts for money or property obtained through fraud or false pretenses including money obtained or renewals or extensions obtained through use of a false written financial statement (11 U.S.C. § 523(a)(2));

2. debts incurred as a result of fraud or defalcation while acting in a fiduciary capacity, larceny, or embezzlement (11 U.S.C. § 523(a)(4)); and

3. debts for willful and malicious injury (11 U.S.C. § 523(a)(6)).

The court determines the dischargeability of these debts after notice and hearing. 11 U.S.C. § 523(c)(1).

§ 35.35 Abuse

If the court finds that a debtor's case would constitute an "abuse," the court has the authority to dismiss the case. 11 U.S.C. § 707(b)(1). A motion for dismissal may be brought by the court on its own motion, by the U.S. trustee, the trustee (or bankruptcy administrator), or any party in interest. The abuse concept applies to only an individual debtor who owes primarily consumer debts. 11 U.S.C. § 707(b)(1).

"Abuse" is not defined in the Bankruptcy Code, but section 707(b)(2)(A) of the Code sets out a test for the presumption of abuse. *See* 11 U.S.C. § 707(b)(2).

A finding of abuse will generally not close the door on bankruptcy completely. The court may also, with the debtor's consent, convert the case to Chapter 11 or 13.

§ 35.36 Reaffirmation

Reaffirmation relates to both exempt property and discharge. If a debt is reaffirmed, the debtor does not get the benefit of the discharge of the debt. Reaffirmation is frequently used in the case of secured or nondischargeable debts.

Reaffirmation is sometimes used for secured debts. With a secured debt, the liability on the debt may be dischargeable, but the lien is not discharged. This means that the creditor is still free to enforce its lien once the bankruptcy case is over. The Bankruptcy Code gives debtors three options for dealing with property subject to a lien in Chapter 7: reaffirmation, redemption, or surrendering the collateral. *See* 11 U.S.C. § 521.

The debtor must file with the clerk of the court a statement of his intentions for the retention or surrender of a secured creditor's collateral and to specify whether the debtor intends to redeem (for cash) the collateral or reaffirm the debt secured by the collateral. 11 U.S.C. § 521.

The Fifth Circuit Court has held that the choices under section 521—surrendering the collateral, redeeming it, or reaffirming the debt—are unambiguous and mandatory and that, therefore, there are no other choices. *See In re Johnson*, 89 F.3d 249 (5th Cir. 1996).

Of the three options, reaffirmation and surrender are the most commonly used. Redemption requires paying the value of the property in cash. Obviously, this may be difficult if the collateral is a house or a car. If the debtor wants to keep collateral that has a high value, the only practical option is likely to be reaffirmation of the debt.

The reaffirmation agreement must—

1. be entered into before the discharge is granted; and
2. be filed with the court and either contain a certification from the debtor's attorney that the agreement is voluntary, it does not impose undue hardship, and the debtor has been advised on the legal effect and consequences of the agreement or, if the individual is not represented by an attorney during negotiation of the agreement, the court approves that the agreement does not impose an undue hardship and is in the best interest of the debtor.

11 U.S.C. § 524(c)(1), (3), (6).

Also, the agreement is enforceable only if—

1. the debtor received the disclosures described in 11 U.S.C. § 524(k) at or before the time the debtor signed the agreement;
2. the debtor has not rescinded the agreement before discharge or within sixty days after the agreement is filed with the court (whichever occurs later); and
3. provisions of 11 U.S.C. § 524(d) have been complied with.

11 U.S.C. § 524(c)(2), (4), (5).

See form 35-9 for a sample reaffirmation agreement.

§ 35.37 Lien Avoidance

A debtor may completely avoid certain types of liens on property in which the debtor has an

interest if the lien impairs an exemption on that property to which the debtor would otherwise be entitled. 11 U.S.C. § 522(f).

Judicial Liens: Judicial liens are liens "obtained by judgment, levy, sequestration or other legal or equitable process or proceeding," including writs of garnishment. 11 U.S.C. § 101(36). Although judicial liens are avoidable under section 522(f)(1), judicial liens to a spouse, former spouse, or child of the debtor for domestic support are not avoidable. 11 U.S.C. § 522(f)(1)(A). Judgments on mortgage foreclosures are not avoidable. 11 U.S.C. § 522(f)(2)(C).

Garnishment Lien: As described above, a garnishment creates a judicial lien. Under Texas law, the garnishment lien attaches at the date of service of the summons. *In re Latham*, 823 F.2d 108, 110 (5th Cir. 1987). The date of attachment is used for determining whether the garnishment falls within statutory time frame to be clawed back as an avoidable preference. *In re Latham*, 823 F.2d at 110.

Nonpossessory, Non–Purchase-Money Security Interests: The debtor may avoid nonpossessory, non–purchase-money security interests in—

1. household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are primarily for the personal or household use of the debtor or the debtor's dependents;
2. implements, professional books, or tools of the trade of the debtor or debtor's dependents; and
3. professionally prescribed health aids for the debtor or the debtor's dependents.

11 U.S.C. § 522(f)(1)(B). Non–purchase-money liens on motor vehicles are not avoidable under section 522(f) because motor vehicles are not considered household goods. A lien on property in which the security interest was taken not only for purchase but for additional funds advanced is not avoidable. Consolidation, renewal, and refinancing loans, however, can transmute a nonavoidable lien into one that is avoidable.

Trustee's Power to Avoid Liens: The trustee may avoid liens and transfers of the debtors. 11 U.S.C. § 544. The trustee can avoid transfers and liens on the debtor's property that could have been avoided by a creditor under the applicable state statute and liens arising by statute (such as a landlord's lien). The individual debtor may also use these powers when the trustee refuses to do so. 11 U.S.C. § 522(h). The purpose of the "strong arm powers" under section 544 is to cut off unperfected security interests, secret liens, and undisclosed prepetition claims against the debtor's property as of the commencement of the case.

Under section 544, the trustee is granted the following powers:

Status of Creditor with Judicial Lien: The trustee has the status of a creditor with a judicial lien on all property on which a creditor could have obtained a judicial lien. Thus, the trustee has the rights and powers, as of the date of the commencement of the case, to avoid any transfer or obligation of the debtor that is avoidable by a hypothetical creditor and may subordinate any other creditor who holds a security interest in the debtor's property but failed to take the necessary steps to perfect his security interest under applicable state law. 11 U.S.C. § 544(a)(1).

Right of Creditor with Unsatisfied Writ of Execution: The trustee has the rights of a creditor who obtains a writ of execution against the debtor that is returned unsatisfied. The effect of this provision is to vest the trustee with the equitable rights of a hypothetical creditor that has exhausted its legal remedies. The trustee

may raise a presumption that the debtor is insolvent and has the ability, in some states, to invoke the equitable doctrine of marshaling. 11 U.S.C. § 544(a)(2).

Right of Bona Fide Purchaser of Real Property: The trustee has the rights of a bona fide purchaser of real property (but not of personal property) if, at the time of the commencement of the case, a hypothetical buyer could have obtained bona fide purchaser status. 11 U.S.C. § 544(a)(3). The trustee has the right to avoid an unrecorded transfer of land. A debtor-in-possession may also prosecute such a cause of action because the test is whether the trustee, not the debtor, qualifies as a bona fide purchaser. Thus, the mortgage valid between the debtor and a mortgagee, which could not be avoided before bankruptcy, may be avoided after bankruptcy. 11 U.S.C. § 544(a)(3).

Right to Avoid Voidable Transfers: The trustee has the right to avoid any transfer of the debtor or obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim. This includes any cause of action under state law for a fraudulent transfer or to avoid a bulk transfer in violation of state law. An actual unsecured creditor must be in existence; otherwise, if there are no creditors against whom the transfer is voidable under state law, the trustee is powerless. 11 U.S.C. § 544(b).

[Sections 35.38 through 35.40 are reserved for expansion.]

V. Chapter 13 Bankruptcy

§ 35.41 Overview

Chapter 13 allows an individual with regular income to file a plan for the reorganization of debts. The three main issues in Chapter 13 are—

1. eligibility to file;
2. confirmation of a plan; and
3. the extent of the discharge.

A complete discussion of Chapter 13 is beyond the scope of this manual. The following is intended to provide the collections practitioner with an idea of the structure of a bankruptcy under Chapter 13 and some indication of the issues that may arise.

§ 35.42 Eligibility to File

To file for bankruptcy under Chapter 13, a debtor must—

1. be an individual or an individual and the individual's spouse;
2. have regular income; and
3. owe, on the date of filing of the petition, noncontingent, liquidated unsecured debts of less than $394,725 and noncontingent, liquidated secured debts of less than $1,184,200.

11 U.S.C. § 109(e); *see also* 11 U.S.C. § 101(30).

The requirement that a debtor be an individual or an individual and a spouse eliminates corporations and partnerships from filing for bankruptcy under Chapter 13. These entities may reorganize under Chapter 11 or, in rare circumstances, under Chapter 12.

An additional requirement for staying in Chapter 13 is filing all necessary income tax returns.

See In re Koval, 205 B.R. 72 (Bankr. N.D. Tex. 1996).

§ 35.42:1 "Regular Income"

The requirement that the debtor have regular income simply means that the debtor must have some level of income on a recurring basis. Social Security payments, welfare payments, disability payments, and pension income have all been held to satisfy the regular income test. *See In re Hammonds*, 729 F.2d 1391, 1394–95 (11th Cir. 1984); *In re Howell*, 138 B.R. 484, 489 (E.D. Pa. 1992). Support from family members, however, standing alone, will not be sufficient to constitute "regular" income because such support can cease at any time.

Practice Note: The "regular income" test is independent of the feasibility test for confirming a plan. Thus, a debtor may qualify for filing under Chapter 13 but still not have enough income to confirm a plan. In that instance, the case would subsequently be dismissed or converted to Chapter 7.

§ 35.42:2 Debt Limits

The debt limits under Chapter 13 pose another restriction on eligibility. A debtor's eligibility to file under Chapter 13 may depend on whether the debt was contingent or unliquidated.

The Bankruptcy Code does not define the terms *contingent* or *unliquidated*, but the courts have supplied definitions. A debt is "noncontingent, if all events giving rise to liability occurred prior to the filing of the bankruptcy petition." *In re Loya*, 123 B.R. 338, 340 (B.A.P. 9th Cir. 1991). A debt is "liquidated" if the amount can be readily determined with precision and is capable of ascertainment by reference to an agreement or a simple mathematical computation. *In re Elrod*, 178 B.R. 5 (Bankr. N.D. Okla. 1995). Thus, a claim on a promissory note will generally be liquidated, while a tort claim may well be unliquidated. Contingent and unliquidated debts do not count toward the debt limits. *See* 11 U.S.C. § 109(e).

§ 35.43 Codebtor's Stay

In Chapter 13, the automatic stay can apply to nonbankrupt codebtors of a debtor. 11 U.S.C. § 1301. The codebtor's stay, however, does not apply to debts that a codebtor became liable on or secured in the ordinary course of the codebtor's business, or after the Chapter 13 case is closed or dismissed or converted to a case under Chapter 7 or 11. 11 U.S.C. § 1301(a).

Streamlined provisions are added for a creditor to obtain relief from the codebtor's stay. A motion for relief of the codebtor's stay should be granted if—

1. the codebtor received the consideration for the creditor's claim;
2. the debtor's plan proposes not to pay the claim; or
3. the creditor's interest would be irreparably harmed by the continuation of the codebtor's stay.

11 U.S.C. § 1301(c). Unless a written opposition is filed to the motion within twenty days after it is filed, the codebtor's stay lifts without the necessity of a court order. 11 U.S.C. § 1301(d).

§ 35.44 Confirmation of Chapter 13 Plan

To confirm a Chapter 13 plan, a debtor must meet the following requirements:

1. The debtor must pay all of his "projected disposable income" into a plan for the applicable commitment period to unsecured creditors under the plan if the trustee or holder of an allowed unsecured claim objects to the confirmation (11 U.S.C. § 1325(b)(4)).

2. All priority claims must be paid in full without interest.

3. For secured claims, the debtor must make equal monthly periodic payments that equal at least an amount sufficient to provide the creditor with adequate protection (11 U.S.C. § 1325(a)(5)).

4. Unsecured creditors must receive at least as much as they would receive under a Chapter 7 liquidation (11 U.S.C. § 1325(a)(4)).

5. The plan is submitted in good faith (11 U.S.C. § 1325(a)(7)).

6. All amounts required under a domestic support obligation are paid (11 U.S.C. § 1325(a)(8)).

7. All tax returns are filed (11 U.S.C. § 1325(a)(9)).

See generally 11 U.S.C. §§ 1322, 1325 for more about contents of the plan and confirmation.

See forms 35-14 and 35-15 in this chapter for sample objections to confirmation of a plan under Chapter 13 of the Bankruptcy Code.

§ 35.44:1 Disposable Income

The Bankruptcy Code defines "disposable income" as current monthly income that is received by the debtor (other than certain child support payments, foster care payments, or disability payments for a dependent child) less amounts reasonably necessary to be expended for the maintenance or support of the debtor or his dependents, a domestic support obligation, or certain charitable contributions. For debtors engaged in business, it does not include income that is necessary for the continuation of the debtor's business. 11 U.S.C. § 1325(b)(2).

Thus, "disposable income" is the debtor's total income less reasonable living expenses and domestic support obligations (and less business expenses for an individual with a business). This includes charitable contributions of up to 15 percent of the debtor's income. 11 U.S.C. § 1325(b)(2)(A)(ii). Other types of expenses that constitute living expenses include food, housing, clothing, laundry and cleaning, utilities and telephone, medical, insurance, taxes, support, and transportation. Generally, voluntary contributions to a retirement plan are not considered reasonable living expenses. *See In re Johnson*, 241 B.R. 394, 402 (Bankr. E.D. Tex. 1999).

Private school tuition will probably not be allowed as a reasonable living expense. *Univest-Coppell Village, Ltd. v. Nelson*, 204 B.R. 497 (Bankr. E.D. Tex. 1996). Additionally, payments on secured claims for luxury items, such as a boat, may be objected to by the Chapter 13 trustee. *See, e.g., In re Samadi*, No. 02-30336-H2-13, 2002 WL 31833254 (Bankr. S.D. Tex. Sept. 30, 2002).

Practice Note: Disposable income is initially based on the schedule of income and expenses submitted by the debtor. If no party objects to this schedule, the amount listed by the debtor will be presumed to be reasonable. Any questionable areas will usually be resolved by negotiation with the Chapter 13 trustee. Only rarely will a creditor object to the proposed budget.

§ 35.44:2 Good Faith

To be entitled to confirmation, the Chapter 13 plan must have been proposed in good faith. 11 U.S.C. § 1325(a)(3). Good faith is generally a fact-specific inquiry into whether the debtor is using Chapter 13 for its intended purpose or is attempting to manipulate the system unfairly. *See, e.g., In re Cedar Shore Resort, Inc.*, 235 F.3d 375, 380 (8th Cir. 2000); *In re Elmwood Development Co.*, 964 F.2d 508, 510 (5th Cir. 1992); *In re Little Creek Development Co.*, 779 F.2d 1068, 1072 (5th Cir. 1986).

Serial Filings: The court shall not grant a discharge under Chapter 13 if the debtor has received a discharge in a case filed under Chapter 7, 11, or 12 during the four-year period preceding the filing of the Chapter 13 petition or if the debtor has received a discharge in a case filed under Chapter 13 during the two-year period preceding the filing of the Chapter 13 petition. 11 U.S.C. § 1328(f). Some courts have found that a "serial filer" has filed in bad faith. *See, e.g., In re Thomas*, 123 B.R. 552 (Bankr. W.D. Tex. 1991). If the court finds that the debtor has acted in bad faith, the court can either lift the stay to allow a secured creditor to foreclose its lien on its collateral or dismiss the case with prejudice. An individual or family farmer who previously filed a petition under the Bankruptcy Code is ineligible for relief if the earlier case had been pending within 180 days before the date on which the newer petition was filed and the earlier case either was dismissed by the court on the ground that the debtor disobeyed orders or failed to appear to prosecute the case or was dismissed when the debtor's motion for relief from the automatic stay was filed. 11 U.S.C. § 109(g).

Practice Note: Section 109(g), related to a bankruptcy filing 180 days after prior dismissal, is usually invoked by a creditor filing a motion to dismiss the subsequent case. The court then decides if the debtor in the earlier case either dismissed the case voluntarily after a motion for relief had been filed or if the debtor intentionally disobeyed an order of the court.

Automatic Termination of Stay in Subsequent Case: If the debtor is an individual and the debtor was a debtor in a prior bankruptcy case that was pending within the preceding one year but was dismissed, the automatic stay expires thirty days after the filing of the subsequent case unless the debtor files a motion to continue the stay and obtains an order from the court continuing the stay. 11 U.S.C. § 362(c)(3). If two or more cases were pending for an individual debtor within the previous year but were dismissed, the automatic stay does not go into effect. 11 U.S.C. § 362(c)(4)(A). A party in interest, however, can seek to impose a stay by filing a request within thirty days and showing that the bankruptcy filing is in good faith as to the creditors to be stayed. 11 U.S.C. § 362(c)(4)(B).

Practice Note: For second bankruptcy filings within a year, debtors almost always seek the extension of the stay. A rebuttable presumption exists that the filing was not in good faith. The presumption can be rebutted with clear and convincing evidence to the contrary. 11 U.S.C. § 362(c)(3)(C). Courts, however, routinely grant the extension of the stay.

§ 35.44:3 Payment of Claims

Secured Claims: There are two options for payment of secured claims. One option is to surrender the collateral to the creditor. In this instance, the secured claim is extinguished by surrendering the collateral, and the remaining balance is treated as an unsecured claim. If the debtor wishes to keep the collateral, the debtor must provide for the creditor to retain its lien and be paid the value of its claims with interest. *See* 11 U.S.C. § 1325(a)(5). To pay the secured claim, the debtor may continue to make the regular contractual payments outside the plan and make payments to cure the arrearages within the plan (this is the only option allowed for home mortgages) or make equal monthly periodic payments that equal at least an amount sufficient to provide the creditor adequate protection. 11 U.S.C. § 1325(a)(5).

The entire secured claim to be paid under the plan (whether it is the arrearage or the entire claim) must be paid in full with interest over the life of the plan. Rather than the contract rate on the debt, the interest rate to be paid will be a "prime-plus" rate calculated by the bankruptcy court based on the circumstances of the estate

using the national prime rate adjusted to reflect the additional risk of the bankrupt debtor's nonpayment. *Till v. SCS Credit Corp.*, 541 U.S. 465, 478–79 (2004); *see also Drive Financial Services, L.P. v. Jordan*, 521 F.3d 343, 347 (5th Cir. 2008).

Unsecured Claims: Unsecured creditors get whatever is left over. The two requirements for payment of unsecured creditors are—

1. that the unsecured creditors receive at least as much as they would receive in a Chapter 7 liquidation; and
2. that the debtor pays all of his projected disposable income into the plan for the applicable commitment period.

11 U.S.C. § 1325(a)(4), (b)(1).

As long as these two tests are satisfied, it does not matter what percentage unsecured creditors receive back on their claims.

Practice Note: In Texas, where exemptions are generous, unsecured creditors will frequently receive no distribution in a Chapter 7 case. Therefore, it is frequently easy to satisfy the Chapter 7 liquidation test. However, for a debtor with a business or significant nonexempt property, the Chapter 7 liquidation test may require a much higher distribution to creditors.

Payments: Payments into a Chapter 13 plan are typically made on a monthly basis by payroll deduction. A pay order may be waived if the debtor is self-employed. However, the presumption is that debtors with third-party employers will have their plan payments withheld from their paychecks. If the amount of monthly payments under the plan is insufficient to pay the priority claims, the secured claims, and the minimum required payment to unsecured creditors, the plan will not be confirmable unless the debtor shows an ability to make a balloon payment either at the end of the plan or during the plan term. *See* 11 U.S.C. § 1325(a)(6).

§ 35.44:4 Super Discharge

The super discharge formerly available in Chapter 13 was eliminated effective October 17, 2005. The Chapter 13 discharge is essentially the same as the Chapter 7 one except that the debtor does not receive his discharge until he has completed making all payments under his Chapter 13 plan. 11 U.S.C. § 1328.

[Sections 35.45 through 35.50 are reserved for expansion.]

VI. Avoidance Actions

§ 35.51 Preferential Transfers

A preferential transfer or preference is a transfer made within ninety days (or one year if made to an insider of debtor) on an antecedent debt before the bankruptcy filing while the debtor was insolvent. The transfer is of an interest of the debtor in property, typically money paid to a creditor or a lien on debtor's collateral. Unless a defense exists, a creditor that received a preferential transfer may be liable for turning over the money received or having any lien obtained set aside. The policy behind preferences is that one creditor that obtains payment or a lien shortly before bankruptcy should not get "preferred" over other creditors of the debtor. Instead, the money or property is clawed back and distributed pro rata to all equally situated creditors.

A preference is defined as any transfer of an interest of the debtor in property that—

1. is to or for the benefit of a creditor;

2. is for or on account of an antecedent debt owed by the debtor before the transfer was made;

3. is made while the debtor was insolvent;

4. is made on or within ninety days before the date of the filing of the petition or between ninety days and one year before the date of the filing of the petition if the creditor at the time of the transfer was an insider; and

5. enables the creditor to receive more than the creditor would receive if the case were a case under Chapter 7, the transfer had not been made, and the creditor received payment of the debt to the extent provided by the provisions of the Bankruptcy Code.

11 U.S.C. § 547(b).

§ 35.52 Defenses to Recovery of Preference

There are nine statutory defenses to recovery of a preference under section 547 of the Bankruptcy Code. *See* 11 U.S.C. § 547(c).

§ 35.52:1 Transfers in Exchange for New Value

A preference will not be avoided if it was intended by the debtor and the creditor to or for whose benefit the transfer was made to be a contemporaneous exchange for new value given to the debtor and if it was in fact a substantially contemporaneous exchange. 11 U.S.C. § 547(c)(1).

§ 35.52:2 Transfers in Ordinary Course of Business

If the transfer was made in payment of a debt incurred by the debtor in the ordinary course of the business or financial affairs of the debtor and the transferee or was made according to ordinary business terms, the transfer will not be avoided. 11 U.S.C. § 547(c)(2).

Practice Note: The ordinary course of business defense is most often relied on; however, it is fact driven by things such as whether it was normal or not for a debtor to pay invoices thirty days late, thirty-one days late, fifty days late, etc. In many cases, debtors payments are varied and inconsistent, thus finding the "ordinary course" is not clear cut and can lead to extensive litigation. The vast majority of preference claims are settled. Consider using an experienced preference litigator to assist you due to nuances associated with litigating preferences and negotiating an appropriate settlement amount.

§ 35.52:3 Purchase-Money Lien Perfected within Thirty Days

A security interest in property acquired by the debtor will not create an avoidable preference to the extent that—

1. the security interest secures new value given;

2. a security agreement describing the property was signed at or before the time the new value was advanced;

3. the new value was given by or on behalf of the secured party under the agreement;

4. the new value was given to enable the debtor to acquire the property;

5. the debtor used the new value to acquire the property; and

6. the security interest was perfected within thirty days after the debtor received possession of the property.

11 U.S.C. § 547(c)(3).

§ 35.52:4 New Value

A preference will not be avoided if it is to or for the benefit of a creditor, to the extent that, after the transfer, the creditor gave new value to or for the benefit of the debtor not secured by an otherwise unavoidable security interest and, on account of the new value, the debtor did not make an otherwise unavoidable transfer to or for the benefit of the creditor. 11 U.S.C. § 547(c)(4).

Practice Note: The new value defense is more straightforward than some other defenses and is often applicable. This defense should be first analyzed when addressing the value of a preference claim.

§ 35.52:5 Perfected Interest in Inventory or Receivables

A preference will not be avoided if it creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interest for such debt on the later of—

1. ninety days before the date of the filing of the petition or, with respect to a transfer to an insider, one year before the date of the filing of the petition; or
2. the date on which new value was first given under the security agreement creating the security interest.

11 U.S.C. § 547(c)(5).

§ 35.52:6 Unavoidable Statutory Lien

A preference will not be avoided if it is the fixing of a statutory lien that is not avoidable under section 545 of the Bankruptcy Code. 11 U.S.C. § 547(c)(6). A statutory lien is avoidable under section 545 if it first becomes effective on the filing of a bankruptcy, is not perfected or enforceable at the time of filing bankruptcy, is for rent, or is a lien of distress for rent. 11 U.S.C. § 545. A perfected Texas mechanic's lien is an example of a statutory lien that may not be avoided under section 545 and therefore qualifies for the defense under section 547(c)(6).

§ 35.52:7 Domestic Support Payments

A preference will not be avoided to the extent a transfer was a bona fide payment of a debt for a domestic support obligation. 11 U.S.C. § 547(c)(7).

§ 35.52:8 Consumer Payments under $600

A preference will not be avoided if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by the transfer is less than $600. 11 U.S.C. § 547(c)(8).

§ 35.52:9 Nonconsumer Payments under $6,425

A preference will not be avoided if, in a case filed by a debtor whose debts are not primarily consumer debts, the aggregate value of all property that constitutes or is affected by the transfer is less than $6,425. 11 U.S.C. § 547(c)(9). The amount is adjusted every three years on April 1st based on the Consumer Price Index, with the next adjustment scheduled for April 1, 2022, with such adjustments not applying to cases filed prior to the date of the adjustment. 11 U.S.C. § 104.

§ 35.53 Statute of Limitations for Recovery of Preferences

A case to recover a preference must be filed before the later of two years after the entry of the order for relief or one year after the appointment of the first trustee in the case as long as the trustee was appointed less than two years after the case was filed or the time the case is closed or dismissed. 11 U.S.C. § 546(a).

§ 35.54 Fraudulent Conveyances

The trustee can recover transfers made within two years before bankruptcy has been filed if they meet the definition of a fraudulent conveyance. 11 U.S.C. § 548. Fraudulent conveyances may also be recovered under applicable state law.

The two types of fraudulent conveyances under the Bankruptcy Code are—

1. an actual fraudulent conveyance, and
2. a constructive fraudulent conveyance.

11 U.S.C. § 548(a)(1).

An actual fraudulent conveyance exists for transfers made with actual intent to hinder, delay, or defraud. 11 U.S.C. § 548(a)(1)(A). A constructive fraudulent conveyance exists for transfers made for less than reasonably equivalent value. 11 U.S.C. § 548(a)(1)(B).

§ 35.54:1 Actual Intent Standard

The trustee may avoid a transfer made or obligation incurred "with actual intent to hinder, delay or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted." 11 U.S.C. § 548(a)(1)(A). *See, e.g., In re Major Funding Corp.*, 126 B.R. 504, 508 (Bankr. S.D. Tex. 1990) (there was requisite intent to defraud where debtor commingled various corporate accounts and used corporate funds for personal benefit); *In re Missionary Baptist Foundation of America, Inc.*, 24 B.R. 973, 976 (Bankr. Tex. 1982) (no intent where debtor continued to make charitable contributions while creditors were not paid).

§ 35.54:2 Financial Standard

The trustee may avoid a transfer that was made for "less than a reasonably equivalent value" and the debtor—

1. was insolvent or became insolvent as a result of the transfer;
2. was about to engage in a business or transaction for which the debtor's remaining property was an unreasonably small capital;
3. intended to incur or believed the debtor would incur debts beyond the debtor's ability to repay; or
4. made the transfer or incurred the obligation to or for the benefit of an insider under an employment contract and not in the ordinary course of business.

11 U.S.C. § 548(a)(1)(B).

Securing Existing Debt: The definition of "value" under section 548 includes the securing of a present or antecedent debt. 11 U.S.C. § 548(d)(2)(A).

Foreclosures: The consideration paid at a foreclosure sale conducted in accordance with state law conclusively establishes "reasonably equivalent value." *BFP v. RTC*, 511 U.S. 531, 545 (1994).

Charitable Contributions: Charitable contributions made by an individual are protected from recovery as long as the contribution did not exceed 15 percent of the annual gross income of the debtor or, if the transfer was greater than 15

percent of the annual gross income of the debtor, it was "consistent with the practices of the debtor in making charitable contributions." 11 U.S.C. § 548(a)(2). *See also* 11 U.S.C. § 548(d)(3).

§ 35.54:3 Protection for Good-Faith Transferees

If a transfer is recovered from a good-faith transferee who gave value, the transferee is entitled to a lien on the property recovered or may retain the property to the extent of the value given. 11 U.S.C. § 548(c).

§ 35.54:4 Statute of Limitations for Actions to Recover Fraudulent Conveyances

An action to recover a fraudulent conveyance must be brought before the later of two years after the entry of the order for relief or one year after the first trustee is appointed, as long as the trustee is appointed before the expiration of two years; or the time the case is closed or dismissed, whichever is earlier. 11 U.S.C. § 546(a).

[Sections 35.55 through 35.60 are reserved for expansion.]

VII. Executory Contracts and Unexpired Leases

§ 35.61 Scope of Executory Contract Provisions

The trustee is authorized to assume or reject executory contracts. 11 U.S.C. § 365(a). The trustee is empowered to cure certain defaults before assumption and to provide adequate assurance of future performance of contracts that are in default. 11 U.S.C. § 365(b)(1). The trustee may also assign most contracts, notwithstanding contractual provisions that might otherwise limit assumption or assignment. 11 U.S.C. § 365(f). The nondebtor party to the contract may still insist on performance from the debtor rather than a trustee. 11 U.S.C. § 365(c).

The Bankruptcy Code does not define the term *executory contract*. Legislative history indicates that the term generally includes contracts under which performance remains due to some extent on both sides. *See* H.R. Rep. No. 95-595, at 347 (1977); S. Rep. No. 95-989, at 58 (1978); *see also NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), superseded by statute on other grounds. 11 U.S.C. § 1113.

§ 35.62 Deadlines for Assumption or Rejection

Section 365(d) of the Bankruptcy Code fixes the time within which the trustee must assume or reject an unexpired lease or executory contract. *See* 11 U.S.C. § 365(d). In a case under Chapter 7 of the Bankruptcy Code, the trustee must assume or reject an executory contract or unexpired lease of residential real property or of the debtor's personal property within sixty days after the order for relief (there is a different time frame for nonresidential real property; *see* 11 U.S.C. § 365(d)(4)). An extension of this deadline can be accomplished only by filing a motion with the court and obtaining the court's approval. *See* 11 U.S.C. § 365(d)(3), (d)(4). If the trustee fails to act within the period established by section 365, the contract or lease is deemed rejected by operation of law. 11 U.S.C. § 365(d)(1), (d)(4).

In a case under Chapter 9, 11, 12, or 13 of the Bankruptcy Code, the trustee may assume or reject an executory contract or unexpired lease

of residential real property or of personal property of the debtor any time before confirmation of the plan. But the court, on the request of any party to the contract or lease, may order the trustee to determine within a specified period whether to assume or reject the contract or lease. 11 U.S.C. § 365(d)(2). See forms 35-19 and 35-20 in this chapter for a motion compelling assumption or rejection of an unexpired lease and its corresponding order.

A lease of nonresidential real property is governed by section 365(d)(4), and the trustee must assume or reject the lease within the specified time frame or obtain a court order extending the deadline. Otherwise, the lease will be deemed rejected. 11 U.S.C. § 365(d)(4).

§ 35.63 Effects of Existing Defaults

The bankruptcy trustee may not assume an executory contract or unexpired lease on which there has been a default unless the trustee complies with three requirements. The trustee must—

1. cure the default or provide adequate assurance that the default will be promptly cured (with certain exceptions);
2. compensate or provide adequate assurance that the trustee will promptly compensate the other party to the contract or lease for any pecuniary loss to the party resulting from the default; and
3. provide adequate assurance of future performance under the contract or lease.

11 U.S.C. § 365(b)(1).

§ 35.64 Effect of Rejection

If the trustee rejects the executory contract or lease, the rejection generally constitutes a breach of the contract or lease. 11 U.S.C. § 365(g), (h). The other party in a rejected lease will be allowed to keep any money held as deposit and may also seek reimbursement for any amounts due under the lease agreement, subject to the limits of the Bankruptcy Code. The claim of a lessor for damages resulting from the termination of a lease of real property cannot exceed the rent reserved under the lease for the greater of one year or 15 percent, not to exceed three years of the remaining term of the lease plus any unpaid rent due under the lease. 11 U.S.C. § 502(b)(6).

§ 35.65 Allowance of Administrative Expense

A creditor may be entitled to an administrative priority claim for the "actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A). A motion and order, not a proof of claim, is required to allow an administrative expense claim. Unless a trustee immediately rejects an unexpired lease for nonresidential real property, the landlord has what amounts to a superpriority administrative claim for the first sixty days after the debtor has filed for relief under the Bankruptcy Code. 11 U.S.C. § 365(d)(1), (3); *see also* 11 U.S.C. § 503(b)(1).

§ 35.66 Reclamation Rights

Under the Uniform Commercial Code, a seller of goods is entitled to reclaim the goods if the buyer is insolvent. Tex. Bus. & Comm. Code § 2.702. Ordinarily, a seller of goods has only ten days from buyer's receipt to assert a reclamation demand. If the buyer of goods files bankruptcy, the Bankruptcy Code provides a larger time frame to reclaim goods. Under the Bankruptcy Code, a seller can reclaim goods received by the debtor in the forty-five days prior to the bankruptcy. The seller must make demand in writing to reclaim such goods either within the forty-five days after debtor received the goods, or if the forty-five day period expires after the

bankruptcy filing, within twenty days after the bankruptcy filing. 11 U.S.C. § 546(c). If a lender holds a security interest and floating lien over the goods being reclaimed, the seller's reclamation rights are eliminated if the value of the goods is less than the amount secured by the lender's lien. *See In re Dana Corp.*, 367 B.R. 409, 419 (Bankr. S.D.N.Y. 2007); *In re Circuit City Stores, Inc.*, 441 B.R. 496, 509–10 (Bankr. E.D. Va. 2010). See form 35-21 in this chapter for a sample reclamation demand.

§ 35.67 Goods Received by Debtor within Twenty Days before Bankruptcy

The Bankruptcy Code provides an administrative expense claim for creditors who sold goods that were received by a debtor within twenty days prior to the debtor's bankruptcy case. 11 U.S.C. § 503(b)(9). The purpose is to encourage suppliers to continue to sell goods to struggling businesses. The seller of such goods must file a motion seeking approval and allowance of its administrative expense claim through a court order. An allowed administrative expense is generally paid in full on the effective date of a Chapter 11 plan or in the order of priority of claim under a Chapter 7 case if distributions are made at all. See forms 35-22 and 35-23 in this chapter for a sample motion and order for allowance of administrative expense claim.

Form 35-1

The practitioner should use this form to analyze a creditor's initial position in a pending bankruptcy. Note: This checklist represents a preliminary review of a client's position at the beginning of a bankruptcy. It primarily identifies issues under Chapter 7 of the Bankruptcy Code; however, issues regarding Chapters 11 and 13 are addressed where applicable. Postconfirmation issues have not been addressed here. All references to the "Code" refer to the United States Bankruptcy Code, Title 11 of the United States Code. References to "Rule" refer to the Bankruptcy Rules.

Checklist

General Questions

☐	1.	**Is your client a creditor? Does your client have a claim against the debtor?**	See Code § 101(10) and (5) for definitions of "creditor" and "claim."
☐	2.	**What type of claim does the creditor have (secured/unsecured/ administrative)?**	See section 35.21 in this chapter for a discussion of the types of claims.
☐	3.	**Does your client have a priority claim?**	See Code § 507(a) for a list of priority claims. See Code §§ 726, 1129(a)(9), and 1322(a)(2) for treatment of priority claims.
☐	4.	**Was the creditor's claim against the debtor incurred during the bankruptcy?**	See Code §§ 507(a)(1) and 503.
☐	5.	**Did the creditor deliver goods to the debtor?**	See Code § 546(c).
☐	6.	**Is the claim for prepetition wages or commissions earned by the creditor within 180 days of bankruptcy?**	See Code § 507(a)(4) for wage claim amount limitations.

☐	7.	**Is the claim arising from the deposit, before bankruptcy, of money in connection with the purchase, lease, or rental of property or the purchase of services for personal, family, or household use that were not delivered or provided?**	See Code § 507(a)(7).
☐	8.	**Is there a claim for debts to a spouse, former spouse, or child of the debtor for domestic support obligations?**	See Code § 507(a)(1).
☐	9.	**Does your client have a secured claim, consensual lien, or judicial lien or hold a security interest?**	See Code § 101(36), (37), and (51) for definitions of "judicial lien," "lien," and "security interest." See Code § 506(a) for the mechanics of determining the value of a secured claim.
☐	10.	**Does your client hold a trade claim against the debtor?**	See Code § 363(b) if your client continues to do business with the debtor during the bankruptcy.
☐	11.	**Has the debtor committed a personal injury, fraud, or intentional tort?**	See Code § 523(a)(2), (4), (6), and (9) for dischargeability exemptions for an individual in a Chapter 7 case; see also Code § 523(c). File a dischargeability complaint within sixty days of the first date set for the creditor's meeting. See Rule 4004(a).
☐	12.	**Is your client a financier of the debtor?**	See Code §§ 363(b), (c), and 364 for possible effects to a secured position. See Code § 552 for the applicability of a prepetition security interest on postpetition events.
☐	13.	**Is your client the single asset real estate mortgage holder?**	See Code § 101(51B) for a definition and Code § 362(d)(3) for the applicability of the automatic stay.

☐	14.	**Is your client in a landlord-tenant relationship with the debtor?**	See Code § 365. See also section 35.25 in this chapter for a discussion on executory contracts and unexpired leases.
☐	15.	**Is your client continuing a business relationship with the debtor?**	See Code § 365. See also section 35.25 in this chapter for a discussion on executory contracts and unexpired leases.
☐	16.	**Is your client subject to a subordination agreement with the debtor? Is your client a target of equitable subordination under state law?**	See Code § 510.
☐	17.	**Is your client related to the debtor?**	See Code § 101(31) for a definition of "insider."
☐	18.	**Is your client a spouse or family member of the debtor?**	See Code § 1301 regarding the codebtor stay in Chapter 13 and Code §§ 362(b)(2), 507(a)(7), and 523(a)(15) for treatment of domestic support obligations.
☐	19.	**Request documentation of the claim from your client for attachment to the proof of claim.**	See Rule 3001(c), (d), and (e).
☐	20.	**Retrieve PACER docket sheet on the case. Is there a claims bar date?**	If so, prepare and file the claim and serve the claim on the court and debtor's attorney. See Rules 3001-3005.
☐	21.	**Has the claim's bar date passed, but your client failed to get a notice of the bankruptcy?**	File a motion to extend the claim's bar date. See Code §§ 502(b)(9) and 726(a)(1).
☐	22.	**Retrieve the local rules for the specific court and judge.**	See section 35.1:2 in this chapter for a list of the courts' Web sites where local rules can be found.
☐	23.	**Review the court's Web site for updated information.**	See section 35.1:2 in this chapter for a list of the courts' Web sites.

☐	24.	**Has the debtor failed to cooperate with your client prior to bankruptcy?**	If so, attend the creditors' meeting and examine the debtor under oath. Consult the PACER docket sheet for the time and place of the meeting. See Code §§ 341 and 343; see also Rules 2002 and 2003.

Automatic Stay

☐	25.	**Is your client currently taking legal action against the debtor?**	The automatic stay prevents commencement or continuation of most actions against the debtor. See Code § 362(a) and (b). See section 35.13 in this chapter for a discussion of exceptions to the automatic stay.
☐	26.	**If your client is prevented from taking action by the automatic stay, does the stay need to be lifted to allow your client to act?**	See Code § 362(d). See form 35-10.
☐	27.	**Is your client a secured creditor of the debtor?**	If so, answer numbers 27 through 29. If not, proceed to number 30.
☐	28.	**Does the debtor have any equity in your client's collateral?**	See Code § 362(d)(2).
☐	29.	**Does your client lack adequate protection of his collateral?**	See Code § 361 for an explanation of adequate protection; see Code § 362(d)(1) for an explanation of lifting the automatic stay. See also section 35.15 in this chapter for a discussion of adequate protection.
☐	30.	**Is your client the secured creditor of real property? Is the real property collateral the only substantial asset of the debtor?**	See Code § 362(d)(3).
☐	31.	**Has the court lifted the automatic stay as to a specific piece of property or as to a creditor?**	Check the PACER sheet for applicable orders.

☐	32.	**If the debtor is an individual filing under Chapter 7, has he received his discharge?**	See Code § 362(c)(2)(C) (terminating the automatic stay) and § 524 (permanent discharge injunction).
☐	33.	**If the debtor is an individual filing under Chapter 13, does your client have a postpetition claim against the debtor? Has confirmation of the Chapter 13 plan occurred?**	See Code §§ 362(c)(1) and 1327(b) (terminating the stay).
☐	34.	**If the debtor is filing under Chapter 11, does your client have a postconfirmation claim against the debtor?**	If so, the automatic stay may no longer apply; see Code §§ 362(c)(1) and 1141(b).
☐	35.	**Has the debtor's bankruptcy been dismissed?**	See Code §§ 362(c)(2)(B) and 349.
☐	36.	**Has the debtor's bankruptcy been converted to a case under another chapter in the Bankruptcy Code?**	See Code § 348.
☐	37.	**Has the debtor's bankruptcy been closed by the court?**	See Code § 350.
☐	38.	**Does your client have an interest in the debtor's cash collateral?**	See Code § 363 (adequate protection of cash collateral); see also Code § 363(a) (definition of "cash collateral").
☐	39.	**Is the debtor trying to use cash collateral in which your client has an interest?**	See Code § 363(b) and (c) (creditor's remedies).
☐	40.	**Is the debtor seeking postpetition credit from your client?**	See Code § 364(a) (postpetition unsecured credit in the ordinary course of business) and § 364(b) (postpetition credit outside the ordinary course of business).

Executory Contracts and Unexpired Leases

☐	41.	**Is the client in a continuing contractual relationship with the debtor?**	See Code § 365 (executory contracts).
☐	42.	**Has the debtor assumed or rejected the client's executory contract or unexpired lease?**	See Code § 365(a) and Rule 6006.
☐	43.	**Has the deadline passed for the debtor to assume or reject your client's executory contract or unexpired lease?**	See Code § 365(d) for applicable deadlines. See section 35.62 in this chapter.
☐	44.	**Is there a default in your client's executory contract or unexpired lease?**	See Code § 365(b) (curing default); see also section 35.63 in this chapter.
☐	45.	**Is your client a landlord of a shopping center in which the debtor is a tenant?**	See Code § 365(b)(3).

Dischargeability

See generally section 35.33 in this chapter.

☐	46.	**Is your client's claim the result of the debtor's false representation or fraud?**	See Code § 523(a)(2).
☐	47.	**Is your client the victim of the debtor's fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny?**	See Code § 523(a)(4).
☐	48.	**Does your client's claim arise out of the debtor's willful and malicious injury to another entity or the property of another entity?**	See Code § 523(a)(6).

☐	49.	**Does your client's claim arise out of a death or personal injury caused by the debtor's illegal operation of a motor vehicle while intoxicated or under the influence of drugs?**	See Code § 523(a)(9).
☐	50.	**Does your client have a claim for a fee or assessment due and payable to the membership association for a condominium or cooperative housing corporation?**	See Code § 523(a)(16).

Creditor Issues

☐	51.	**Is your client subject to contractual or equitable subordination of his claim?**	See Code § 510.
☐	52.	**If the debtor has received a discharge, has your client observed the discharge and permanent injunction provisions of Code § 524?**	See Code § 524.
☐	53.	**Is your client the debtor's employer?**	See Code § 525 (discrimination against employees on the basis of bankruptcy).
☐	54.	**Does your client possess property that belongs to the debtor?**	See Code §§ 541 and 542.
☐	55.	**Is your client a custodian of property belonging to the debtor's bankruptcy estate?**	See Code § 101(11) (definition of "custodian") and § 543.
☐	56.	**Does your client hold an unperfected security interest against the debtor?**	See Code § 544 (an unperfected security interest is probably voidable).
☐	57.	**Does your client hold a statutory lien against the debtor's property?**	See Code § 545 (a statutory lien may be voidable).

Avoidance Actions

☐	58.	**Did your client receive any payments from the debtor within ninety days of filing for bankruptcy?**	See Code § 547 (avoidable preferences); see also part VI. in this chapter for a discussion of avoidance actions.
☐	59.	**If the debtor or bankruptcy trustee has filed an avoidance action against your client, is the action timely?**	See Code § 546(a).
☐	60.	**Are there other defenses to the avoidance action that are available to your client?**	See Code § 546; see also section 35.52 in this chapter for a discussion of defenses to avoidance actions.
☐	61.	**Was the preferential transfer intended by the debtor and your client to be a contemporaneous exchange for new value given to the debtor?**	See Code § 547(c)(1); see also section 35.52:4 in this chapter.
☐	62.	**Was the preferential transfer made in payment of a debt incurred by the debtor in the ordinary course of business between the debtor and your client?**	See Code § 547(c)(2); see section 35.52:2 in this chapter.
☐	63.	**Did your client give new value to the debtor in exchange for the preferential transfer?**	See Code § 547(c)(4); see also section 35.52:4 in this chapter.
☐	64.	**Did the preferential transfer create a perfected security interest in inventory or a receivable or the proceeds of either?**	See Code § 547(c)(5); see also section 35.52:5 in this chapter.
☐	65.	**Did the preferential transfer fix a statutory lien that is not avoidable?**	See Code §§ 545 and 547(c)(6); see also section 35.52:6 in this chapter.

☐	66.	**Was the preferential transfer a bona fide payment of a debt for a domestic support obligation?**	See Code § 547(c)(7); see also section 35.52:7 in this chapter.
☐	67.	**Were the debtor's debts primarily consumer debts? Is the aggregate of the property that constitutes or is affected by the transfer less than $600?**	See Code § 547(c)(8); see also section 35.52:8 in this chapter.
☐	68.	**Did your client receive a fraudulent transfer within one year of the bankruptcy?**	See Code § 548 (fraudulent transfers within one year of filing for bankruptcy can be avoided); see also section 35.54 in this chapter.
☐	69.	**Did your client receive fair value for the potentially fraudulent transfer?**	See Code § 548(c).
☐	70.	**Has your client received any transfers of property from the debtor postbankruptcy filing?**	See Code § 549(a) (a transfer of property made after the bankruptcy filing may be avoidable).
☐	71.	**Does your client hold a claim against the debtor that can be set off against the debtor's claim against the client?**	See Code § 553(a) (mutual debts may be offset).
☐	72.	**Has your client offset a mutual debt with the debtor within ninety days prior to the bankruptcy filing?**	See Code § 553(b) (some or all of the setoff may be recoverable by the trustee or the debtor-in-possession).

Form 35-2

Note: Parts of the following form—the generic pleading descriptions and Bankruptcy Code and rule references—are applicable to bankruptcy courts in all four districts of Texas, but the negative notice references and service requirements are specific to the Eastern District. The practitioner should consult the court for the district in which he intends to file for any additional requirements. This form is © 2017 Hon. Bill Parker and is used with permission.

Guide to Practice and Procedures—Eastern District of Texas

GUIDE TO PRACTICE AND PROCEDURES[1]

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS

(Revised December 1, 2017)

Description of Desired Action	Applicable Bankruptcy Code Section	Applicable Federal and Local Rules[1]	Type of Pleading Required [2]	Applicable Negative Notice (Suspense) Language[3]	Type of Pleading Notice Required [4]
Abandon, Intent of Trustee to	§ 554(a)	BR 6007 LBR 6007	Notice	14 - Day	Matrix[5]
Abandon, to Compel Trustee to	§ 554(b)	BR 6007 LBR 6007	Motion	14 - Day	Matrix

[1] This guide reflects the provisions of the Local Rules of Bankruptcy Procedure (LBR) which became effective on December 1, 2017. The Local Rules are now available on the Eastern District Bankruptcy Court's website — www.txeb.uscourts.gov.

[2] For general guidelines governing motion practice and preparation for hearings on contested matters, you should consult LBR 9013 and LBR 9014.

[3] Pleadings requiring 21-day negative notice language should be accompanied by a proposed order substantially conforming with *TXEB Local Form 9007-a*. Additionally, pleadings requiring 14-day negative notice language should be accompanied by a proposed order substantially conforming with *TXEB Local Form 4001*.

[4] LBR 9013(f) requires service, not merely upon certain specified parties in specified chapters, but also upon: (1) any party entitled to such under the Federal Rules of Bankruptcy Procedure and (2) any party who has requested notice.

[5] Pleadings requiring service on the matrix must be served upon all parties listed on the master mailing list (matrix) as constituted by the Court on the date of service. An updated matrix sufficient to meet this standard may be downloaded in a particular case from the "Reports" section of the CM-ECF system.

Description of Desired Action	Bankr. Code Section	Applicable Rules	Pleading Required	Neg. Notice Language	Pleading Notice Required
Abstention from Particular Proceeding	28 USC § 1334(c)	BR 5011(b)	Motion	14 - Day	Adv. Parties
Accounting by Custodian	§ 543	BR 6002	Motion	21 - Day	LBR 9013(f)
Administrative Expense, Allowance of	§ 503	None	Motion	21 - Day	Matrix
Adversary Complaint	Various	BR 7001 LBR 7003	Complaint	None	BR 7004
Adversary Proceedings: Motion Practice in	None	LBR 7007	Motion	14 - Day	Adv. Parties
Adversary Proceedings: Obtaining Default Judgment	None	BR 7055 LBR 7055	Motion	None	None
Adversary Proceedings: Obtaining Injunctive Relief / TRO	None	BR 7065 LBR 7065	Application	None	Adv. Parties
Adversary Proceedings: Removal to Bankruptcy Court	28 USC § 1452(a)	BR 9027 LBR 9027	Notice w/ required attachments	None	All parties in removed case
Adversary Proceedings: Remand of Removed Case	28 USC § 1452(b)	BR 9027	Motion	14 - Day	All parties in removed case

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Adequate Protection	§ 361	BR 4001 LBR 4001	Motion	14 - Day	LBR 9013(f)
Admission *Pro Hac Vice*	None	LBR 1001(d)	Application	None	None
Alter or Amend Judgment: Adversary [a/k/a motion for reconsideration/new trial/ to vacate order]	None	BR 9023	Motion	14 - Day	Adv. Parties
Alter or Amend Judgment: Contested Matter [a/k/a motion for reconsideration/new trial/ to vacate order]	None	BR 9023	Motion	21 - Day	LBR 9013(f)
Appeals: Extend Time to File Notice of Appeal	None	BR 8002(d)	Motion	14 - Day	LBR 9013(f)
Appeals: For Leave to Appeal	None	BR 8004	Motion	14 - Day	LBR 9013(f)
Appeals: For Stay Pending Appeal	None	BR 8007	Motion	14 - Day	Matrix
Appeals: Request For Certification to Court of Appeals	28 U.S.C. §158(d)(2)	BR 8006	Motion	14 - Day	Bk Rule 8006(f)(2)
Approval of Trustee's Final Report	§ 704(9)	BR 5009	Report	30 - Day	Matrix
Authority to Operate Business [by Trustee]	§ 721	None	Motion	21 - Day	Matrix

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Automatic Stay: Continuation of Stay in Consecutive Case [individual chapter 7-11-13 case only][6]	§362(c)(3)(B)	LBR 4000(a)	Motion	None	Matrix or any affected party
Automatic Stay: Continuation of Stay by Trustee on Personal Property of Individual Debtor	§362(h)(2) §521(a)(6)	LBR 4000(a)	Motion	None	LBR 9013(f)
Automatic Stay: Debtor's Petition Date Certification of Compliance to Invoke Automatic Stay Regarding Lease of Residential Real Property	§362(l)(1)	LBR 4000(b)	Certification	14 - Day	affected lessor
Automatic Stay: Debtor's Post -Petition Certification of Compliance to Continue Automatic Stay Regarding Lease of Residential Real Property	§362(l)(2)	LBR 4000(c)	Certification	14 - Day	affected lessor
Automatic Stay: Imposition of Stay by Small Business Debtor	§362(n)(2)	LBR 4000(a)	Motion	None	Matrix or any affected party
Automatic Stay: Imposition of Stay[7]	§362(c)(4)(B)	LBR 4000(a)	Motion	None	Matrix or any affected party

[6] A motion for continuation of the stay should be accompanied by a proposed deadline order substantially conforming with *TXEB Local Form 4000-a* and a proposed order granting the requested relief substantially conforming to *TXEB Local Form 4000-b.*

[7] A motion for imposition of the stay should be accompanied by a proposed deadline order substantially conforming with *TXEB Local Form 4000-a* and a proposed order granting the requested relief substantially conforming to *TXEB Local Form 4000-b.*

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Automatic Stay: Relief from	§ 362(d)	BR 4001 LBR 4001(b)	Motion	14 - Day	LBR 9013(f)
Automatic Stay: Request to Confirm Status[8]	§362(c)(4)(A); §362(j)	LBR 4000(d)	Request	None	None
Automatic Stay: Damages for Willful Violation	§ 362(k)	None	Motion	21 - Day	LBR 9013(f)
Avoidance of Lien	§ 522(f)	BR 4003(d) LBR 4003(e)	Motion	21 - Day	LBR 9013(f)
Bankruptcy Petition Preparer: Recover Excessive Fees from	§110(h)(3)		Motion	21 - Day	LBR 9013(f)
Bankruptcy Petition Preparer: To Enjoin Practices of	§110(j)(3)		Motion	21 - Day	LBR 9013(f)
Bankruptcy Petition Preparer: To Impose Fine Upon	§110(l)(3)		Motion	21 - Day	LBR 9013(f)

[8] A request to confirm status of automatic stay should be accompanied by a proposed order substantially conforming with *TXEB Local Form 4000-d.*

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Budget Analysis and Credit Counseling: Damages for Willful or Negligent Failure of Agency to Comply with Requirements	§111(g)(2)		Complaint	None	
Budget Analysis and Credit Counseling: Obtain 14-Day Extension of Temporary Exemption	§109(h)(3)	BR 1007(b)(3)	Motion	None	Case trustee; UST
Budget Analysis and Credit Counseling: Certification for 30-Day Temporary Exemption From	§109(h)(3)	BR 1007(b)(3)	Certification	None	LBR 9013(f)
Budget Analysis and Credit Counseling: Permanent Exemption From	§109(h)(4)	BR 1007(b)(3)	Motion	21 - Day	Matrix
Cash Collateral: Authority to Use	§ 363(c)	BR 4001 LBR4001(c)(1)	Motion	14 - Day	Matrix
Cash Collateral: Request for Emergency Hearing [seeking authority to use]	§ 363(c)	BR 4001 LBR 4001(c)(2) LBR 9007(c)	Motion	None	LBR 9013(f)
Cash Collateral: To Prohibit Use	§ 363(c)	BR 4001 LBR 4001	Motion	14 - Day	LBR 9013(f)
Claim, Allowance of Late-Filed	§502(b)(9)	BR 3002(c) BR 3004	Motion	21 - Day	Matrix

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Claim, Objection to[9]	§ 502	BR 3007 LBR 3007	Objection	30 - Day is optional.	LBR 9013(f)
Chapter 7: Objection to Discharge (Due to Prior Discharge)	§ 727(a)(8) § 727(a)(9)	BR 4004(a)	Motion	28 - Day	LBR 9013(f)
Chapter 11: Committee, Appoint or Request for Additional	§ 1102	None	Motion	21 - Day	LBR 9013(f)
Chapter 11: Committee, Change Composition of	§ 1102	None	Motion	21 - Day	LBR 9013(f)
Chapter 11: Disclosure Statement, For Conditional Approval [only by plan proponent in small business case][10]	§ 1125	BR 3017.1 LBR 3017.1(a)	Motion	None	Matrix
Chapter 11: Disclosure Statement, To Waive Requirement [only by plan proponent in small business case][11]	§ 1125	BR 3017.1 LBR 3017.1(b)	Motion	14 - Day	Matrix

[9] Any objection to claim should be accompanied by a proposed order substantially conforming with *TXEB Local Form 3007.*

[10] This motion for conditional approval should be accompanied by a proposed order substantially conforming with *TXEB Local Form 3017.1.*

[11] This motion for waiver should be accompanied by a proposed order substantially conforming with *TXEB Local Form 3017.1.*

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Chapter 11: Approve Discharge of Individual Debtor Upon Confirmation	§1141 (d)(5)(A)	None	Motion	21 - Day	Matrix
Chapter 11: Examiner, Appointment of	§ 1104	BR 2007.1	Motion	21 - Day	Matrix
Chapter 11: Entry of Final Decree [corporation or partnership cases only]	§ 350	BR 3022 LBR 2015(c)(1)	Application	21 - Day	Matrix
Chapter 11: Hearing to Consider Approval of Disclosure Statement	§ 1125	BR 3017 LBR 3017	Notice from Court	None	Matrix
Chapter 11: Hearing on Confirmation of Chapter 11 Plan	§ 1121	BR 3018 LBR 3018	Notice from Court	None	Matrix
Chapter 11: Notice of Plan Completion (individual debtor)[12]	§1141(d)(5)	LBR 4004(b)	Notice	None	None
Chapter 11: Post-Confirmation Modification of Plan	§ 1127	BR 3019 LBR 3019	Motion w/ proposed plan attached	28 - Day (individual) 21- Day (others)	Matrix

[12] This notice of plan completion for Chapter 11 individual debtors should substantially conform with *TXEB Local Form 4004-b.*

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Chapter 11: Post-Confirmation Report	None	LBR 2015(c)(1) or 2015(c)(2)(A)	Report	None	Matrix
Chapter 11: Post-Confirmation Request for Hardship Discharge	§1141 (d)(5)(b)	BR 4007(d) LBR 4004(d)	Motion	21 - Day	Matrix
Chapter 11: Trustee, Appointment of	§ 1104	BR 2007.1	Motion	21 - Day	Matrix
Chapter 11: Trustee, Approval of Appointment	§ 1104	BR 2007.1(C)	Application	None	Matrix
Chapter 11: Trustee, to Resolve Disputed Election	§ 1104	BR 2007.1 (b)(3)(B)	Motion	21 - Day	Matrix
Chapter 11: Trustee, Termination of	§ 1105	None	Motion	21 - Day	Matrix
Chapter 12: Approval of Trustee's Final Report	§ 1202(b)	BR 5009	Report	30 - Day	Matrix
Chapter 12: Co-Debtor Stay Relief	§1201(c)-(d)	None	Motion	14 - Day	LBR 9013(f)
Chapter 12: Hearing on Confirmation of Chapter 12 Plan	§ 1221	BR 2002(a)(8) LBR 3015(d)	Notice from Court	None	Matrix

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Chapter 12: Plan & Plan Summary (Pre-Confirmation)	§ 1221	BR 3015 LBR 3015(b)	Plan	None	Matrix
Chapter 12: Post-Confirmation Modification of Plan	§ 1229	BR 3015(g) LBR 3015(h)	Motion w/ proposed plan attached	28 - Day	Matrix
Chapter 12: Post-Confirmation Request for Hardship Discharge	§ 1228(b)	LBR 4004(d)	Motion	21 - Day	Matrix
Chapter 13: Approval of Trustee's Final Report	§ 1302(b)	BR 5009	Report	30 - Day	Matrix
Chapter 13: Co-Debtor Stay Relief	§1301(c)-(d)	LBR 4001(a)	Motion	14 - Day	LBR 9013(f)
Chapter 13: Compel Amendment of TRCC	None	LBR 3015(g)	Motion	14 - Day	LBR 9013(f)
Chapter 13: Debtor's Attorney's Fees in ...	§330(a) (4)(B)	LBR 2016(h)	Application (if required)	21 - Day (if req.)	Matrix, (if required)
Chapter 13: Determine Mortgage Fees, Expenses & Charges	§1322(b)(5)	BR 3002.1(e)	Motion	21- Day	LBR 9013(f)
Chapter 13: Determine Final Cure of Mortgage Defaults and Status of Post-Petition Payments	§1322(b)(5)	BR 3002.1(h)	Motion	21- Day	LBR 9013(f)

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Chapter 13: Notice of Final Cure Payment by Trustee	§1322(b)(5)	BR 3002.1(c)	Notice	None	LBR 9013(f)
Chapter 13: Objection to Discharge (Due to Prior Discharge)	§ 1328(f)	BR 4004(a)	Motion	28 - Day	LBR 9013(f)
Chapter 13: Plan & Plan Summary (Pre-Confirmation)[13]	§ 1321	BR 3015 LBR 3015(a)	Plan	None	Matrix
Chapter 13: Post-Confirmation Request for Hardship Discharge	§ 1328(b)	BR 4007(d) LBR 4004(d)	Motion	21 - Day	Matrix
Chapter 13: Post-Confirmation Modification of Plan[14]	§ 1329	BR 3015(g) LBR 3015(h)	Motion	28 - Day	Matrix
Compel Action or Enforce Order: Adversary	None	BR 9023	Motion	14 - Day	Adv. Parties
Compel Action or Enforce Order: Contested Matter	Various	None	Motion	21 - Day	LBR 9013(f)
Compensation of Professionals	§ 330 § 331	BR 2016 LBR 2016	Application	21 - Day	Matrix[15]

[13] A proposed Chapter 13 plan should substantially conform with *TXEB Local Form 3015-a.*

[14] A motion to modify a confirmed Chapter 13 plan should substantially conform with *TXEB Local Form 3015-d,* accompanied by a proposed order that substantially conforms to *TXEB Local Form 3015-e.*

[15] In lieu of sending the complete fee application with exhibits to all parties on the matrix, a summary of the fee application containing (1) the relevant facts regarding the application, (2) the 21-day negative notice language, and (3) a notification that a complete copy of the application will be sent upon request at no charge, may be sent to the matrix, subject to the requirements of LBR 2016(c).

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Compromise or Settlement Agreement, Approval of	None	BR 9019 LBR 9019	Motion	21 - Day	Matrix
Consolidation, Substantive	§ 302(b)	BR 1015(a) LBR 1015	Motion	21 - Day	Matrix
Contempt, Civil	None	BR 9020	Motion	21 - Day	LBR 9013(f)
Continuance of Hearing	None	None	Motion	None	LBR 9013(f)
Continued Case Admin Following Debtor Death	None	BR 1016	Motion	14 - Day	Matrix
Conversion: Chapter 7 case to Ch. 12 or 13 [by debtor]	§ 706(a)	BR 1017 LBR 1017(d)	Motion	14 - Day	Matrix
Conversion: Chapter 7 case to Chapter 11 [by trustee or creditor]	§ 706(b)	BR 1017 LBR 1017(d)	Motion	14 - Day	Matrix
Conversion: Chapter 11 case to Chapter 7 [by debtor]	§ 1112(a)	BR 1017 LBR 1017(d)	Motion	14 - Day	Matrix
Conversion: Chapter 11 case to Ch. 7-12-13 [by trustee or creditor]	§ 1112(b)	BR 1017 LBR 1017(d)	Motion	14 - Day	Matrix
Conversion: Chapter 11 case to Ch. 12 or 13 [by debtor]	§ 1112(d)	BR 1017 LBR 1017(d)	Motion	14 - Day	Matrix

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Conversion: Chapter 12 case to Chapter 7 [by debtor]	§ 1208(a)	BR 1017 LBR 1017(d)	Notice of Conversion	None	Matrix
Conversion: Chapter 12 case to Ch. 7 [by trustee or creditor]	§ 1208(d)	BR 1017 LBR 1017(d)	Motion	14 - Day	Matrix
Conversion: Chapter 13 case to Chapter 7 [by debtor]	§ 1307(a)	BR 1017 LBR 1017	Notice of Conversion	None	Matrix
Conversion: Chapter 13 case to Ch. 7-11-12 [by trustee or creditor]	§ 1307(c)	BR 1017 LBR 1017(d)	Motion	14 - Day	Matrix
Conversion: Chapter 13 case to Ch. 11 or 12 [by debtor]	§ 1307(d)	BR 1017 LBR 1017	Motion	14 - Day	Matrix
Core Proceeding, Determine Existence of	28 USC § 157(b)(3)	None	Motion	21 - Day	adv. parties
Corporate Ownership Statement	None	BR 7007.1	Statement	None	adv. parties
Credit, to Obtain [a/k/a motion to incur debt outside of the ordinary course of business]	§ 364	BR 4001 LBR 4001	Motion	14 - Day	Matrix
Creditor Representation Disclosure, Determine Compliance with....	None	BR 2019	Motion	21 - Day	LBR 9013(f)

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Declaration for Release of Lien Based Upon Satisfaction of Secured Claim (by debtor)	None	BR 5009(d) LBR 5009	Motion	21 - Day	LBR 9013(f)
Delay Discharge (by debtor)	None	BR 4004(c)(2)	Motion	None	LBR 9013(f)
Deposit Funds in Court Registry [a/k/a ... for Disposition of Funds]	None	None	Motion	None	Per Court Directive
Disclosure of Names of Minor Children [by UST, case trustee or auditor]	§ 112	None	Motion	21 - Day	LBR 9013(f)
Dismissal: Chapter 7 Case [for failure to file schedules]	§ 707(a)(3)	BR 1017 LBR 1017(b)	Motion	14 - Day or directly set by Trustee	LBR 9013(f)
Dismissal: Chapter 7 Case [by debtor, trustee or creditor]	§ 707(a)	BR 1017 LBR 1017(b)	Motion	14 - Day or directly set by Trustee	Matrix
Dismissal: Chapter 7 Case for Abuse	§ 707(b)	BR 1017(e) LBR 1017(b)	Motion	14 - Day	LBR 9013(f)

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Dismissal: Chapter 12 Case [for failure to file schedules]	§ 1208	BR 1017 LBR 1007(a)	Motion	14 - Day or directly set by UST or Trustee	Matrix
Dismissal: Chapter 11 Case [for failure to file schedules]	§ 1112(e)	BR 1017 LBR 1007(a)	Motion	14 - Day or directly set by UST	Matrix
Dismissal: Chapter 11 Case [by debtor, trustee or creditor]	§ 1112(b)	BR 1017 LBR 1017(b)	Motion	14 - Day or directly set by UST or Trustee	Matrix
Dismissal: Chapter 12 Case [by debtor, trustee or creditor]	§ 1208(b) § 1208(c)	BR 1017 LBR 1017(b)	Motion	14 - Day or directly set by UST or Trustee	Matrix
Dismissal: Chapter 13 Case [by trustee]	§1307(c)	BR 1017 LBR 1017(b)	Motion	14 - Day or directly set by Trustee	LBR 9013(f)
Dismissal: Chapter 13 Case [by debtor or creditor]	§ 1307(b) § 1307(c)	BR 1017 LBR 1017(b)	Motion	14 - Day	LBR 9013(f)

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Disposition of Books & Records, Intent of Trustee Regarding	None	LBR 2015(b)	Notice	21 - Day	LBR 2015(d)
Emergency Hearing, Request for [Need hearing within 7 days or less][16]	None	LBR 9007(b)	Motion w/ affidavit	None	LBR 9013(f)
Employment of Professional Person[17]	§ 327	BR 2014 LBR 2014	Application	14 - Day	LBR 9013(f)
Employment of Professional Person Nunc Pro Tunc	§ 327	BR 2014 LBR 2014(d)	Motion	21 - Day	Matrix
Examine Debtor's Transactions with Debtor's Attorney	§ 329	BR 2017	Motion	21 - Day	LBR 9013(f)
Executory Contract: Establish Deadline to Assume or Reject	§ 365(d)	BR 6006	Motion	21 - Day	LBR 9013(f)
Executory Contract: Assumption of ... or Rejection of	§ 365	BR 6006	Motion	21 - Day	LBR 9013(f)

[16] This request should be accompanied by a proposed order substantially conforming with *TXEB Local Form 9007-b.*

[17] An application to employ a professional person should be accompanied by a proposed order substantially conforming with *TXEB Local Form 2014.*

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Executory Contract: Extension of Deadline to Assume or Reject	§ 365(d)	None	Motion	21 - Day	LBR 9013(f)
Exemptions, Objection to	§ 522	BR 4003 LBR 4003(c)	Objection	21 - Day	LBR 9013(f)
Expedited Hearing, Request for[18] [shorten notice w/expedited hrg. over 5 business days away]	None	LBR 9007(c)	Motion	None	LBR 9013(f)
Expunging Records: False Involuntary Petition [Dismissed]	§303(l)(3)	None	Motion	None	petitioners & UST
Extension of Time: Claims Bar Date in Chapters 7-12-13 [limited grounds]	§ 501	BR 3002(c)	Motion	None	LBR 9013(f)
Extension of Time: Claims Bar Date in Chapter 11 Case	§ 501	BR 3003(c)(3)	Motion	None	LBR 9013(f)
Extension of Time: Chapter 11 Plan Exclusivity Periods	§ 1121(d)	None	Motion	21 - Day	LBR 9013(f)
Extension of Time: Filing Chapter 12 Plan	§ 1221	BR 3015(a)	Motion	21 - Day	LBR 9013(f)

[18] Any request for an expedited hearing should be accompanied by a proposed order substantially conforming with *TXEB Local Form 9007-c.*

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Extension of Time: Filing Schedules, Statements & Other Required Documents [initial request]	§ 521	BR 1007(c) LBR 1007(b)	Motion	None	LBR 1007(b)
Extension of Time: Filing Schedules, Statements & Other Required Documents [subsequent request]	§ 521	BR 1007(c) LBR 1007(b)	Motion	None (but requires declaration)	LBR 1007(b)
Extension of Time: Deadline to File Complaints to Determine Dischargeability of Debt [by trustee or creditor]	§ 523(c)	BR 4007(c) LBR 4007(a)	Motion	21 - Day	Matrix
Extension of Time: Deadline to File Complaints to Determine Dischargeability of Debt [by debtor]	§ 523(c)	BR 4007(c) LBR 4007(a)	Motion	None	LBR 9013(f)
Extension of Time: Deadline to File Objections to Discharge [by debtor]	§ 727	BR 4004 LBR 4004	Motion	None	LBR 9013(f)
Extension of Time: Deadline to File New Chapter 13 Plan Under Order Denying Confirmation	None	None	Motion	None	LBR 9013(f)
Extension of Time: Deadline to File Objections to Debtor's Claim of Exemptions	§ 522(l)	BR 4003(b) LBR 4003	Motion	21 - Day	LBR 9013(f)
Extension of Time: Deadline to File Objections to Discharge [by trustee or creditor]	§ 727	BR 4004 LBR 4004	Motion	21 - Day	Matrix

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Filing Fee: Request by Individual Debtor for Permission to Pay in Installments	None	BR 1006(b)	Application **[Official Form 3A]**	None	None
Filing Fee: Request by Chapter 7 Individual Debtor To Waive Filing Fee	28 USC § 1930(f)	BR 1006(c)	Application **[Official Form 3B]**	None	None
Filing Fee: Request for Refund	None	None	Application	None	None
Financing Agreement, Approval of	§ 364	BR 4001 LBR 4001	Motion	14 - Day	Matrix
Health Care Business: Determination of Status	§101(27A)	BR 1021(b)	Motion	21 - Day	Matrix
Incur Secured Debt [see "Credit, to Obtain"]	----------	---------- -	----------	----------	----------
Joint Administration of Cases	None	BR 1015(b) LBR 1015	Motion	21 - Day	Matrix
Meeting of Creditors (§341): Waive Debtor's Appearance	None	None	Motion	None	Matrix
Meeting of Creditors (§341): Waive Meeting Due to Pre-Petition Solicitation of Plan	§341(e)		Motion	21 - Day	Matrix

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
New Trial [see "alter/amend judgment"]	----------	----------	----------	----------	----------
Notice to Parties, to Limit or Restrict....	None	BR 9007 LBR 9007	Motion	21 - Day	Matrix
Patient Care: [chapters 7-9-11 only] To Waive Appointment of Patient Care Ombudsman	§ 333(a)(1)	BR 2007.2(a)	Motion	14 - Day	Matrix
Patient Care: [chapters 7-9-11 only] For Appointment of Patient Care Ombudsman	§ 333	BR 2007.2(b)	Motion	14 - Day	Matrix
Patient Care: [chapters 7-9-11 only] To Terminate Appointment of Patient Care Ombudsman	§ 333	BR 2007.2(c)	Motion	14 - Day	Matrix
Patient Care: [chapters 7-9-11 only] Notice of Ombudsman's Intent to File 60-Day Report	§ 333(b)(2)	BR 2015.1(a)	Notice	None	LBR 9013(f) & all patients
Patient Care: [chapters 7-9-11 only] For Authority to Review Confidential Patient Records [by Patient Care Ombudsman]	§ 333(c)(1)	BR 2015.1(b)	Motion	14 - Day	BR 2015.1(b)
Patient Care: [chapters 7-9-11 only] For Authority to Dispose of Patient Records [by Trustee]	§ 351	BR 6011	Notice	None	BR 6011(b)
Pay Pre-Petition Claims or Pay Taxes [pre- or post-petition]	§ 105	None	Motion	21 - Day	Matrix

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Protection Against Disclosure of Personal Information	§ 107(c)(1)	None	Motion	None (auto hrg)	LBR 9013(f)
Property of the Estate: Approval of Agreed Property Division Upon Divorce	None	None	Motion	21 - Day	Matrix
Property of the Estate: Approval of Bidding Procedures for Sale of Property	None	None	Motion	21 - Day	Matrix
Property of the Estate: Authority to Use, Sell, or Lease	§ 363(b)	BR 6004 BR 6004 LBR 6004	Motion or Notice	21 - Day	Matrix
Property of the Estate: Sell Personally Identifiable Information	§363(b)(1)(B)	BR 6004 LBR 6004(b)	Motion	None (auto hrg)	Matrix
Property of the Estate: Prohibit or Condition Use, Sale or Lease of....	§ 363(e)	BR 4001 LBR 4001	Motion	14 - Day	LBR 9013(f)
Property of the Estate: Sell Free & Clear of Liens	§ 363(f)	BR 6004 LBR 6004	Motion	21 - Day	Matrix
Reconsideration of Order [see "alter or amend judgment"]	----------	----------	----------	----------	----------
Redemption of Property from Lien or Sale	§ 722	BR 6008 LBR 6008	Motion	21 - Day	LBR 6008(b)

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Relief from Judgment or Order [when beyond 10-day filing period for m/amend or alter judgment]	None	BR 9024	Motion	21 - Day	Same as orig. doc.
Removal of Trustee or Examiner	§ 324	BR 2012	Motion	21 - Day	Matrix
Reopen Case	§ 350	BR 5010 LBR 5010	Motion	None	Matrix
Retainer: for Distribution of. . . [chapter 11 or 12 only]	None	LBR 2016(g)	Motion	14 - Day	LBR 2016(g)
Retainer: for Payment of Post-Petition	None	LBR 2016(f)	Motion	21 - Day	LBR 9013(f)
Rule 2004 Examination: Motion for	None	BR 2004 LBR 2004	Motion	14 - Day	LBR 9013(f)
Sanctions [Contested Matter]	Various	Various	Motion	21 - Day	LBR 9013(f)
Schedules & Statements, Original	§ 521	BR 1007 LBR 1007	Schedule	----------	----------
Schedules & Statements, Amended	§ 521	BR 1009 LBR 1009	Schedule	----------	LBR 1009

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Sealing of Documents:		BR 9018 LBR 9018	Motion	None	None
Sealing of Documents: False Involuntary Petition [Dismissed]	§303(l)(1)		Motion	None	involuntary petitioners & UST
Severance of Case	None	None	Motion	None	Matrix
Shorten Notice Period	---	BR 9006 LBR 9007	Application	None	same as affected pleading
Small Business: Determination of Status of Unsecured Creditors' Committee	§101 (51D)(A)	BR 1020 LBR 1020(b)	Motion	21 - Day	LBR 9013(f)
Small Business: Determination of Small Business Debtor Status	§101 (51D)(A)	BR 1020 LBR 1020(a)	Motion	21 - Day	LBR 9013(f)
Stipulation, to Approve Rule 4001	Various	BR 4001(d)	Motion	14 - Day	Matrix
Substitution of Attorney	None	LBR 2014(c)	Motion	14 - Day	LBR 9013(f)
Suspension or Dismissal of Case	§ 305	BR 1017(c)	Motion	21 - Day	Matrix

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Tax Information: Request for Debtor to File with Court [individual chapter 7-11-13 case only]	§521(f)	LBR 4002(c)	Request	None	Debtor & counsel
Tax Information: Access to Information Filed with Court [individual chapter 7-11-13 case only]	§521(g)(2)	LBR 4002(d)	Motion	14 - Day	Debtor & counsel
Tax Liability [Determination of]	§ 505	None	Motion	21 - Day	LBR 9013(f)
Utility Service Deposit, Determine Adequacy of...	§ 366	None	Motion	21 - Day	LBR 9013(f)
Vacate Order [see "alter/amend judgment"]	----------	----------	----------	----------	----------
Valuation of Property or Secured Status, Determination of	§ 506	BR 3012 LBR 3012	Motion	21 - Day	LBR 9013(f) LBR 3012
Venue, Change of	28 USC § 1412	BR 1014	Motion	21 - Day	Matrix
Venue: Stay Proceedings in Related Case Filed in Another District	----------	BR 1014(b)	Motion	21 - Day	BR 1014(b)
Waive Automatic Dismissal of Case [by Ch 7 or 13 trustee]	§521(i)(4)	LBR 1017(c)	Motion	14 - Day	Matrix

Description of Desired Action	Bankr. Code Section	Applicable Rules & Regs	Pleading Required	Neg. Notice Language	Pleading Notice Required
Withdrawal of Attorney	----------	----------	Motion	21 - Day	LBR 9013(f)
Withdrawal of Pleading	----------	----------	Notice	None	LBR 9013(f)

Form 35-3

The captions in form 35-3 are adapted from Official Bankruptcy Forms 16A, 16B, and 16D found in the appendix of title 11 of the U.S. Code. The practitioner should consult 11 U.S.C. § 342 to determine which caption to use for a specific pleading. For the caption for a complaint in an adversary proceeding, see Form 16C. For the caption for a notice of appeal under 28 U.S.C. § 158(a) or (b) or from a judgment, order, or decree of a bankruptcy judge, see Form 17. Before filing any pleading with the court, the practitioner should also consult the local rules for the bankruptcy court in which he will appear.

All documents and proposed orders filed in the bankruptcy courts for the four districts in Texas must be filed electronically by means of the CF/ECF system as PDF files, with one exception: the local rules of the bankruptcy courts for the Northern District of Texas require that proposed orders be filed in Word format.

Warning: The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2 in this chapter.

Official Captions

Full Caption

Clause 35-3-1

UNITED STATES BANKRUPTCY COURT
[**District**] DISTRICT OF TEXAS
[**Division**] DIVISION

In re [**include all names, including married, maiden, and trade names, used by debtor within last eight years**], Debtor	§	
[**Address, city, state**]	§	Case No. [**case number**]
[**Last four digits of Social Security or individual-tax-payer-identification (ITIN) no.[s] (if any)**]	§	Chapter [**chapter**]
[**Employer tax-identification (EIN) no.[s] (if any)**]	§	

Short Caption

Clause 35-3-2

UNITED STATES BANKRUPTCY COURT
[**District**] DISTRICT OF TEXAS
[**Division**] DIVISION

In re [**name of debtor**], Debtor	§	No. [**number**]
	§	Chapter [**chapter**]

Caption for Use in Adversary Proceeding Other Than Complaint Filed by Debtor

Clause 35-3-3

UNITED STATES BANKRUPTCY COURT
[**District**] DISTRICT OF TEXAS
[**Division**] DIVISION

In re [**name of debtor**], Debtor	§	
	§	Case No. [**case number**]
[**Name of plaintiff**], Plaintiff	§	
	§	Chapter [**chapter**]
v.	§	
	§	Adv. No. [**number**]
[**Name of defendant**], Defendant	§	
	§	

Form 35-4

Warning: The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2 in this chapter.

[Caption. See form 35-3 in this chapter.]

Notice of Appearance

Pursuant to Fed. R. Bankr. P. 2002 and 9007, the undersigned appears for [**name of client**], a party in interest in this case, and requests that all notices given and papers served in this case be given to and served on the undersigned at [**name, office, address, phone, fax, and e-mail**].

Please take further notice that, pursuant to section 1109(b) of the Bankruptcy Code, this request includes the notices and papers referred to in the rules specified above and also includes, without limitation, notices of any orders, applications, complaints, demands, hearings, motions, petitions, pleadings, or requests and any other documents brought before this Court in this case.

[**Name**]
Attorney for [**name of client**]
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Include a certificate of service (form 19-1). Send a copy of the notice of appearance to the debtors, debtors' counsel, and the bankruptcy trustee.

Form 35-5

The suggestion of bankruptcy is usually filed in state court by the debtor to put the court on notice of the pending bankruptcy and the automatic stay; however, the creditor may choose to file a suggestion of bankruptcy to make the court aware of the stay. There is no requirement that the bankruptcy trustee be served with a copy of the suggestion of bankruptcy, but the preferred practice is to serve the bankruptcy trustee.

Warning: The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2 in this chapter.

[Caption of the state court lawsuit or other proceeding in which the suggestion of bankruptcy will be filed.]

Suggestion of Bankruptcy

[**Name of party**], [Defendant/Plaintiff], files this suggestion of bankruptcy and notice of the automatic stay imposed by 11 U.S.C. § 362 and states:

On [**date bankruptcy petition was filed**], [**name of debtor**], Debtor, filed a petition for relief under Chapter [7/11/13] of the United States Bankruptcy Code (Title 11) in Case No. [**number**], currently pending in the United States Bankruptcy Court for the [**district number**] District of Texas, [**division number**] Division.

[Defendant/Plaintiff] prays that [Defendant/Plaintiff] and this Court take notice of this bankruptcy filing and of the automatic stay of 11 U.S.C. § 362.

Dated: _____.

[**Name**]
Attorney for [**name of client**]
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Include a certificate of service (form 19-1). Send a copy of the suggestion of bankruptcy to all parties in the state court action.

Form 35-6

Proof of Claim

Fill in this information to identify the case:
Debtor 1 _____
Debtor 2 (Spouse, if filing) _____
United States Bankruptcy Court for the: _____ District of _____
Case number _____

Official Form 410

Proof of Claim 12/15

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) **that you received.**

Part 1: Identify the Claim

1. **Who is the current creditor?**
   _____
   Name of the current creditor (the person or entity to be paid for this claim)
   Other names the creditor used with the debtor _____

2. **Has this claim been acquired from someone else?**
   ☐ No
   ☐ Yes. From whom? _____

3. **Where should notices and payments to the creditor be sent?**
   Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

Where should notices to the creditor be sent?	**Where should payments to the creditor be sent? (if different)**
Name	Name
Number Street	Number Street
City State ZIP Code	City State ZIP Code
Contact phone	Contact phone
Contact email	Contact email

   Uniform claim identifier for electronic payments in chapter 13 (if you use one):
   _

4. **Does this claim amend one already filed?**
   ☐ No
   ☐ Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY

5. **Do you know if anyone else has filed a proof of claim for this claim?**
   ☐ No
   ☐ Yes. Who made the earlier filing? _____

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. **Do you have any number you use to identify the debtor?**
- ☐ No
- ☐ Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____ ____ ____ ____

7. **How much is the claim?** $_____. **Does this amount include interest or other charges?**
- ☐ No
- ☐ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. **What is the basis of the claim?**

Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.

Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).

Limit disclosing information that is entitled to privacy, such as health care information.

_____

9. **Is all or part of the claim secured?**
- ☐ No
- ☐ Yes. The claim is secured by a lien on property.

Nature of property:
- ☐ Real estate. If the claim is secured by the debtor's principal residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim.*
- ☐ Motor vehicle
- ☐ Other. Describe: _____

Basis for perfection: _____

Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

Value of property: $_____

Amount of the claim that is secured: $_____

Amount of the claim that is unsecured: $_____ (The sum of the secured and unsecured amounts should match the amount in line 7.)

Amount necessary to cure any default as of the date of the petition: $_____

Annual Interest Rate (when case was filed)_____%
- ☐ Fixed
- ☐ Variable

10. **Is this claim based on a lease?**
- ☐ No
- ☐ Yes. **Amount necessary to cure any default as of the date of the petition.** $_____

11. **Is this claim subject to a right of setoff?**
- ☐ No
- ☐ Yes. Identify the property: _____

12. **Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?**

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

☐ No

☐ Yes. *Check one:*

Amount entitled to priority

☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B). $_____

☐ Up to $2,775* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7). $_____

☐ Wages, salaries, or commissions (up to $12,475*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4). $_____

☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8). $_____

☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5). $_____

☐ Other. Specify subsection of 11 U.S.C. § 507(a)(__) that applies. $_____

* Amounts are subject to adjustment on 4/01/16 and every 3 years after that for cases begun on or after the date of adjustment.

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

☐ I am the creditor.

☐ I am the creditor's attorney or authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date _____
MM / DD / YYYY

_____
Signature

Print the name of the person who is completing and signing this claim:

Name _____
First name Middle name Last name

Title _____

Company _____
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address _____
Number Street

_____
City State ZIP Code

Contact phone _____ Email _____

Form 35-7

See 11 U.S.C. § 726 concerning distribution of the property of the estate.

Warning: Some courts have held that a bankruptcy court does not have authority under the Bankruptcy Code to allow a late-filed proof of claim. See section 35.22 in this chapter for a discussion of late-filed proofs of claim.

Warning: The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2.

[Caption. See form 35-3 in this chapter.]

Creditor's Motion to Allow Late Filing of Proof of Claim

Insert negative notice as required under local rules. See form 35-18.

1. *Parties.* [**Name of creditor**], Creditor, files this Motion to Allow Late Filing of Creditor's Proof of Claim.

2. *Facts.* [**Name of debtor**], Debtor, filed this case on [**date**]. Creditor did not receive notice of the bankruptcy until after the deadline to file proofs of claim.

3. *Grounds.*

Include the grounds for allowing a late filing of the proof of claim. The following are examples only.

a. Debtor's Chapter 13 plan includes Creditor as a secured creditor. The amount of the claim is listed as $[**amount**] and is a fully secured claim. Creditor shows the actual net balance to be $[**amount**].

b. The claim is founded on a retail installment contract dated [**date of contract**] covering [**description of collateral**].

c. Debtor's Chapter 13 plan provides for monthly payments of $[**amount**] to Creditor with [**percent**] percent interest on the claim.

d. Unless and until Debtor pays Creditor its secured claim, Creditor will retain its lien on the collateral and will not release title to the collateral to Debtor. Therefore, allowing Creditor's proof of claim will facilitate an effective reorganization for Debtor.

e. Since Debtor has provided for Creditor in the plan, Creditor's late filing of a proof of claim will not adversely affect any other creditors.

f. A copy of the proof of claim filed is attached as Exhibit [**exhibit number/ letter**].

4. *Prayer.* Creditor prays that this Court allow the late filing of Creditor's proof of claim in this case and that Creditor be granted all further relief to which Creditor is entitled.

Creditor prays that [Creditor/Debtor] and this Court take notice of this bankruptcy filing and of the automatic stay of 11 U.S.C. § 362.

[**Name**]
Attorney for [**name of client**]
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach a copy of the proof of claim (form 35-6). Attach exhibit(s). Include a certificate of service (form 19-1). Send a copy of the motion to allow late filing of proof of claim to the debtors, debtors' counsel, the bankruptcy trustee, and all other parties in interest.

Form 35-8

Warning: Some courts have held that a bankruptcy court does not have authority under the Bankruptcy Code to allow a late-filed proof of claim. See section 35.22 in this chapter for a discussion of late-filed proofs of claim.

Note: The judge will insert an image of his signature and the date of signing electronically. In the bankruptcy courts for the Western District of Texas, the practitioner should leave four inches of blank space at the top of the first page for insertion of the judge's signature. In other bankruptcy courts in the other districts in Texas, the image of the judge's signature will be inserted below the last line of text, so the practitioner should leave adequate space on the form. It is good practice to refer to the local rules and procedures of each district for any updates or changes.

Warning: The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2.

[Caption. See form 35-3 in this chapter.]

Order Granting Creditor's Motion to Allow Late Filing of Proof of Claim

At the hearing on [**name of creditor**]'s Motion to Allow Late Filing of Proof of Claim, the Court, having considered the Motion, finds that it should be granted.

It is therefore ORDERED that [**name of creditor**]'s Proof of Claim is allowed as filed.

Form 35-9

This form is Official Bankruptcy Form 2400A, a reaffirmation agreement. This agreement is enforceable only if the debtor received the disclosures described in 11 U.S.C. § 524(k) at or before the time the debtor signs the agreement. *See* 11 U.S.C. § 524(c), (2), (4), (5). The practitioner should consult the local rules for the court in which he will appear to adapt the form. If the debtor is represented by counsel, the debtor's attorney must sign the certification in part C of the form. *See* 11 U.S.C. § 524(c)(3). If the debtor isn't represented by counsel, the court will set a hearing to consider the reaffirmation agreement. See section 35.36 in this chapter regarding reaffirmation agreements.

Warning: The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2.

Reaffirmation Agreement

B2400A/B ALT (Form 2400A/B ALT) (12/15)

☐ **Presumption of Undue Hardship**
☐ **No Presumption of Undue Hardship**
(Check box as directed in Part D: Debtor's Statement in Support of Reaffirmation Agreement.)

UNITED STATES BANKRUPTCY COURT

_____District of_____

In re _____, Debtor

Case No._____
Chapter_____

REAFFIRMATION AGREEMENT

[Indicate all documents included in this filing by checking each applicable box.]

☐ Part A: Disclosures, Instructions, and Notice to Debtor (pages 1 - 5)

☐ Part B: Reaffirmation Agreement

☐ Part C: Certification by Debtor's Attorney

☐ Part D: Debtor's Statement in Support of Reaffirmation Agreement

☐ Part E: Motion for Court Approval

*[**Note:** Complete Part E only if debtor was not represented by an attorney during the course of negotiating this agreement. **Note also:** If you complete Part E, you must prepare and file Form 2400C ALT - Order on Reaffirmation Agreement.]*

Name of Creditor:_____

☐ *[Check this box if]* Creditor is a Credit Union as defined in §19(b)(1)(a)(iv) of the Federal Reserve Act

PART A: DISCLOSURE STATEMENT, INSTRUCTIONS AND NOTICE TO DEBTOR

1. DISCLOSURE STATEMENT

Before Agreeing to Reaffirm a Debt, Review These Important Disclosures:

SUMMARY OF REAFFIRMATION AGREEMENT

This Summary is made pursuant to the requirements of the Bankruptcy Code.

AMOUNT REAFFIRMED

The amount of debt you have agreed to reaffirm: $_____

The amount of debt you have agreed to reaffirm includes all fees and costs (if any) that have accrued as of the date of this disclosure. Your credit agreement may obligate you to pay additional amounts which may come due after the date of this disclosure. Consult your credit agreement.

ANNUAL PERCENTAGE RATE

[The annual percentage rate can be disclosed in different ways, depending on the type of debt.]

a. If the debt is an extension of "credit" under an "open end credit plan," as those terms are defined in § 103 of the Truth in Lending Act, such as a credit card, the creditor may disclose the annual percentage rate shown in (i) below or, to the extent this rate is not readily available or not applicable, the simple interest rate shown in (ii) below, or both.

(i) The Annual Percentage Rate disclosed, or that would have been disclosed, to the debtor in the most recent periodic statement prior to entering into the reaffirmation agreement described in Part B below or, if no such periodic statement was given to the debtor during the prior six months, the annual percentage rate as it would have been so disclosed at the time of the disclosure statement: _____%.

--- And/Or ---

(ii) The simple interest rate applicable to the amount reaffirmed as of the date this disclosure statement is given to the debtor: _____%. If different simple interest rates apply to different balances included in the amount reaffirmed, the amount of each balance and the rate applicable to it are:

$_____@_____%;
$_____@_____%;
$_____@_____%.

b. If the debt is an extension of credit other than under than an open end credit plan, the creditor may disclose the annual percentage rate shown in (I) below, or, to the extent this rate is not readily available or not applicable, the simple interest rate shown in (ii) below, or both.

(i) The Annual Percentage Rate under §128(a)(4) of the Truth in Lending Act, as disclosed to the debtor in the most recent disclosure statement given to the debtor prior to entering into the reaffirmation agreement with respect to the debt or, if no such disclosure statement was given to the debtor, the annual percentage rate as it would have been so disclosed: _____%.

--- And/Or ---

(ii) The simple interest rate applicable to the amount reaffirmed as of the date this disclosure statement is given to the debtor: _____%. If different simple interest rates apply to different balances included in the amount reaffirmed, the amount of each balance and the rate applicable to it are:

$_____@_____%;
$_____@_____%;
$_____@_____%.

c. If the underlying debt transaction was disclosed as a variable rate transaction on the most recent disclosure given under the Truth in Lending Act:

The interest rate on your loan may be a variable interest rate which changes from time to time, so that the annual percentage rate disclosed here may be higher or lower.

d. If the reaffirmed debt is secured by a security interest or lien, which has not been waived or determined to be void by a final order of the court, the following items or types of items of the debtor's goods or property remain subject to such security interest or lien in connection with the debt or debts being reaffirmed in the reaffirmation agreement described in Part B.

Item or Type of Item	Original Purchase Price or Original Amount of Loan

Optional---At the election of the creditor, a repayment schedule using one or a combination of the following may be provided:

Repayment Schedule:

Your first payment in the amount of $_____ is due on _____(date), but the future payment amount may be different. Consult your reaffirmation agreement or credit agreement, as applicable.

— Or —

Your payment schedule will be: _____(number) payments in the amount of $_____ each, payable (monthly, annually, weekly, etc.) on the _____ (day) of each _____ (week, month, etc.), unless altered later by mutual agreement in writing.

— Or —

A reasonably specific description of the debtor's repayment obligations to the extent known by the creditor or creditor's representative.

2. INSTRUCTIONS AND NOTICE TO DEBTOR

Reaffirming a debt is a serious financial decision. The law requires you to take certain steps to make sure the decision is in your best interest. If these steps are not completed, the reaffirmation agreement is not effective, even though you have signed it.

1. Read the disclosures in this Part A carefully. Consider the decision to reaffirm carefully. Then, if you want to reaffirm, sign the reaffirmation agreement in Part B (or you may use a separate agreement you and your creditor agree on).

2. Complete and sign Part D and be sure you can afford to make the payments you are agreeing to make and have received a copy of the disclosure statement and a completed and signed reaffirmation agreement.

3. If you were represented by an attorney during the negotiation of your reaffirmation agreement, the attorney must have signed the certification in Part C.

4. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, you must have completed and signed Part E.

5. The original of this disclosure must be filed with the court by you or your creditor. If a separate reaffirmation agreement (other than the one in Part B) has been signed, it must be attached.

6. If the creditor is not a Credit Union and you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court unless the reaffirmation is presumed to be an undue hardship as explained in Part D. If the creditor is a Credit Union and you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court.

7. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, it will not be effective unless the court approves it. The court will notify you and the creditor of the hearing on your reaffirmation agreement. You must attend this hearing in bankruptcy court where the judge will review your reaffirmation agreement. The bankruptcy court must approve your reaffirmation agreement as consistent with your best interests, except that no court approval is required if your reaffirmation agreement is for a consumer debt secured by a mortgage, deed of trust, security deed, or other lien on your real property, like your home.

YOUR RIGHT TO RESCIND (CANCEL) YOUR REAFFIRMATION AGREEMENT

You may rescind (cancel) your reaffirmation agreement at any time before the bankruptcy court enters a discharge order, or before the expiration of the 60-day period that begins on the date your reaffirmation agreement is filed with the court, whichever occurs later. To rescind (cancel) your reaffirmation agreement, you must notify the creditor that your reaffirmation agreement is rescinded (or canceled).

Frequently Asked Questions:

What are your obligations if you reaffirm the debt? A reaffirmed debt remains your personal legal obligation. It is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Otherwise, your obligations will be determined by the reaffirmation agreement which may have changed the terms of the original agreement. For example, if you are reaffirming an open end credit agreement, the creditor may be permitted by that agreement or applicable law to change the terms of that agreement in the future under certain conditions.

Are you required to enter into a reaffirmation agreement by any law? No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments you agree to make.

What if your creditor has a security interest or lien? Your bankruptcy discharge does not eliminate any lien on your property. A ''lien'' is often referred to as a security interest, deed of trust, mortgage or security deed. Even if you do not reaffirm and your personal liability on the debt is discharged, because of the lien your creditor may still have the right to take the property securing the lien if you do not pay the debt or default on it. If the lien is on an item of personal property that is exempt under your State's law or that the trustee has abandoned, you may be able to redeem the item rather than reaffirm the debt. To redeem, you must make a single payment to the creditor equal to the amount of the allowed secured claim, as agreed by the parties or determined by the court.

NOTE: When this disclosure refers to what a creditor ''may'' do, it does not use the word "may'' to give the creditor specific permission. The word ''may'' is used to tell you what might occur if the law permits the creditor to take the action. If you have questions about your reaffirming a debt or what the law requires, consult with the attorney who helped you negotiate this agreement reaffirming a debt. If you don't have an attorney helping you, the judge will explain the effect of your reaffirming a debt when the hearing on the reaffirmation agreement is held.

PART B: REAFFIRMATION AGREEMENT.

I (we) agree to reaffirm the debts arising under the credit agreement described below.

1. Brief description of credit agreement:

2. Description of any changes to the credit agreement made as part of this reaffirmation agreement:

SIGNATURE(S):

Borrower:

_____
(Print Name)

_____
(Signature)

Date: _____

Co-borrower, if also reaffirming these debts:

_____
(Print Name)

_____
(Signature)

Date: _____

Accepted by creditor:

_____
(Printed Name of Creditor)

_____
(Address of Creditor)

_____
(Signature)

_____
(Printed Name and Title of Individual Signing for Creditor)

Date of creditor acceptance:

_____

PART C: CERTIFICATION BY DEBTOR'S ATTORNEY (IF ANY).

[To be filed only if the attorney represented the debtor during the course of negotiating this agreement.]

I hereby certify that (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.

☐ *[Check box, if applicable and the creditor is not a Credit Union.]* A presumption of undue hardship has been established with respect to this agreement. In my opinion, however, the debtor is able to make the required payment.

Printed Name of Debtor's Attorney: _____

Signature of Debtor's Attorney: _____

Date: _____

B2400A/B ALT (Form 2400A/B ALT) (12/15) **8**

PART D: DEBTOR'S STATEMENT IN SUPPORT OF REAFFIRMATION AGREEMENT

*[Read and complete sections 1 and 2, **OR**, if the creditor is a Credit Union and the debtor is represented by an attorney, read section 3. Sign the appropriate signature line(s) and date your signature. If you complete sections 1 and 2 **and** your income less monthly expenses does not leave enough to make the payments under this reaffirmation agreement, check the box at the top of page 1 indicating "Presumption of Undue Hardship." Otherwise, check the box at the top of page 1 indicating "No Presumption of Undue Hardship"]*

1. I believe this reaffirmation agreement will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received) is $_____, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total $_____, leaving $_____ to make the required payments on this reaffirmed debt.

I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship on me and must be reviewed by the court. However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here: _____

_____

_____ .

(Use an additional page if needed for a full explanation.)

2. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.

Signed: _____
(Debtor)

_____
(Joint Debtor, if any)

Date: _____

— Or —

[If the creditor is a Credit Union and the debtor is represented by an attorney]

3. I believe this reaffirmation agreement is in my financial interest. I can afford to make the payments on the reaffirmed debt. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.

Signed: _____
(Debtor)

_____
(Joint Debtor, if any)

Date: _____

PART E: MOTION FOR COURT APPROVAL

[To be completed and filed only if the debtor is not represented by an attorney during the course of negotiating this agreement.]

MOTION FOR COURT APPROVAL OF REAFFIRMATION AGREEMENT

I (we), the debtor(s), affirm the following to be true and correct:

I am not represented by an attorney in connection with this reaffirmation agreement.

I believe this reaffirmation agreement is in my best interest based on the income and expenses I have disclosed in my Statement in Support of this reaffirmation agreement, and because (provide any additional relevant reasons the court should consider):

Therefore, I ask the court for an order approving this reaffirmation agreement under the following provisions (*check all applicable boxes)*:

☐ 11 U.S.C. § 524(c)(6) (debtor is not represented by an attorney during the course of the negotiation of the reaffirmation agreement)

☐ 11 U.S.C. § 524(m) (presumption of undue hardship has arisen because monthly expenses exceed monthly income)

Signed:_____
(Debtor)

_____
(Joint Debtor, if any)

Date: _____

Form 35-10

Form 35-11 (affidavit in support of motion for relief from automatic stay) in this chapter should accompany this motion. See form 35-12 for an order granting motion for relief from automatic stay.

Warning: The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2.

[Caption. See form 35-3 in this chapter.]

Motion for Relief from Automatic Stay

Insert negative notice as required under local rules. See form 35-18.

1. *Parties.* This Motion for Relief from Automatic Stay against property of the estate is filed on behalf of [**name of creditor**], Creditor, pursuant to 11 U.S.C. § 362(d)(1), for cause, by reason of a lack of adequate protection of Creditor's rights as a secured creditor [**include if applicable:** and alternatively, pursuant to 11 U.S.C. § 362(d)(2) by reason of [the Debtor's lack of equity in the collateral described in Exhibit [**exhibit number/letter**] [and]/the collateral's not being necessary for an effective reorganization]].

2. *Nature of Suit.*

   a. This Motion is filed pursuant to Fed. R. Bankr. P. 9014 and constitutes a contested matter.

   b. [**Name of debtor**], Debtor, filed a Petition for Relief under Chapter [7/9/11/13] of title 11 of the United States Code on [**date**].

3. *Facts.*

a. Creditor is a secured creditor of Debtor with respect to the collateral described in Exhibit [**exhibit number/letter**] (the "Collateral").

b. The Collateral is in possession of Debtor.

c. Debtor purchased the Collateral under a [deed of trust/retail installment contract/lease] (the "Contract"). A copy of the Contract is attached as Exhibit [**exhibit number/letter**] and incorporated by reference for all purposes.

d. Creditor is the holder of the Contract.

e. Creditor's security interest is properly shown by the [deed of trust/security agreement/financing statement].

4. *Grounds.*

Include specific grounds as appropriate to the case. Examples of appropriate supporting grounds follow.

a. Under the terms of Debtor's plan, monthly payments are to be paid to the trustee for distribution in accordance with the terms of the plan.

And/Or

b. Debtor is in arrears in his payments to the trustee, and Creditor is not receiving payments from the trustee.

And/Or

c. Debtor has had the full use of the Collateral described in the attached exhibits.

And/Or

d. The Collateral has depreciated and continues to depreciate in value.

And/Or

e. Debtor has no equity in the Collateral described in the attached exhibits.

And/Or

f. The Collateral is exposed to risks of damage or loss through accident, theft, fire, and weather, and Debtor has not maintained insurance on the Collateral to insure it against such risks.

Continue with the following.

g. Under the circumstances described above, good cause exists for lifting the stay, including, but not limited to, Creditor's lack of adequate protection.

5. *Prayer.* Creditor prays that—

a. an Order Granting Motion for Relief from Automatic Stay be entered to permit Creditor to repossess the Collateral, to sell or otherwise dispose of the Collateral, and to apply the proceeds from the sale or other disposition against the outstanding indebtedness, less all unearned finance charges and less all other charges that have not yet become due and payable, owed by Debtor under the contract;

b. the stay be immediately lifted on entry of an Order Granting Motion for Relief from Automatic Stay, notwithstanding Fed. R. Bankr. P. 4001(a)(3);

c. Creditor be awarded reasonable attorney's fees; and

d. Creditor be awarded all further relief to which Creditor may be entitled.

[Name]
Attorney for [name of client]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach exhibit(s). Include a certificate of service (form 19-1). Send a copy of the motion for relief from automatic stay to the debtors, debtors' counsel, the bankruptcy trustee, and all other parties in interest.

Form 35-11

The practitioner should use this form along with form 35-10 (motion for relief from automatic stay) in this chapter. See form 35-12 for the order granting motion for relief from automatic stay.

Warning: The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2.

[Caption. See form 35-3 in this chapter.]

Affidavit in Support of Motion for Relief from Automatic Stay

BEFORE ME, the undersigned authority, on this day personally appeared [**name of affiant**], who swore on oath that the following facts are true:

"My name is [**name of affiant**]. I am the [**title**] of [**name of company**]. I am over the age of 18 years and am fully competent to give this affidavit.

"I am responsible for and am personally familiar with the account that Debtor, [**name of debtor**], has at [**name of creditor**], Creditor.

"Creditor is the holder of a [deed of trust/retail installment contract/financing statement] for the purchase of [**describe property**] (the "Contract"), a copy of which is attached as Exhibit [**exhibit number/letter**]. Debtor executed the Contract to purchase the [**describe property**] described in the Contract (the "Property"). A copy of Creditor's security interest in the Property is attached as Exhibit [**exhibit number/letter**]. Creditor's rights in the Property were perfected by filing the [deed of trust/retail installment contract/financing statement] with the [county clerk of [**county**] County, Texas/secretary of state of Texas], a copy of which is attached as Exhibit [**exhibit number/letter**].

"The fair market value of the Property is $[**amount**]. The fair market value was derived from [**provide source for fair market value, e.g.,** the Kelley Blue Book; auction records].

Include facts supporting the creditor's request to set aside the automatic stay. Examples of possible supporting facts follow.

"Because there is no insurance on the Property, Creditor is at serious risk. Creditor will be liable for any damage to the Property arising from accidents involving the Property."

Continue with the following.

_____

[**Name of affiant**]
Affiant

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

Attach exhibit(s).

Form 35-12

See forms 35-10 (motion for relief from automatic stay) and 35-11 (affidavit in support of motion for relief from automatic stay) in this chapter.

Note: The judge will insert an image of his signature and the date of signing electronically. In the bankruptcy courts for the Western District of Texas, the practitioner should leave four inches of blank space at the top of the first page for insertion of the judge's signature. In other bankruptcy courts in the other districts in Texas, the image of the judge's signature will be inserted below the last line of text, so the practitioner should leave adequate space on the form. It is good practice to refer to the local rules and procedures for any updates or changes.

Warning: The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2.

[Caption. See form 35-3 in this chapter.]

Order Granting Motion for Relief from Automatic Stay

On [**date**], a Motion for Relief from Automatic Stay (the "Motion") was filed by [**name of movant**], Creditor, in this case. The Court finds that the Motion was properly served pursuant to the Federal and Local Rules of Bankruptcy Procedure and that it contained the appropriate negative notice language, pursuant to Local Rule of Bankruptcy Procedure 4001, that directs any party opposed to the granting of the relief sought by the Motion to file a written response within [**number**] days or the Motion will be deemed by the Court to be unopposed. The Court finds that no objection or other written response to the Motion has been timely filed by any party. Due to the failure of any party to file a timely written response, the allegations contained in the Motion stand unopposed; therefore, the Court finds that good cause exists for the entry of the following order.

It is therefore ORDERED that the Motion for Relief from Automatic Stay filed by Creditor on [**date**] is GRANTED so as to modify the automatic stay to allow Creditor to immediately repossess the [**describe property**] (the "Property"), to sell or otherwise dispose of

the Property, and to apply the proceeds against the outstanding indebtedness, less all unearned finance charges and less all other charges that have not yet become due and payable, owed by [**name of debtor**], Debtor, to Creditor.

It is further ORDERED that the Chapter [7/9/11/13] trustee shall continue making disbursements to Creditor until such time as [he/she] receives notification from Debtor that Creditor has possession of the Property.

It is further ORDERED that Creditor, if [he/she/it] cannot repossess the Property, may resort to any other procedure allowable under state law to obtain possession of the Property, including procurement of a writ of sequestration.

It is further ORDERED that if Creditor needs to procure a writ of sequestration, the automatic stay is modified so as to allow Creditor to file suit against Debtor in order to obtain the writ of sequestration.

And it is further ORDERED that, since the Motion was unopposed by any party, the fourteen-day stay period otherwise imposed by Fed. R. Bankr. P. 4001(a)(3) shall not apply to this Order, and the stay shall lift immediately on entry of this Order.

Form 35-13

The practitioner should use this form when the creditor and debtor have reached an agreement to modify the automatic stay. See forms 35-10 (motion for relief from automatic stay), 35-11 (affidavit in support of motion for relief from automatic stay), and 35-12 (order granting motion for relief from automatic stay) in this chapter. See section 35.15 regarding adequate protection. *See also* 11 U.S.C. § 361.

Note: The judge will insert an image of his signature and the date of signing electronically. In the bankruptcy courts for the Western District of Texas, the practitioner should leave four inches of blank space at the top of the first page for insertion of the judge's signature. In other bankruptcy courts in the other districts in Texas,,the image of the judge's signature will be inserted below the last line of text, so the practitioner should leave adequate space on the form. It is good practice to refer to the local rules and procedures for any updates or changes.

Warning: The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements about the content of captions. See section 35.1:2.

[Caption. See form 35-3 in this chapter.]

Agreed Order Providing for Adequate Protection of Collateral

The undersigned agree that [**name of creditor**], Creditor, filed its Motion for Relief from Automatic Stay, a settlement has been reached with respect to the Motion, and Creditor has a valid security interest in the [**describe property**] (the "Property") by virtue of the [**describe agreement creating the security interest, e.g.,** retail installment contract] entered into by Creditor and [**name of debtor**], Debtor, on [**date**] (the "Contract").

Creditor agrees, in lieu of its right to enforce its security interest, obtain relief from the automatic stay, and take possession of the Property, to accept adequate protection from Debtor and Debtor agrees to provide it to Creditor.

It is therefore ORDERED that Creditor is entitled to adequate protection of its interests as a secured creditor of Debtor.

It is further ORDERED that Debtor shall make timely monthly payments to the trustee under Debtor's Chapter [11/13] plan so that Creditor shall be able to receive payments every month from the trustee. The payments represent Creditor's allowed secured claim, which is secured by the Property owned by and presently in the possession of Debtor.

It is further ORDERED that Debtor shall at all times maintain physical damage insurance issued by a company authorized to transact business in Texas on the Property as required by and in accordance with the terms and conditions of the Contract that pertain to required physical damage insurance; that Creditor shall be named as a loss payee on the policy or policies of physical damage insurance to be procured by Debtor; that Creditor shall be provided by Debtor with certificates of insurance or other written documentation from the insurer selected by Debtor showing that the Property is, in fact, covered by required physical damage insurance and that such insurance coverage is for a term of not less than 180 days; and Debtor shall notify Creditor of any change in insurance companies within ten days of the execution of any new policy.

And it is further ORDERED that (1) should Debtor default in making any payments to the trustee as provided for in Debtor's plan, or (2) should Debtor fail to provide Creditor with written documentation of the physical damage insurance required by the terms of this Order, or (3) should Creditor receive notice of cancellation of any policy of physical damage insurance procured by Debtor and the default or failure is not cured within ten days of written notice to Debtor and Debtor's attorney (the "Default Notice"), the automatic stay is hereby lifted without need for further order of this Court.

APPROVED AS TO FORM AND SUBSTANCE:

[Name]
Attorney for [**name of debtor**]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Name]
Attorney for [**name of creditor**]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Name]
Trustee
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Form 35-14

The practitioner should use this form to object to confirmation of a Chapter 13 plan on behalf of a secured creditor.

Warning: The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2 in this chapter.

[Caption for an adversary proceeding. See form 35-3 in this chapter.]

Objection to Confirmation of Debtor's Chapter 13 Plan by Secured Creditor

Insert negative notice as required under local rules. See form 35-18.

[**Name of creditor**], Creditor, a secured creditor in this case, files this Objection to Confirmation of Debtor's Chapter 13 Plan and, in support of this Objection, states as follows:

1. [**Name of debtor**], Debtor, filed for protection under Chapter 13 of the Bankruptcy Code on [**date**].

2. Confirmation of Debtor's Chapter 13 plan is scheduled for [**date**].

3. Creditor is the holder of a claim against Debtor that is secured by the [**describe collateral, including any identification number**] (the "Property").

Include specific grounds for denying confirmation of the Chapter 13 plan. Examples of appropriate grounds follow.

4. The value of the Property, as of the effective date of Debtor's Chapter 13 plan, is $[**amount**]. The value of the Property shown on Debtor's schedule is only $[**amount**]. Creditor, therefore, objects because Debtor is undervaluing the amount of Debtor's allowed secured claim.

And/Or

5. Debtor's Chapter 13 plan proposes that Debtor retain the Property, that Creditor retain his lien thereon, and that Creditor receive monthly distributions of $[**amount**] from the trustee. Creditor objects because the plan does not propose to pay Debtor the full amount of the value of its secured claim as of the effective date of the plan to which Debtor is entitled under 11 U.S.C. § 1325(a)(5)(B)(ii).

And/Or

6. Debtor's Chapter 13 plan provides that Debtor will make monthly payments of $[**amount**] to the trustee over a period of [**number**] months. Creditor objects because, under 11 U.S.C. § 1322(c), the plan may not provide for payments over a period that is longer than thirty-six months unless this Court, for cause, approves a longer period. Creditor respectfully submits that Debtor has failed to show good cause for extending the plan beyond thirty-six months.

And/Or

7. Debtor's plan proposes to pay Creditor interest of [**percent**] percent on his claim. Creditor objects to confirmation of Debtor's plan because, as of the effective date of the plan, the value of the Property to be distributed is less than the allowed amount of Debtor's claim in direct violation of 11 U.S.C. § 1325(a)(5)(B)(ii).

8. Creditor demands a rate of interest equivalent to the rate that could have been obtained had it foreclosed on the Property and reinvested the proceeds in loans of equivalent duration and risk or, alternatively, the contract rate of interest of [**percent**] percent.

And/Or

9. Creditor objects because Debtor's Chapter 13 plan fails to provide a "drop dead" clause, which would allow Creditor at some point in time to exercise its rights as a secured

creditor should Debtor default under the terms of the Chapter 13 plan, specifically if Debtor fails to make the required monthly payments to the trustee or fails to keep proper insurance on the Property.

Continue with the following.

Creditor respectfully prays for an Order denying confirmation of the Debtor's Chapter 13 plan and granting all further relief to which Creditor may be entitled.

[Name]
Attorney for [**name of client**]
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Include a certificate of service (form 19-1). Send a copy of the objection to Chapter 13 plan to the debtors, debtors' counsel, the bankruptcy trustee, and all other parties in interest.

Form 35-15

The practitioner should use this form to object to confirmation of a Chapter 13 plan on behalf of an unsecured creditor.

Warning: The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2 in this chapter.

[Caption for an adversary proceeding. See form 35-3 in this chapter.]

Objection to Confirmation of Debtor's Chapter 13 Plan by Unsecured Creditor

Insert negative notice as required under local rules. See form 35-18.

[**Name of creditor**], Creditor, an unsecured creditor in the above-styled case, files its Objection to Confirmation of Debtor's Chapter 13 Plan and states as follows:

1. [**Name of debtor**], Debtor, filed for protection under Chapter 13 of the Bankruptcy Code on [**date**]. The first meeting of creditors was held on [**date**], and a hearing on confirmation is scheduled for [**date**]. [**Include if applicable:** The plan before the Court is Debtor's [**describe version of plan**], and this is the [**number, e.g.,** third] hearing on confirmation.]

2. Creditor has an allowed unsecured claim in the instant case in the amount of $[**amount**], arising out of [**describe circumstances**]. Creditor timely filed a proof of claim on or about [**date**] in the above-stated amount. [No objection has been filed to Creditor's proof of claim./An objection to Creditor's claim was filed by [**name**] and was resolved with a claim allowed in the stated amount.]

3. Debtor's proposed Chapter 13 plan proposes to pay $[**amount**] for [**number**] months [**include if applicable:** and $[**amount of additional payments**] for [**number of additional**

payments]] for a total of $[**amount**] over [**number**] months. The distribution to unsecured creditors under this plan, per the Debtor's estimates in the plan, is [**percent**] percent.

Include specific grounds for objecting to confirmation of the Chapter 13 plan. Examples of appropriate grounds follow.

Include the following if applicable.

4. Creditor objects to confirmation of Debtor's plan because it does not provide for the submission of all or such portion of future earnings or other future income of Debtor to the supervision and control of the trustee as is necessary to meet the payment obligations of the plan as required by 11 U.S.C. § 1322(a)(1). More particularly, [**include additional facts in support**].

And/Or

5. Creditor objects to Debtor's Chapter 13 plan because it does not provide for full payment of claims entitled to priority under 11 U.S.C. § 507 as required by 11 U.S.C. § 1322(a)(2). In particular, [**include specific facts in support**].

And/Or

6. Creditor objects to the Chapter 13 plan on the grounds that, while Debtor has classified his claims as permitted by 11 U.S.C. § 1322(b)(2), Debtor has not provided for similar treatment for each claim in a particular class in violation of 11 U.S.C. § 1322(a)(3). More particularly [**include specific facts in support**]. [**Include if applicable:** Debtor's plan discriminates unfairly against one or more of its proposed classes in that [**include specific facts in support**].]

And/Or

7. Debtor's schedules reflect nonexempt assets sufficient to pay unsecured creditors approximately [**percent**] percent of their allowed claims if the bankruptcy estate were liquidated under Chapter 7. Debtor's plan, which proposed to pay only [**percent**] percent of allowed unsecured claims, is in violation of 11 U.S.C. § 1325(a)(4), which requires that the

value of the Property, as of the effective date of the plan, to be distributed under the plan on account of each allowed unsecured claim is in an amount not less than the amount that would be paid on such claim if the estate of Debtor were to liquidate under Chapter 7.

And/Or

8. Pursuant to 11 U.S.C. § 1325(b), the Court may not approve a Chapter 13 plan over the objection of a creditor with an allowed unsecured claim unless—

a. the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

b. the plan provides that all of Debtor's projected disposable income for three years beginning on the date the first payment is due under the plan will be applied to make payments under the plan.

Creditor is not scheduled to receive the full amount of his allowed claim. Therefore, the proposed Chapter 13 plan cannot be approved because Debtor is proposing to pay less than all of his disposable income into the plan for the thirty-six months beginning [**date**]. In particular:

Select as applicable.

a. Debtor's budget does not include all of Debtor's current or projected disposable income. In particular, [**include specific facts**].

And/Or

b. Debtor's budget does not reflect all the sources of income that must be considered for determining disposable income. In particular, [**include specific facts**].

And/Or

c. Debtor's expenses are not reasonably necessary for the support or maintenance of Debtor or a dependent of Debtor. In particular, [**list specific expenses**] are unnecessary.

And/Or

d. The expenses listed by Debtor as being incurred on a monthly basis for the continuation, preservation, and operation of Debtor's business are excessive in that [**list specific expenses**] are [excessive/unnecessary/excessive and unnecessary] because [**list specific reasons**].

Continue with the following if applicable.

9. Creditor objects to confirmation of Debtor's Chapter 13 plan in that it is not proposed in good faith as specified by 11 U.S.C. § 1325(a)(3). In particular:

Select as applicable.

a. Debtor has filed [**number**] bankruptcies in the last [**number**] years; [**include other relevant facts**].

And/Or

b. Debtor's petition, schedules, and statement of affairs are vague or inaccurate in that [**include supporting facts**].

And/Or

c. Debtor's motivation for filing the instant Chapter 13 case are suspect in that [**include supporting facts**].

And/Or

d. Debtor's [schedules [and]/testimony] at the first meeting of creditors reflect a consistent pattern of overspending and spending on items not reasonably necessary for support or maintenance.

And/Or

e. Notwithstanding a substantial income, Debtor is proposing to pay only [**percent**] percent of unsecured allowed claims.

And/Or

f. Debtor's budget reflects a surplus even after the proposed plan payments that could, but is not, being utilized to repay creditors, nor has Debtor provided any explanation of this failure.

And/Or

g. It is clear from Debtor's [schedules [and]/testimony] at the first meeting of creditors that the reason for filing Chapter 13 is to discharge debt that would otherwise not be dischargeable in a Chapter 7 case, to wit [**include specific debts**]. Debtor is seeking to benefit from the "superdischarge" of Chapter 13 without a concomitant benefit to Debtor's creditors.

And/Or

h. [**Include any special circumstances that indicate that debtor's bankruptcy filing was made in bad faith.**]

Continue with the following if applicable.

10. Creditor objects to Debtor's proposed Chapter 13 plan because Debtor cannot make all payments under the plan and comply with the plan as required by 11 U.S.C. § 1325(a)(6). This is evidenced by the fact that [Debtor did not commence making the payments proposed by Debtor's plan within thirty days after the plan was filed as required by 11

U.S.C. § 1326(a)(1)/Debtor has only sporadically made the payments required by Debtor's plan between the time the first payment was due and the filing of the instant objection/[**include other supporting facts as appropriate**]].

11. Creditor respectfully requests that the Chapter 13 plan proposed by Debtor be denied and asks for such other relief as may be just.

_____

[**Name**]
Attorney for [**name of client**]
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Include a certificate of service (form 19-1). Send a copy of the objection to Chapter 13 plan to the debtors, debtors' counsel, the bankruptcy trustee, and all other parties in interest.

Form 35-16

The practitioner should use this form to object to the discharge of the debtor under Chapter 7 of the Bankruptcy Code. See sections 35.33 and 35.34 in this chapter for a discussion of discharge.

Warning: The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2 in this chapter.

[Caption for an adversary proceeding. See form 35-3 in this chapter.]

Objection to Discharge of Debtor

Insert negative notice as required under local rules. See form 35-18.

[**Name of creditor**], Creditor, a creditor in the above-styled case, files this Objection to Discharge of Debtor. Creditor states as follows:

1. Creditor is a creditor and a party in interest. [**Name of debtor**], Debtor, is the debtor in this case and may be served with process at [**address, city, state**] and by serving its attorney of record, [**name of attorney**], at [**address, city, state**]. The Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

2. [**Insert facts supporting the causes of action.**]

Include the following paragraphs 3.–6. if applicable under 11 U.S.C. § 727(a)(2).

3. Under 11 U.S.C. § 727(a)(2), the Court may deny the debtor a discharge if the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed property of the debtor or permitted such acts within one year before the date the

petition was filed. Likewise, the Court may deny the debtor a discharge if the debtor permitted such acts against the property of the estate after the date the petition was filed.

4. As set forth above, Debtor transferred, removed, and concealed property of Debtor within one year before the date the petition was filed with intent to hinder, delay, or defraud Creditor. Specifically, before the petition date, Debtor [**describe debtor's actions**]. These actions were taken with intent to hinder, delay, or defraud Creditor.

5. After the petition was filed, Debtor [transferred, removed, and concealed/continued to transfer, remove, and conceal] property of the estate with the intent to hinder, delay, or defraud creditors and the Chapter 7 trustee.

6. Discharge should be denied under 11 U.S.C. § 727(a)(2) based on the [prepetition/postpetition/prepetition and postpetition] actions.

And/Or

Include the following paragraph if applicable under 11 U.S.C. § 727(a)(3).

7. Under 11 U.S.C. § 727(a)(3), the court may deny Debtor's discharge if Debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers from which Debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case. Debtor's discharge should be denied for the reason that it failed to preserve documents and records with regard to [**describe specific facts**], and Debtor's failure to do so was not justified under all of the circumstances of the case.

And/Or

Include the following paragraph if applicable under 11 U.S.C. § 727(a)(4).

8. Under 11 U.S.C. § 727(a)(4), the Court may deny Debtor's discharge if Debtor knowingly and fraudulently, in or in connection with the case, made a false oath or account. On or about [**date**], Debtor executed schedules and a statement of financial affairs in this case. These documents were executed under penalty of perjury. The schedules and statement of financial affairs were false and incomplete in the following respects: [**include specific facts**]. Therefore, Debtor's discharge should be denied under 11 U.S.C. § 727(a)(4).

And/Or

Include the following paragraph if applicable under 11 U.S.C. § 727(a)(5).

9. Under 11 U.S.C. § 727(a)(5), the Court may deny Debtor's discharge if Debtor has failed to explain satisfactorily, before determination of denial of discharge, any loss of assets or deficiency of assets to meet the debtor's liabilities. As set forth above, Debtor has failed to account for more than $[**amount**] in funds that it received from [**source**]. No satisfactory explanation has ever been given for what happened to these funds.

Continue with the following.

10. Debtor's discharge should be denied in its entirety.

11. Creditor prays that it be granted judgment that Debtor be denied a discharge pursuant to 11 U.S.C. § 727(a) and for all other relief to which Creditor may be entitled.

[**Name**]
Attorney for [**name of client**]
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Include a certificate of service (form 19-1).

Form 35-17

The practitioner should use this form to object to the discharge of debts under Chapter 7 of the Bankruptcy Code. See section 35.34 in this chapter for a list of categories of debts that must be proven to be nondischargeable.

Warning: The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2.

[Caption for an adversary proceeding. See form 35-3 in this chapter.]

Objection to Discharge of a Specific Debt

Insert negative notice as required under local rules. See form 35-18.

[**Name of creditor**], Creditor, a creditor in the above-styled case, files this Objection to Discharge of a Specific Debt. Creditor states as follows:

1. Creditor is a creditor and a party in interest. [**Name of debtor**], Debtor, is the debtor in this case and may be served with process at [**address, city, state**] and by serving its attorney of record, [**name of attorney**], at [**address, city, state**]. The Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

2. **[Insert facts supporting the causes of action.]**

Include the following paragraphs 3.–5. if applicable under 11 U.S.C. § 523(a)(2).

3. Under 11 U.S.C. § 523(a)(2), an individual debtor is not entitled to a discharge from any debt for money, property, or services or an extension, renewal, or refinancing of credit to the extent obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or insider's financial condition.

4. The debt incurred with regard to [**describe debt**] is a debt that is nondischargeable based on false pretenses, a false representation, and/or actual fraud. Debtor represented to Creditor [**describe representations**]. This representation was false as shown by [**describe facts**]. Creditor justifiably relied on Debtor's false representation as shown by [**describe facts**]. Had Creditor known [**describe facts**], Creditor would not have [**describe actions**]. Creditor has been damaged by the justifiable reliance on Debtor's false representation in the amount of $[**amount**].

5. Creditor requests that the Court determine that the damages sustained by Creditor in the amount of $[**amount**] as set forth in paragraphs [**paragraph numbers**], plus interest and attorney's fees and such other damages as may be established, be determined to be nondischargeable under 11 U.S.C. § 523(a)(2).

And/Or

Include the following paragraphs 6.–10. if applicable under 11 U.S.C. § 523(a)(4).

6. Under 11 U.S.C. § 523(a)(4), a debtor may not receive a discharge from a debt incurred through fraud or defalcation in a fiduciary capacity.

7. [**Describe circumstances creating fiduciary relationship**] created a fiduciary relationship between the parties. Debtor was required to [**describe requirements**].

8. Debtor has failed to account for more than $[**amount**], which he received in the fiduciary relationship. As a result of such failure, Creditor was damaged in the amount of at least $[**amount**] as set forth in paragraphs [**paragraph numbers**].

9. Creditor's losses arise from Debtor's fraud or defalcation in a fiduciary capacity. Debtor committed fraud by [**describe actions**]. [**Include if applicable:** Debtor also committed defalcation by receiving funds in a fiduciary capacity and failing to satisfactorily account for such funds.]

10. Creditor requests that the Court determine that the damages sustained by Creditor on both prepetition and postpetition actions in the amount of $[**amount**] as set forth in paragraphs [**paragraph numbers**], plus interest and attorney's fees and such other damages as may be established, be determined to be nondischargeable under 11 U.S.C. § 523(a)(4).

And/Or

Include the following paragraphs 11.–13. if applicable under 11 U.S.C. § 523(a)(6).

11. Under 11 U.S.C. § 523(a)(6), a debtor may not receive a discharge from a debt for willful and malicious injury by the debtor to another entity or the property of another entity. Conversion falls within 11 U.S.C. § 523(a)(6).

12. Before filing the bankruptcy petition, Debtor converted more than $[**amount**] in proceeds received from [**source**]. Debtor's actions were willful because Debtor intentionally failed to remit those proceeds to Creditor. Debtor's actions were malicious because Debtor specifically intended to convert the funds to Debtor's own use without remitting the funds to Creditor and knew that such action would necessarily result in harm to Creditor.

13. Creditor requests that the Court determine that the damages sustained by Creditor in the amount of $[**amount**] as set forth in paragraphs [**paragraph numbers**], plus interest and attorney's fees and such other damages as may be established, be determined to be nondischargeable under 11 U.S.C. § 523(a)(6).

Continue with the following.

14. Creditor prays that the Court determine that the debts described above are nondischargeable pursuant to 11 U.S.C. § 523(a) and for all other relief to which Creditor may be entitled.

[**Name**]
Attorney for [**name of client**]
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Include a certificate of service (form 19-1).

Form 35-18

The form and time requirements for negative notice vary, and **the practitioner should check the local rules before filing a pleading that requires inclusion of negative notice**. The following are the negative notice provisions that are applicable to most motions and applications from the Local Rules of the Bankruptcy Courts for the Northern, Southern, Eastern, and Western Districts of Texas. Different negative notice language applies to certain specific motions and applications such as motions for relief from the automatic stay. The negative notice language provisions of the local rules are changed from time to time, so consult the courts' Web sites for the current form. See section 35.1:2 in this chapter for the individual Web sites for each district. This negative notice language should be placed on the motion or application immediately below the caption and title of the motion or application, unless otherwise specified by local rules.

Negative Notice Language

Select the following for the Northern District of Texas (Local Rule 9007-1(c)).

Select one of the following.

NO HEARING WILL BE CONDUCTED HEREON UNLESS A WRITTEN RESPONSE IS FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AT (ADDRESS OF CLERK'S OFFICE) BEFORE CLOSE OF BUSINESS ON (MONTH) (DAY), (YEAR), WHICH IS 24 DAYS FROM THE DATE OF SERVICE HEREOF.

Or
(where sales free and clear are involved)

HEARING DATE ON SUCH SALE IS SET FOR (MONTH, DAY, YEAR), WHICH IS 24 DAYS FROM THE DATE OF SERVICE HEREOF. NO OBJECTION TO SUCH SALE WILL BE CONSIDERED UNLESS A WRITTEN RESPONSE IS FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AT (ADDRESS OF CLERK'S OFFICE) AT LEAST 4 DAYS IN ADVANCE OF SUCH HEARING DATE.

Or
(involving objections to claims in Chapters 7, 12, or 13 cases)

NO HEARING WILL BE CONDUCTED ON THIS OBJECTION TO CLAIM UNLESS A WRITTEN RESPONSE IS FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AT (ADDRESS OF CLERK'S OFFICE) BEFORE CLOSE OF BUSINESS ON (MONTH, DAY, YEAR), WHICH IS 33 DAYS FROM THE DATE OF SERVICE HEREOF.

Continue with the following.

ANY RESPONSE MUST BE IN WRITING AND FILED WITH THE CLERK, AND A COPY SHALL BE SERVED UPON COUNSEL FOR THE MOVING PARTY PRIOR TO THE DATE AND TIME SET FORTH HEREIN. IF A RESPONSE IS FILED A HEARING MAY BE HELD WITH NOTICE ONLY TO THE OBJECTING PARTY.

IF NO HEARING ON SUCH NOTICE OR MOTION IS TIMELY REQUESTED, THE RELIEF REQUESTED SHALL BE DEEMED TO BE UNOPPOSED, AND THE COURT MAY ENTER AN ORDER GRANTING THE RELIEF SOUGHT OR THE NOTICED ACTION MAY BE TAKEN.

Select the following for the Southern District of Texas (Local Rule 9013-1(b)).

This motion seeks an order that may adversely affect you. If you oppose the motion, you should immediately contact the moving party to resolve the dispute. If you and the moving party cannot agree, you must file a response and send a copy to the moving party. You must file and serve your response within 21 days of the date this was served on you. Your response must state why the motion should not be granted. If you do not file a timely response, the relief may be granted without further notice to you. If you oppose the motion and have not reached an agreement, you must attend the hearing. Unless the

parties agree otherwise, the court may consider evidence at the hearing and may decide the motion at the hearing.

Represented parties should act through their attorney.

Select the following for the Eastern District of Texas (Local Rule 9007(a)).

NO HEARING WILL BE CONDUCTED ON THIS MOTION/OBJECTION/APPLICATION UNLESS A WRITTEN OBJECTION IS FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AND SERVED UPON THE PARTY FILING THIS PLEADING WITHIN TWENTY-ONE (21) DAYS FROM DATE OF SERVICE UNLESS THE COURT SHORTENS OR EXTENDS THE TIME FOR FILING SUCH OBJECTION. IF NO OBJECTION IS TIMELY SERVED AND FILED, THIS PLEADING SHALL BE DEEMED TO BE UNOPPOSED, AND THE COURT MAY ENTER AN ORDER GRANTING THE RELIEF SOUGHT. IF AN OBJECTION IS FILED AND SERVED IN A TIMELY MANNER, THE COURT WILL THEREAFTER SET A HEARING. IF YOU FAIL TO APPEAR AT THE HEARING, YOUR OBJECTION MAY BE STRICKEN. THE COURT RESERVES THE RIGHT TO SET A HEARING ON ANY MATTER.

Select the following for the Western District of Texas (Local Rule 9014(a)).

THIS PLEADING REQUESTS RELIEF THAT MAY BE ADVERSE TO YOUR INTERESTS.

IF NO TIMELY RESPONSE IS FILED WITHIN TWENTY (20) DAYS FROM THE DATE OF SERVICE, THE RELIEF REQUESTED HEREIN MAY BE GRANTED WITHOUT A HEARING BEING HELD.

A TIMELY RESPONSE IS NECESSARY FOR A HEARING TO BE HELD.

Form 35-19

Warning: The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2 in this chapter.

[Caption. See form 35-3 in this chapter.]

Motion to Compel Assumption or Rejection of Lease and Payment of Administrative Claim

Insert negative notice as required under local rules. See form 35-18.

1. *Parties.* [**Name of creditor**], Creditor, files this Motion to Compel Assumption or Rejection of Leases and Payment of Administrative Claim.

2. *Jurisdiction.* The Court has jurisdiction of this motion pursuant to 28 U.S.C. §§ 157 and 1334 and 11 U.S.C. §§ 365, 503, and 507.

3. *Facts.*

   a. Debtor filed for protection under Chapter [11/13] of the Bankruptcy Code on [**date**]. The first meeting of creditors was held on or about [**date**]. [**Include if applicable:** Debtor filed a Chapter 13 plan on or about [**date**].]

   b. Debtor entered into a lease with Creditor (the "Lease") on or about [**date**]. The effective date of the Lease was [**date**]. The Lease was a [**term of lease, e.g.,** twelve-month] lease for [**list lease items**]. Debtor was to make monthly payments pursuant to the Lease in the sum of $[**amount**] per month. The Lease is attached as Exhibit [**exhibit number/letter**].

c. At the time this case was filed, Debtor was [**number**] month[s] in arrears or $[**amount**] (payment plus tax and late charges) in arrears on the Lease. No payments have been received by Creditor since this case was filed on [**date**], and postpetition arrearages total $[**amount**].

4. *Grounds.*

a. Section 365(d)(2) of the Bankruptcy Code provides:

> In a case under chapter 9, 11, 12 or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

Creditor requests that the Court require the Debtor to assume or reject the Lease within [**number, e.g.,** thirty] days of the entry of an order by this Court.

b. Debtor has effectively failed to make at least [**number**] of the [**number**] payments due to date. Moreover, the property leased to Debtor by Creditor is equipment that will depreciate in value with the passage of time and development of new technology. To the best of Creditor's knowledge, Debtor is still using the property, and the depreciation of the property is accelerated by use.

5. *Assumption of Lease.* Section 365(b)(1) of the Bankruptcy Code provides that, if there has been a default in an executory contract or unexpired lease, the contract or lease may not be assumed unless the trustee, at the time of the assumption, cures or provides adequate assurance that the trustee will promptly cure such default and provides adequate assurance of

future performance under the contract or lease. Creditor therefore requests Debtor, should [he/she] elect to assume the Lease with Creditor, tender payment of the arrearages in full within [**number, e.g.,** thirty] days of Debtor's filing to assume the Lease, including the attorney's fees incurred by Creditor. Should Debtor fail to cure the arrearages as required by 11 U.S.C. § 365(b)(1), Creditor requests that the order entered in response to this motion include a provision that Debtor surrender Creditor's equipment at a place to be designated by Creditor.

6. *Assurances of Future Performance.* Creditor also requests, pursuant to 11 U.S.C. § 365(b)(1), that should Debtor be required, in any motion to assume the Lease, to provide adequate assurance of future performance, that such adequate assurances may be by way of Debtor providing a request for automatic bank drafts to Creditor or some similar evidence.

7. *Administrative Expenses.* At least [**number**] lease payments have accrued postpetition and at least [**number**] additional payments will come due by the time this matter is heard. Even assuming that Debtor elects to reject the Lease with Creditor, Creditor requests that the Court find that the payments that have become due postpetition and before rejection are administrative expenses as defined in 11 U.S.C. § 503(b)(1) and require Debtor to pay the same within [**number, e.g.,** thirty] days of a motion rejecting the Lease as provided in 11 U.S.C. § 503(a).

8. *Prayer.* Creditor prays that—

a. this Court enter an order compelling Debtor to assume or reject the Lease within [**number, e.g.,** thirty] days of the entry of the order;

b. the order require Debtor, should Debtor file a motion to assume the Lease, to cure all arrearages, including late charges and attorney's fees, within [**number, e.g.,** thirty] days after filing the motion or to surrender the property within the same period;

c. if Debtor elects to reject the Lease, this Court find that all postpetition payments that came due prior to the entry of the Order rejecting the Lease be deemed to be administrative expenses and paid within [**number, e.g.,** thirty] days of the entry of the Court's order; and

d. Creditor be granted all other relief to which it may be entitled.

Dated: _____.

_____

[**Name**]
Attorney for [**name of client**]
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach exhibit(s). Include a certificate of service (form 19-1). Send a copy of the motion to compel assumption or rejection of lease and payment of administrative claim to the debtors, debtors' counsel, the bankruptcy trustee, and all other parties in interest.

Form 35-20

Note: The judge will insert an image of his signature and the date of signing electronically. In the bankruptcy courts for the Western District of Texas, the practitioner should leave four inches of blank space at the top of the first page for insertion of the judge's signature. In other bankruptcy courts in the other districts in Texas, the image of the judge's signature will be inserted below the last line of text, so the practitioner should leave adequate space on the form. It is good practice to refer to the local rules and procedures for any updates or changes.

Warning: The local rules of the Bankruptcy Courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2 in this chapter.

[Caption. See form 35-3 in this chapter.]

Order Granting Motion to Compel Assumption or Rejection of Lease and Payment of Administrative Claim

At the hearing on Creditor [**name of creditor**]'s Motion to Compel Assumption or Rejection of Lease and Payment of Administrative Claim, the Court, having considered the Motion, the arguments of counsel, and the papers on file in this case, finds that it should be granted.

It is therefore ORDERED that—

1. Debtor, [**name of debtor**], shall assume or reject the lease dated [**date of lease**] (the "Lease") within [**number, e.g.,** thirty] days from the date of entry of this Order;

2. Should Debtor file a motion to assume the Lease, Debtor shall—

   a. cure all arrearages, including late charges and attorney's fees, within [**number, e.g.,** thirty] days after filing the motion or surrender the leased property within the same period; and

b. provide adequate assurance of future performance in the form of [**select from the following:** certified funds/a letter of credit/a third-party guarantee acceptable to Creditor/an automatic bank draft] or some similar protection; and

3. Should Debtor elect to reject the Lease, all postpetition payments that came due prior to the entry of the Order rejecting the Lease shall be deemed to be administrative expenses and shall be paid by Debtor within [**number, e.g.,** thirty] days of the entry of the Order.

Form 35-21

Reclamation Demand

[**date**]

Via [**method of delivery**]
[Debtor's Counsel]

[**and/or**]

Via [**method of delivery**]
Debtor

[**Include claims agent if one exists**]

Re: *In re* [**name of debtor**], Case No. [**number**], in the United States Bankruptcy Court for the [Northern/Southern/Western/Eastern] District of Texas, [**city**] Division

NOTICE AND DEMAND TO RECLAIM GOODS

Dear Debtor's Representative:

Our firm represents [**name of vendor**] ("Vendor") regarding its reclamation demand against [**name of debtor**] ("Debtor"). Vendor demands that goods delivered to Debtor in the amount of $[**amount**] (the "Reclaimed Goods") be returned immediately to Vendor. A copy of the invoice and delivery information for the Reclaimed Goods is enclosed as Exhibit [**number/ letter**].

Pursuant to the provisions of sections 546(c)(1) of Chapter 11 of the United States Code ("Bankruptcy Code"), section 2-702(2) of the Uniform Commercial Code, and any other applicable law, Vendor files this demand to reclaim the goods shipped by Vendor to Debtor and received by Debtor within the forty-five-day period immediately preceding the filing of Debtor's bankruptcy petition as provided under section 546 of the Bankruptcy Code.

Vendor is entitled to and does reclaim the Reclaimed Goods shipped to Debtor. The quantity and value of the Reclaimed Goods is set forth in the enclosed Exhibit [**number/letter**] and represents goods shipped by Vendor and received by Debtor. The applicable shipping terms, the date of delivery to, and/or acceptance by Debtor of the Reclaimed Goods and other supporting documentation is set forth in Exhibit [**number/letter**].

Vendor demands that Debtor segregate and identify the Reclaimed Goods and that Debtor refrain from using the Reclaimed Goods pending the return of the Reclaimed Goods to Vendor or until this matter has been otherwise resolved. If Debtor's records of the property received from Vendor during the applicable periods are different, please promptly provide an accounting to us within ten calendar days of the date of receipt of the letter. Otherwise, we will assume that the Reclaimed Goods were received by Debtor during the applicable periods and that all of the Reclaimed Goods are in Debtor's possession and have been identified and segregated.

Nothing herein shall constitute a waiver of rights by Vendor, and Vendor specifically reserves all rights and remedies, including but not limited to its right to (1) assert secured claims, (2) receive payment of goods delivered in the ordinary course of Debtor's business, (3) assert administrative expense claims under section 503(b)(9) of the Bankruptcy Code, and (4) assert additional claims pursuant to any applicable law.

Please contact me with any questions.

Very truly yours,

[Name]
Attorney for [**name of vendor**]

Enclosure

cc: *Via* [**method of delivery**]
Counsel for Unsecured Creditor's Committee

cc: *Via* [**method of delivery**]
US Trustee

Form 35-22

Warning: The local rules of the bankruptcy courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2 in this chapter.

[Caption. See form 35-3 in this chapter.]

Motion of [name of creditor] for Allowance of Administrative Expense Claim under 11 U.S.C. § 503(b)(9)

[**Name of creditor**] ("Claimant") files its Motion of [**name of creditor**] for Allowance of Administrative Expense Claim under 11 U.S.C. § 503(b)(9) (the "Motion") and shows:

Summary of Relief Requested

1. Claimant seeks entry of an order allowing Claimant an administrative expense claim in the amount of $[**amount**] under section 503(b)(9) of the Bankruptcy Code for goods received by the debtor within twenty days prior to the petition date.

Background

1. On [**date**] (the "Petition Date"), [**name of debtor**] (the "Debtor") filed a voluntary petition for relief under Chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the [Northern/Southern/Western/Eastern] District of Texas, [**city**] Division (the "Bankruptcy Court").

2. Debtor is operating its businesses and managing its affairs as a debtor and debtor in possession under sections 1107(a) and 1108 of the Bankruptcy Code.

3. Claimant was a supplier of [**describe goods**] to Debtor prior to Petition Date.

4. Within twenty days before the petition date, Debtor received goods, as identified in the attached Exhibit [**number/letter**], that were sold to Debtor by the claimant in the ordinary course of Debtor's business (the "Goods"). The value of the Goods was $[**amount**].

Argument and Authorities

6. Section 503 of the Bankruptcy Code provides for the allowance of administrative expense claims. Section 503(a) provides that an entity may file a request for the payment of an administrative expense claim. Administrative expense claims are granted priority of payment pursuant to section 507 of the Bankruptcy Code. Further, in a bankruptcy case under Chapter 11, a plan of reorganization may not be confirmed without payment of allowed administrative expense claims. 11 U.S.C. § 1129(a)(9)(A). The term "administrative expense" is not defined in the Bankruptcy Code. Section 503(b) provides a nonexclusive list of categories of administrative expense claims. In 2005, Congress added three new categories of claims entitled to administrative expense priority under section 503(b) of the Bankruptcy Code. Among them, section 503(b)(9) was added. In pertinent part, section 503(b)(9) provides that:

> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—
>
> . . .
>
> (9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

11 U.S.C. § 503(b).

7. Claimant sold the Goods to Debtor in the ordinary course of Debtor's business, and Debtor received the Good within twenty days before the petition date. The value of the Goods sold by Claimant to Debtor was $[**amount**]. Under section 503(b)(9) of the Bankruptcy Code, Claimant is entitled to an administrative expense claim in the amount of $[**amount**]. On allowance, Claimant requests the Court to order Debtor to immediately pay Claimant's administrative expense claim.

8. Claimant expressly reserves its right to assert additional claims against Debtor and to amend, modify, or supplement this request.

WHEREFORE, Claimant requests that the Court enter an Order allowing Claimant an administrative expense claim under section 503(b)(9) of the Bankruptcy Code in the amount of $[**amount**], requiring payment of the administrative expense claim immediately, and granting such other relief as the Court deems just and proper.

Date: [**date**]. _____Respectfully submitted,

_____

[**Name**]
Attorney for [**name of client**]
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Form 35-23

Warning: The local rules of the bankruptcy courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2 in this chapter.

[Caption. See form 35-3 in this chapter.]

Order Granting Motion of [name of creditor] for Allowance of Administrative Expense Claim under 11 U.S.C. § 503(b)(9)

The Court considered the Motion of [**name of creditor**] ("Claimant") for Allowance of Administrative Expense Claim under 11 U.S.C. § 503(b)(9) (the "Motion") and finds that this Court has jurisdiction over this matter, that this matter is a core proceeding, and that notice of the Motion was sufficient. This Court, after determining the legal and factual bases set forth in the Motion, hereby finds good cause for granting the relief requested in the Motion exists and hereby GRANTS the Motion.

IT IS THEREFORE ORDERED that the Motion is GRANTED.

IT IS FURTHER ORDERED that Claimant is allowed an administrative expense claim under 11 U.S.C. § 503(b)(9) in the amount of $[**amount**] (the "Administrative Claim") and further ORDERED that the Administrative Claim shall be paid by [**name of debtor**] ("Debtor") on entry of this Order.

Dated: [**date**].

UNITED STATES BANKRUPTCY JUDGE

Form 35-24

Warning: The local rules of the bankruptcy courts for the four districts in Texas have specific requirements for the content of the captions of pleadings and orders, and they are all different. The practitioner should consult the local rules of the bankruptcy court for the district in which he intends to file for the specific requirements as to the content of captions. See section 35.1:2 in this chapter.

[Caption. See form 35-3 in this chapter.]

Notice of Appearance and Request for Service of Papers

PLEASE TAKE NOTICE of the appearance of [**name of attorney**] as counsel for [**name of creditor**], a creditor in this bankruptcy case who requests notice of all matters and pleadings in this case. Notice should be sent to [**name of counsel, address, city, state**].

Date: [**date**].

Respectfully submitted,

[**Name**]
Attorney for [**name of client**]
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Appendix

New Justice Court Rules and Rules Related to Expedited Trials[1]

By Michael J. Scott

Table of Contents

1. This was originally presented at the 11th Annual Advanced Collections and Creditor's Rights Course in Dallas, May 2–3, 2013.

New Justice Court Rules and Rules Related to Expedited Trials

A. A Brief Orientation

The 82nd Texas legislative session resulted in a variety of statutory mandates to the Supreme Court of Texas for the formulation of new rules and the restructuring of the Texas court system as it relates to the justice and small claims courts. This tour is intended to highlight the key features of each of the new rules. The text of the rule will be presented in parallel with specific highlighted points.

B. Dismissal for Baseless Causes of Action

Rule 91a, Dismissal of Baseless Causes of Action, came about as the result of an Act of May 25, 2011, 82nd Leg., R.S., ch. 203, §§ 1.01, 2.01 (H.B. 274). In section 22.004(g) of the Government Code, the legislature instructed the Supreme Court of Texas to:

> [A]dopt rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without evidence. The rules shall provide that the motion to dismiss shall be granted or denied within 45 days of the filing of the motion to dismiss. The rules shall not apply to actions under the Family Code.

Further section 30.021 provided for the award of attorney's fees, stating:

> In a civil proceeding, on a trial courts' granting or denial, in whole or in part, of a motion to dismiss filed under the rules adopted by the supreme court under Section 22.004(g), Government Code, the court shall award costs and reasonable and necessary attorneys' fees to the prevailing party. This section does not apply to actions by or against the state, other governmental entities, or public officials acting in their official capacity or under color of law.

C. Expedited Actions and Related Rule Changes

Rule 169, Expedited Actions, came about as the result of an Act of May 25, 2011, 82nd Leg., R.S., ch. 203, §§ 1.01, 2.01 (H.B. 274). In section 22.004(h) of the Government Code, the legislature instructed the Supreme Court of Texas to:

> [A]dopt rules to promote the prompt, efficient, and cost-effective resolution of civil actions. The rules shall apply to civil actions in district courts, county courts at law, and statutory probate courts in which the amount in controversy, inclusive of all claims for damages of any kind, whether actual or exemplary, a penalty, attorneys' fees, expenses, costs, interest, or any other type of damage of any kind, does not exceed $100,000. The rules shall address the need for lowering discovery costs in these actions and the procedure for ensuring that these actions will be expedited in the civil justice system.

The Task Force appointed by the Supreme Court engaged in substantial debate as to whether the Expedited Civil Actions rule was to be elective or mandatory, ultimately resulting in two independent recommendations. Those advocating a voluntary system believed that significant opportunity existed to control both trial costs (smaller juries) and appeal cost (through limitations and waivers). There was, however, a concern that the system would not be utilized, thereby defeating the purpose of the statute. Ultimately, the Supreme Court adopted a mandatory approach. Texas Rules of Civil Procedure rules 47 and 190.2 were revised to be consistent with the Expedited Civil Actions Rule, with rule 47 expressly requiring the plaintiff to plead into the requirements of the rule, or describe relief that fell outside the rule.

D. Level 1 Discovery Control Plan

Changes to rule 190.2 (Level 1 Discovery Control Plan) were not directly mandated by the legislature, but arose out of the challenges associated with the implementation of the Expedited Actions rule. The Supreme Court had observed that the Level 1 Discovery Control Plan called for by rule 190.2 was (1) little used and (2) allowed for a certain degree of discovery abuse by the parties (there is no limit to requests for production of admissions). As such, the Court saw the rule as failing to fulfill its intended purpose. This, combined with the need to have some form of discovery limitation which would promote the objectives of the Expedited Actions rule, resulted in a modification to rule 190.2. A

key feature of rule 190.2 is the inability of the parties or the court to relax the yoke of restraint imposed by the rule.

E. The Justice Court Rules

The new Justice Court Rules came about as the result of an Act of June 29, 2011, 82nd Leg., 1st C.S., ch. 3, §§ 5.02, 5.07 (H.B. 79). As of the writing of this "tour," the justices of the peace oversee two distinct court systems, mandated by the Government Code. Chapter 27 pertains to Justice Courts and chapter 28 pertains to Small Claims Courts . . . one justice, two courts. As of May 1, 2013, the Small Claims Courts are dissolved and those cases are effectively transferred to the Justice Courts. Specifically, the legislature instructed the Supreme Court to handle small claim matters in Justice Court (Tex. Gov't Code § 27.060) and to promulgate rules to "define cases that constitute small claims cases" (H.B. 79, § 5.06) so as to ensure "the fair, expeditious, and inexpensive resolution" of these cases (Tex. Gov't Code § 27.060(a)).

The legislation also required the Supreme Court to provide specific procedures for an action by:

(1) an assignee of a claim or other person seeking to bring an action on an assigned claim;

(2) a person primarily engaged in the business of lending money at interest; or

(3) a collection agency or collection agent.

Tex. Gov't Code § 27.060(c). These cases are collectively described as Debt Claim Cases and are ultimately the object of two specific rules.

Finally, the legislature wanted these new rules to be understandable to a lay person. To this end, the statute provides:

> The rules adopted by the supreme court **may not**:
>
> (1) require that a party in a case be represented by an attorney;
>
> (2) be so complex that a reasonable person without legal training would have difficulty understanding or applying the rules; or
>
> (3) **require that discovery rules adopted under the Texas Rules of Civil Procedure or the Texas Rules of Evidence be applied** except to the extent the justice of the peace hearing the case determines that the rules must be followed to ensure that the proceeding is fair to all parties.

Tex. Gov't Code § 27.060(d) (emphasis added). In essence, the Supreme Court was to write **an entirely new set of rules of civil procedure** . . . but keep it simple.

RULE 91a. DISMISSAL OF BASELESS CAUSES OF ACTION

Effective Date: March 1, 2013

Applies to: Pending Cases

Text of Rule of Civil Procedure	Summary of Rule Elements
91a.1 Motion and Grounds. Except in a case brought under the Family Code or a case governed by Chapter 14 of the Texas Civil Practice and Remedies Code, a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact. A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them do not entitle the claimant to the relief sought. A cause of action has no basis in fact if no reasonable person could believe the facts pleaded.	**The Rule Does Not Apply To** • Family Code Cases • Inmate Litigation **Grounds for Dismissal** • No basis in Law - the allegations, together with inferences reasonably drawn from them do not entitle the claimant to the relief sought • No basis in Facts - no reasonable person could believe the facts pled
91a.2 Contents of Motion. A motion to dismiss must state that it is made pursuant to this rule, must identify each cause of action to which it is addressed, and must state specifically the reasons the cause of action has no basis in law, no basis in fact, or both.	**Motion Must State** • It is made pursuant to TRCP 91a • Each cause of action it addresses • The reasons the cause of action has no basis in law, no basis in fact, or both
91a.3 Time for Motion and Ruling. A motion to dismiss must be: (a) filed within 60 days after the first pleading containing the challenged cause of action is served on the movant; (b) filed at least 21 days before the motion is heard; and (c) granted or denied within 45 days after the motion is filed.	**Timing of Motion** • Filed within 60 days of when the cause of action was first served • Filed 21 days before the motion is heard **Court Ruling** • Must be determined within 45 days after motion is filed
91a.4 Time for Response. Any response to the motion must be filed no later than 7 days before the date of the hearing.	**Response** • Filed 7 days before the motion is heard • Not required
91a.5 Effect of Nonsuit or Amendment; Withdrawal of Motion. (a) The court may not rule on a motion to dismiss if, at least 7 days before the date of the hearing, the respondent files a nonsuit of the challenged cause of action, or the movant files a withdrawal of the motion.	**Court May Not Rule on Motion to Dismiss** • If claimant nonsuits the challenged cause of action 7 days before the motion is heard • If Movant files a withdrawal of the motion

Text of Rule of Civil Procedure	Summary of Rule Elements
(b) If the respondent amends the challenged cause of action at least 7 days before the date of the hearing, the movant may, before the date of the hearing, file a withdrawal of the motion or an amended motion directed to the amended cause of action. (c) Except by agreement of the parties, the court must rule on a motion unless it has been withdrawn or the cause of action has been nonsuited in accordance with (a) or (b). In ruling on the motion, the court must not consider a nonsuit or amendment not filed as permitted by paragraphs (a) or (b). (d) An amended motion filed in accordance with (b) restarts the time periods in this rule.	**Amending the Challenged Cause** • Claimant may amend a challenged cause up to 7 days before the motion is heard • In the event of an amendment, Movant may withdraw or amend the motion before the date of hearing **Court Must Rule** • The Court is required to rule on a Motion unless: – The Challenged Cause of Action is nonsuited – The Motion to Dismiss is withdrawn **Effect of Amended Motion** • An Amended Motion to Dismiss filed in response to an amended cause of action restarts the time periods prescribed by the rule
91a.6 Hearing; No Evidence Considered. Each party is entitled to at least 14 days' notice of the hearing on the motion to dismiss. The court may, but is not required to, conduct an oral hearing on the motion. Except as required by 91a.7, the court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59.	**Hearing** • Parties entitled to 14 days' notice of hearing • May be by Submission **Evidence** • Court may not consider evidence; Motion decided based solely on the pleadings • Court may consider evidence for purposes of awarding attorney's fees under Rule 91a.7
91a.7 Award of Costs and Attorney Fees Required. Except in an action by or against a governmental entity or a public official acting in his or her official capacity or under color of law, the court must award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court. The court must consider evidence regarding costs and fees in determining the award.	**Mandatory Award of Cost and Attorney Fees** • Prevailing party entitled to recover costs and fees incurred • Governmental entities and public officials are exempt

Text of Rule of Civil Procedure	Summary of Rule Elements
91a.8 Effect on Venue and Personal Jurisdiction. This rule is not an exception to the pleading requirements of Rules 86 and 120a, but a party does not, by filing a motion to dismiss pursuant to this rule or obtaining a ruling on it, waive a special appearance or a motion to transfer venue. By filing a motion to dismiss, a party submits to the Court's jurisdiction in proceedings on the motion and is bound by the court's ruling, including an award of attorney fees and costs against the party.	**Due Order of Pleadings** • Filing of Motion does not consent to venue • Filing of Motion does not waive any jurisdictional challenge raised by special exception **Jurisdiction** • Court has special jurisdiction to enforce the rule, including – disposal of the cause of action, and – the award of cost and attorney's fees
91a.9 Dismissal Procedure Cumulative. This rule is in addition to, and does not supersede or affect, other procedures that authorize dismissal.	**Motion Does Not Preclude Other Remedies** • Dismissal procedure is in addition to other available procedures and remedies

Comment to Rule 91a

Rule 91a is a new rule implementing section 22.004(g) of the Texas Government Code, which was added in 2011 and calls for rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without evidence. A motion to dismiss filed under this rule must be ruled on by the court within 45 days unless the motion, pleading, or cause of action is withdrawn, amended, or nonsuited as specified in 91a.5. If an amended motion is filed in response to an amended cause of action in accordance with 91a.5(b), the court must rule on the motion within 45 days of the filing of the amended motion and the respondent must be given an opportunity to respond to the amended motion. The term "hearing" in the rule includes both submission and an oral hearing. Attorney fees awarded under 91a.7 are limited to those associated with challenged cause of action, including fees for preparing or responding to the motion to dismiss.

RULE 169. EXPEDITED ACTIONS

Effective Date: March 1, 2013

Applies to: Cases Filed After Effective Date

Text of Rule of Civil Procedure	Summary of Rule Elements
RULE 47. CLAIMS FOR RELIEF	
(a) An original pleading which sets forth a claim for relief, whether an original petition, counterclaim, cross-claim, or third party claim, shall contain (a) a short statement of the cause of action sufficient to give fair notice of the claim involved; (b) a statement that the damages sought are within the jurisdictional limits of the court; (c) except in suits governed by the Family Code, a statement that the party seeks: **(1) only monetary relief of $100,000 or less, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees; or** (2) monetary relief of $100,000 or less and non-monetary relief; or (3) monetary relief over $100,000 but not more than $200,000; or (4) monetary relief over $200,000 but not more than $1,000,000; or (5) monetary relief over $1,000,000; and (d) a demand for judgment for all the other relief to which the party deems himself entitled. Relief in the alternative or of several different types may be demanded; provided, further, that upon special exception the court shall require the pleader to amend so as to specify the maximum amount claimed. A party that fails to comply with (c) may not conduct discovery until the party's pleading is amended to comply.	**Comment to Rule 47** Rule 47 is amended to require a more specific statement of the relief sought by a party. **The amendment requires parties to plead into or out of the expedited actions process governed by Rule 169.** The further specificity in paragraphs (c)(2)–(5) is to provide information regarding the nature of cases filed and does not affect a party's substantive rights.
RULE 169. EXPEDITED ACTIONS	
(a) ***Application.***	
(1) The expedited actions process in this rule applies to a suit in which all claimants, other than counter-claimants, affirmatively plead that they seek only monetary relief aggregating $100,000 or less, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees.	**Pleading Requirements** • All claimants affirmatively plead that they seek only monetary relief • Aggregate relief does not exceed $100,000, including: – damages of any kind – penalties

Text of Rule of Civil Procedure	Summary of Rule Elements
(2) The expedited actions process does not apply to a suit in which a party has filed a claim governed by the Family Code, the Property Code, the Tax Code, or Chapter 74 of the Civil Practice & Remedies Code.	– costs – expenses – pre-judgment interest, and – attorney fees. **The Rule Does Not Apply To** • Family Code Case • Property Code Case • Tax Code Case • Medical Liability Cases
(b) ***Recovery.***	
In no event may a party who prosecutes a suit under this rule recover a judgment in excess of $100,000, excluding post-judgment interest.	**Limit on Total Recovery** • $100,000 • Plus Post-Judgment Interest
(c) ***Removal from Process.***	
(1) A court must remove a suit from the expedited actions process: (A) on motion and a showing of good cause by any party; or (B) if any claimant, other than a counter-claimant, files a pleading or an amended or supplemental pleading that seeks any relief other than the monetary relief allowed by (a)(1).	**Removal from Process Required** • On Motion and Showing of Good Cause by any party, or • Any claimant amends or supplements pleading to seek relief other than the monetary relief allowed by (a)(1). • Claims of counter-claimant and relief sought are not relevant to the issue of removal other than in the context of "Good Cause"
(2) A pleading, amended pleading, or supplemental pleading that removes a suit from the expedited actions process may not be filed without leave of court unless it is filed before the earlier of 30 days after the discovery period is closed or 30 days before the date set for trial. Leave to amend may be granted only if good cause for filing the pleading outweighs any prejudice to an opposing party.	**Pleading Amendments and Supplements that Operate to Remove a Case from Expedited Actions** • If Timely Filed - removes the case automatically • If Not Timely Filed - requires leave of court prior to filing **Timeliness; the Earlier of:** • Before 30 days after close of discovery period • Before 30 days prior to trial date **Leave of Court** • Must show Good Cause for filing outweighs any prejudice to an opposing party
(3) If a suit is removed from the expedited actions process, the court must reopen discovery under Rule 190.2(c).	**Discovery Rules Following Removal** • Case proceeds under Level 1 Discovery Control Plan, including Level 1 limitations (as revised)
(d) ***Expedited Actions Process.***	
(1) Discovery. Discovery is governed by Rule 190.2.	**Level 1 Discovery Control Plan**

Text of Rule of Civil Procedure	Summary of Rule Elements
(2) Trial Setting; Continuances. On any party's request, the court must set the case for a trial date that is within 90 days after the discovery period in Rule 190.2(b)(1) ends. The court may continue the case twice, not to exceed a total of 60 days.	**Trial Setting** • Rule requires that trial be set if requested by party • Upon request, trial must be set within 90 days after close of discovery period (180 days after the first request for discovery of any kind is served) **Continuances** • Limited to 2 Continuances • Not to exceed 60 days combined
(3) Time Limits for Trial. Each side is allowed no more than eight hours to complete jury selection, opening statements, presentation of evidence, examination and crossexamination of witnesses, and closing arguments. On motion and a showing of good cause by any party, the court may extend the time limit to no more than twelve hours per side. (A) The term "side" has the same definition set out in Rule 233. (B) Time spent on objections, bench conferences, bills of exception, and challenges for cause to a juror under Rule 228 are not included in the time limit.	**Time Limit Is Eight (8) Hours per Side** • The following activities count against the time allotment: – Jury selection – Opening statements – Presentation of evidence – Examination – Crossexamination of witnesses, and – Closing arguments **Time Limit May Be Extended** • On Motion and showing of good cause • Cannot be extended to more than 12 hours per side **Housekeeping Matters** • "Side" defined • The following activities do not count against the time allotment: – Objections – Bench conferences – Bills of exception, and – Challenges for cause to a juror
(4) Alternative Dispute Resolution. (A) Unless the parties have agreed not to engage in alternative dispute resolution, the court may refer the case to an alternative dispute resolution procedure once, and the procedure must: (i) not exceed a half-day in duration, excluding scheduling time; (ii) not exceed a total cost of twice the amount of applicable civil filing fees; and	**Alternative Dispute Resolution Allowed** • Court may refer the case to ADR **only once** **ADR Requirements/Limitations** • Time not to exceed one-half day • Cost not to exceed twice the civil filing fee • Completed at least 60 days prior to initial trial setting

Text of Rule of Civil Procedure	Summary of Rule Elements
(iii) be completed no later than 60 days before the initial trial setting. (B) The court must consider objections to the referral unless prohibited by statute. (C) The parties may agree to engage in alternative dispute resolution other than that provided for in (A).	**Court Must Consider Objections to Referral** **ADR Limitations May be Modified by Agreement**
(5) Expert Testimony. Unless requested by the party sponsoring the expert, a party may only challenge the admissibility of expert testimony as an objection to summary judgment evidence under Rule 166a or during the trial on the merits. This paragraph does not apply to a motion to strike for late designation.	**Challenging Expert** • No *Robinson* Challenges • Challenges may only occur: – To summary judgment expert testimony – At trial on the merits **Saving Provision** • Sponsoring party may request ruling on admissibility of expert testimony • Party can challenge late designation of expert

Comments to 2013 change:

1. Rule 169 is a new rule implementing section 22.004(h) of the Texas Government Code, which was added in 2011 and calls for rules to promote the prompt, efficient, and cost effective resolution of civil actions when the amount in controversy does not exceed $100,000.

2. The expedited actions process created by Rule 169 **is mandatory**; any suit that falls within the definition of 169(a)(1) is subject to the provisions of the rule.

3. In determining whether there is good cause to remove the case from the process or extend the time limit for trial, the court should consider factors such as whether the damages sought by multiple claimants against the same defendant exceed in the aggregate the relief allowed under 169(a)(1), whether a defendant has filed a compulsory counterclaim in good faith that seeks relief other than that allowed under 169(a)(1), the number of parties and witnesses, the complexity of the legal and factual issues, and whether an interpreter is necessary.

4. Rule 169(b) specifies that a party who prosecutes a suit under this rule cannot recover a judgment in excess of $100,000. Thus, the rule in *Greenhalgh v. Service Lloyds Insurance Co.*, 787 S.W.2d 938 (Tex. 1990), does not apply if a jury awards damages in excess of $100,000 to the party. **The limitation of 169(b) does not apply to a counter-claimant that seeks relief other than that allowed under 169(a)(1).**

5. The discovery limitations for expedited actions are set out in Rule 190.2, which is also amended to implement section 22.004(h) of the Texas Government Code.

RULE 190.2 DISCOVERY CONTROL PLAN

Expedited Actions and Divorces Involving $50,000 or Less (Level 1)

Effective Date: March 1, 2013

Applies to: Cases Filed On or After Effective Date

Text of Rule of Civil Procedure	Summary of Rule Elements
(a) Application. This subdivision applies to: (1) ~~any suit in which all plaintiffs affirmatively plead that they seek only monetary relief aggregating $50,000 or less, excluding costs, pre-judgment interest and attorney's fee~~ any suit that is governed by the expedited actions process in Rule 169; and (2) any suit for divorce not involving children in which a party pleads that the value of the marital estate is more than zero but not more than $50,000.	**Scope** • Any suits governed by the expedited action process
~~**(b) Exceptions.** This subdivision does not apply if.~~ ~~(1) the parties agree that Rule 190.3 should apply;~~ ~~(2) the court orders a discovery control plan under Rule 190.4; or any party files a pleading or an amended or supplemental pleading that seeks relief other than that to which this subdivision applies.~~ ~~A pleading, amended pleading (including trial amendment), or supplemental pleading that renders this subdivision no longer applicable may not be filed without leave of court less than 45 days before the date set for trial. Leave may be granted only if good cause for filing the pleading outweighs any prejudice to an opposing party.~~	**Agreed Opt-Out** • No longer allowed **Modification by Court Order** • No longer allowed

Text of Rule of Civil Procedure	Summary of Rule Elements
(b) Limitations. Discovery is subject to the limitations provided elsewhere in these rules and to the following additional limitations: (1) Discovery Period. All discovery must be conducted during the discovery period, which begins when the suit is filed and continues until ~~30 days before the date set for trial~~ 180 days after the date the first request for discovery of any kind is served on a party. (2) Total Time for Oral Depositions. Each party may have no more than six hours in total to examine and cross-examine all witnesses in oral depositions. The parties may agree to expand this limit up to ten hours in total, but not more except by court order. The court may modify the deposition hours so that no party is given unfair advantage. (3) Interrogatories. Any party may serve on any other party no more than ~~25~~ 15 written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate interrogatory. (4) Requests for Production. Any party may serve on any other party no more than 15 written requests for production. Each discrete subpart of a request for production is considered a separate request for production. (5) Requests for Admissions. Any party may serve on any other party no more than 15 written requests for admissions. Each discrete subpart of a request for admission is considered a separate request for admission. (6) Requests for Disclosure. In addition to the content subject to disclosure under Rule 194.2, a party may request disclosure of all documents, electronic information, and tangible items that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses. A request for disclosure made pursuant to this paragraph is not considered a request for production.	**Calculation of Discovery Period** • Old: 30 days before trial date • New: 180 days after service of first request for discovery **Old Scope of Limitation** • Limit on Interrogatories (25, including subparts) • Limit on Depositions **New Scope of Limitations** • Changes limit on Interrogatories (15) • Adds limit on Requests for Production (15) • Adds limit on Admissions (15) • Expands Disclosures **Expanded Disclosures** • Not mandatory; must be requested by party • If to be used at trial, it must be produce • Does not constitute a Request for Production

Text of Rule of Civil Procedure	Summary of Rule Elements
(c) Reopening Discovery. ~~When the filing of a pleading or an amended or supplemental pleading renders this subdivision no longer applicable,~~ If a suit is removed from the expedited actions process in Rule 169 or, in a divorce, the filing of a pleading renders this subdivision no longer applicable, the discovery period reopens, and discovery must be completed within the limitations provided in Rules 190.3 or 190.4, whichever is applicable. Any person previously deposed may be redeposed. On motion of any party, the court should continue the trial date if necessary to permit completion of discovery.	**Effect of Removal from Expedited Action** • Court must reopen discovery • Witnesses can be redeposed

TEXAS RULES OF CIVIL PROCEDURE
PART V. RULES OF PRACTICE IN JUSTICE COURTS

Effective Date: May 1, 2013

Applies to: Pending Case, but does not contravene existing obligations and rights

Text of Rule of Civil Procedure	Summary of Rule Elements
Note: Rules of Civil Procedure 500–510 govern cases filed on or after August 31, 2013, and cases pending on August 31, 2013, except to the extent that in the opinion of the court their application in a case pending on August 31, 2013, would not be feasible or would work injustice, in which event the formerly applicable procedure applies. An action taken before August 31, 2013, in a case pending on August 31, 2013, that was done pursuant to any previously applicable procedure must be treated as valid. Where citation or other process was issued or served prior to August 31, 2013, in compliance with any previously applicable procedure, the party served has the time provided for under the previously applicable procedure to answer or otherwise respond.	
RULE 500. GENERAL RULES	
RULE 500.1. CONSTRUCTION OF RULES Unless otherwise expressly provided, in Part V of these Rules of Civil Procedure: (a) the past, present, and future tense each includes the other; (b) the term "it" includes a person of either gender or an entity; and (c) the singular and plural each includes the other.	**Housekeeping Language**
RULE 500.2. DEFINITIONS In Part V of these Rules of Civil Procedure: (a) "Answer" is the written response that a party who is sued must file with the court after being served with a citation. (b) "Citation" is the court-issued document required to be served upon a party to inform the party that it has been sued. (c) "Claim" is the legal theory and alleged facts that, if proven, entitle a party to relief against another party in court. (d) "Clerk" is a person designated by the judge as a justice court clerk, or the judge if there is no clerk available. (e) "Counterclaim" is a claim brought by a party who has been sued against the party who filed suit, for example, a defendant suing a plaintiff. (f) "County court" is the county court, statutory county court, or district court in a particular county with jurisdiction over appeals of civil cases from justice court. (g) "Cross-claim" is a claim brought by one party against another party on the same side of a lawsuit. For example, if a plaintiff sues two defendants, the defendants can seek relief against each other by means of a cross-claim. (h) "Default judgment" is a judgment awarded to a plaintiff when the defendant fails to answer and dispute the plaintiff's claims in the lawsuit.	

Text of Rule of Civil Procedure	Summary of Rule Elements
(i) "Defendant" is a party who is sued, including a plaintiff against whom a counterclaim is filed. (j) "Defense" is an assertion by a defendant that the plaintiff is not entitled to relief from the court. (k) "Discovery" is the process through which parties obtain information from each other in order to prepare for trial or enforce a judgment. The term does not refer to any information that a party is entitled to under applicable law. (l) "Dismissed without prejudice" means a case has been dismissed but has not been finally decided and may be refiled. (m) "Dismissed with prejudice" means a case has been dismissed and finally decided and may not be refiled. (n) "Judge" is a justice of the peace. (*o*) "Judgment" is a final order by the court that states the relief, if any, a party is entitled to or must provide. (p) "Jurisdiction" is the authority of the court to hear and decide a case. (q) "Motion" is a request that the court make a specified ruling or order. (r) "Notice" is a document prepared and delivered by the court or a party stating that something is required of the party receiving the notice. (s) "Party" is a person or entity involved in the case that is either suing or being sued, including all plaintiffs, defendants, and third parties that have been joined in the case. (t) "Petition" is a formal written application stating a party's claims and requesting relief from the court. It is the first document filed with the court to begin a lawsuit. (u) "Plaintiff" is someone who sues, including a defendant who files a counterclaim. (v) "Pleading" is a written document filed by a party, including a petition and an answer, that states a claim or defense and outlines the relief sought. (w) "Relief" is the remedy a party requests from the court, such as the recovery of money or the return of property. (x) "Serve" and "service" are delivery of citation as required by Rule 501.2, or of a document as required by Rule 501.4. (y) "Sworn" means signed in front of someone authorized to take oaths, such as a notary, or signed under penalty of perjury. Filing a false sworn document can result in criminal prosecution. (z) "Third party claim" is a claim brought by a party being sued against someone who is not yet a party to the case.	**Included to help guide pro se parties**

RULE 500.3. APPLICATION OF RULES IN JUSTICE COURT CASES

(a) *Small Claims Case.* A small claims case is a lawsuit brought for the recovery of money damages, civil penalties, personal property, or other relief allowed by law. The claim can be for no more than $10,000, excluding statutory interest and court costs but including attorney fees, if any. Small claims cases are governed by Rules 500–507 of Part V of the Rules of Civil Procedure.

(b) *Debt Claim Case.* A debt claim case is a lawsuit brought to recover a debt by an assignee of a claim, a debt collector or collection agency, a financial institution, or a person or entity primarily engaged in the business of lending money at interest. The claim can be for no more than $10,000, excluding statutory interest and court costs but including attorney fees, if any. Debt claim cases in justice court are governed by Rules 500–507 and 508 of Part V of the Rules of Civil Procedure. To the extent of any conflict between Rule 508 and the rest of Part V, Rule 508 applies.

(c) *Repair and Remedy Case.* A repair and remedy case is a lawsuit filed by a residential tenant under Chapter 92, Subchapter B, of the Texas Property Code to enforce the landlord's duty to repair or remedy a condition materially affecting the physical health or safety of an ordinary tenant. The relief sought can be for no more than $10,000, excluding statutory interest and court costs but including attorney fees, if any. Repair and remedy cases are governed by Rules 500–507 and 509 of Part V of the Rules of Civil Procedure. To the extent of any conflict between Rule 509 and the rest of Part V, Rule 509 applies.

(d) *Eviction Case.* An eviction case is a lawsuit brought to recover possession of real property under Chapter 24 of the Texas Property Code, often by a landlord against a tenant. A claim for rent may be joined with an eviction case if the amount of rent due and unpaid is not more than $10,000, excluding statutory interest and court costs but including costs and attorney fees, if any. Eviction cases are governed by Rules 500–507 and 510 of Part V of the Rules of Civil Procedure. To the extent of any conflict between Rule 510 and the rest of Part V, Rule 510 applies.

(e) *Application of Other Rules.* The other Rules of Civil Procedure and the Rules of Evidence do not apply except:

(1) when the judge hearing the case determines that a particular rule must be followed to ensure that the proceedings are fair to all parties; or

(2) when otherwise specifically provided by law or these rules.

(f) *Examination of Rules.* The court must make the Rules of Civil Procedure and the Rules of Evidence available for examination, either in paper form or electronically, during the court's business hours.

Jurisdictional Limit of $10,000

- Includes:
  - Damages
  - Penalties
  - Property
  - Attorney's Fees
- Excludes:
  - Statutory Interest
  - Court Cost

Debt Claim Case Defined

- Assignee of a Claim
- A Financial Institution
- A Debt Collector or Collection Agency
- A person or entity primarily engaged in the business of lending money at interest

Repair and Remedy Case Defined

- Alleged failure of a landlord to remedy or repair a condition as required by Chapter 92 of the Texas Property Code

Eviction Cases

- lawsuit brought to recover possession of real property
- May include a claim for rent

Note: Effective September 1, 2020, the jurisdictional limit of the justice courts under Tex. Gov't Code § 27.031 increases to $20,000. *See* Acts 2019, 86th Leg., R.S., ch. 696, §§ 2, 32 (S.B. 2342). As of the publication date of the latest supplement of this manual, chapter 500 of the Texas Rules of Civil Procedure has not been revised to reflect the increase.

RULE 500.4. REPRESENTATION IN JUSTICE COURT CASES (a) *Representation of an Individual.* An individual may: (1) represent himself or herself; (2) be represented by an authorized agent in an eviction case; or (3) be represented by an attorney. (b) *Representation of a Corporation or Other Entity.* A corporation or other entity may: (1) be represented by an employee, owner, officer, or partner of the entity who is not an attorney; (2) be represented by a property manager or other authorized agent in an eviction case; or (3) be represented by an attorney. (c) *Assisted Representation.* The court may, for good cause, allow an individual representing himself or herself to be assisted in court by a family member or other individual who is not being compensated.	**No Substantive Change from Prior Rules**
RULE 500.5. COMPUTATION OF TIME; TIMELY FILING (a) *Computation of Time.* To compute a time period in these rules: (1) exclude the day of the event that triggers the period; (2) count every day, including Saturdays, Sundays, and legal holidays; and (3) include the last day of the period, but (A) if the last day is a Saturday, Sunday, or legal holiday, the time period is extended to the next day that is not a Saturday, Sunday, or legal holiday; or (B) if the last day for filing falls on a day during which the court is closed before 5:00 p.m., the time period is extended to the court's next business day. (b) *Timely Filing by Mail.* Any document required to be filed by a given date is considered timely filed if deposited in the U.S. mail on or before that date, and received within 10 days of the due date. A legible postmark affixed by the United States Postal Service is evidence of the date of mailing. (c) *Extensions.* The judge may, for good cause shown, extend any time period under these rules except those relating to new trial and appeal.	**Follows District Court Rules**
RULE 500.6. JUDGE TO DEVELOP THE CASE In order to develop the facts of the case, a judge may question a witness or party and may summon any person or party to appear as a witness when the judge considers it necessary to ensure a correct judgment and a speedy disposition.	**Applies to All Cases - This substantially changes the role of the judge**

RULE 500.7. EXCLUSION OF WITNESSES	Follows District Court Rules
The court must, on a party's request, or may, on its own initiative, order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize the exclusion of: (a) a party who is a natural person or the spouse of such natural person; (b) an officer or employee designated as a representative of a party who is not a natural person; or (c) a person whose presence is shown by a party to be essential to the presentation of the party's case.	
RULE 500.8. SUBPOENAS	**Follows District Court Rules**
(a) *Use.* A subpoena may be used by a party or the judge to command a person or entity to attend and give testimony at a hearing or trial. A person may not be required by subpoena to appear in a county that is more than 150 miles from where the person resides or is served. (b) *Who Can Issue.* A subpoena may be issued by the clerk of the justice court or an attorney authorized to practice in the State of Texas, as an officer of the court. (c) *Form.* Every subpoena must be issued in the name of the "State of Texas" and must: (1) state the style of the suit and its case number; (2) state the court in which the suit is pending; (3) state the date on which the subpoena is issued; (4) identify the person to whom the subpoena is directed; (5) state the date, time, place, and nature of the action required by the person to whom the subpoena is directed; (6) identify the party at whose instance the subpoena is issued, and the party's attorney of record, if any; (7) state that "Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of court from which the subpoena is issued and may be punished by fine or confinement, or both"; and (8) be signed by the person issuing the subpoena. (d) *Service: Where, By Whom, How.* A subpoena may be served at any place within the State of Texas by any sheriff or constable of the State of Texas, **or by any person who is not a party and is 18 years of age or older.** A subpoena must be served by delivering a copy to the witness and tendering to that person any fees required by law. If the witness is a party and is represented by an attorney of record in the proceeding, the subpoena may be served on the witness's attorney of record. Proof of service must be made by filing either: (1) the witness's signed written memorandum attached to the subpoena showing that the witness accepted the subpoena; or (2) a statement by the person who made the service stating the date, time, and manner of service, and the name of the person served.	

Text of Rule of Civil Procedure	Summary of Rule Elements
(e) *Compliance Required.* A person commanded by subpoena to appear and give testimony must remain at the hearing or trial from day to day until discharged by the court or by the party summoning the witness. If a subpoena commanding testimony is directed to a corporation, partnership, association, governmental agency, or other organization, and the matters on which examination is requested are described with reasonable particularity, the organization must designate one or more persons to testify on its behalf as to matters known or reasonably available to the organization. (f) *Objection.* A person commanded to attend and give testimony at a hearing or trial may object or move for a protective order before the court at or before the time and place specified for compliance. A party causing a subpoena to issue must take reasonable steps to avoid imposing undue burden or expense on the person served. In ruling on objections or motions for protection, the court must provide a person served with a subpoena an adequate time for compliance and protection from undue burden or expense. The court may impose reasonable conditions on compliance with a subpoena, including compensating the witness for undue hardship. (g) *Enforcement.* Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena is issued or of a district court in the county in which the subpoena is served, and may be punished by fine or confinement, or both. A fine may not be imposed, nor a person served with a subpoena attached, for failure to comply with a subpoena without proof of service and proof by affidavit of the party requesting the subpoena or the party's attorney of record that all fees due the witness by law were paid or tendered.	
RULE 500.9. DISCOVERY (a) *Pretrial Discovery.* Pretrial discovery is limited to that which the judge considers reasonable and necessary. Any requests for pretrial discovery must be presented to the court for approval by written motion. The motion must be served on the responding party. Unless a hearing is requested, the judge may rule on the motion without a hearing.The discovery request must not be served on the responding party unless the judge issues a signed order approving the request. Failure to comply with a discovery order can result in sanctions, including dismissal of the case or an order to pay the other party's discovery expenses.	**No Automatic Right to Discovery** **Discovery only available after court order** • Request presented by written motion, served on all parties • Requires signed order • Limited to what is reasonable and necessary

Text of Rule of Civil Procedure	Summary of Rule Elements
(b) *Post-judgment Discovery.* Post-judgment discovery is not required to be filed with the court. The party requesting discovery must give the responding party at least 30 days to respond to a post-judgment discovery request. The responding party may file a written objection with the court within 30 days of receiving the request. If an objection is filed, the judge must hold a hearing to determine if the request is valid. If the objection is denied, the judge must order the party to respond to the request. If the objection is upheld, the judge may reform the request or dismiss it entirely.	**Discovery Order enforceable by sanctions** **Post-Judgment Discovery allowed without necessity of Court Order**
RULE 501. CITATION AND SERVICE	
RULE 501.1. CITATION (a) *Issuance.* When a petition is filed with a justice court to initiate a suit, the clerk must promptly issue a citation and deliver the citation as directed by the plaintiff. The plaintiff is responsible for obtaining service on the defendant of the citation and a copy of the petition with any documents filed with the petition. Upon request, separate or additional citations must be issued by the clerk. The clerk must retain a copy of the citation in the court's file. (b) *Form.* The citation must: (1) be styled "The State of Texas"; (2) be signed by the clerk under seal of court or by the judge; (3) contain the name, location, and address of the court; (4) show the date of filing of the petition; (5) show the date of issuance of the citation; (6) show the file number and names of parties; (7) be directed to the defendant; (8) show the name and address of attorney for plaintiff, or if the plaintiff does not have an attorney, the address of plaintiff; (9) notify defendant that if the defendant fails to file an answer, judgment by default may be rendered for the relief demanded in the petition. (c) *Notice.* The citation must include the following notice to the defendant in boldface type:	**Generally follows District Court rules, except -** • Answer Date is 14 days from service date

Text of Rule of Civil Procedure	Summary of Rule Elements
"You have been sued. You may employ an attorney to help you in defending against this lawsuit. But you are not required to employ an attorney. You or your attorney must file an answer with the court. Your answer is due by the end of the 14th day after the day you were served with these papers. If the 14th day is a Saturday, Sunday, or legal holiday, your answer is due by the end of the first day following the 14th day that is not a Saturday, Sunday, or legal holiday. Do not ignore these papers. If you do not file an answer by the due date, a default judgment may be taken against you. For further information, consult Part V of the Texas Rules of Civil Procedure, which is available online and also at the court listed on this citation." (d) *Copies.* The plaintiff must provide enough copies to be served on each defendant. If the plaintiff fails to do so, the clerk may make copies and charge the plaintiff the allowable copying cost.	
RULE 501.2. SERVICE OF CITATION (a) *Who May Serve.* No person who is a party to or interested in the outcome of the suit may serve citation in that suit, and, unless otherwise authorized by written court order, only a sheriff or constable may serve a citation in an eviction case, a writ that requires the actual taking of possession of a person, property or thing, or process requiring that the enforcement action be physically enforced by the person delivering process. Other citations may be served by: (1) a sheriff or constable; (2) a process server certified under order of the Supreme Court; (3) the clerk of the court, if the citation is served by registered or certified mail; or (4) a person authorized by court order who is 18 years of age or older. (b) *Method of Service.* Citation must be served by: (1) delivering a copy of the citation with a copy of the petition attached to the defendant in person, after endorsing the date of delivery on the citation; or (2) mailing a copy of the citation with a copy of the petition attached to the defendant by registered or certified mail, restricted delivery, with return receipt or electronic return receipt requested. (c) *Service Fees.* A plaintiff must pay all fees for service unless the plaintiff has filed a sworn statement of inability to pay the fees with the court. If the plaintiff has filed a sworn statement of inability to pay, the plaintiff must arrange for the citation to be served by a sheriff, constable, or court clerk.	**Generally follows District Court rules, except -** • Request for Alternative Service may come from the constable, sheriff or process server

Text of Rule of Civil Procedure	Summary of Rule Elements
(d) *Service on Sunday.* A citation cannot be served on a Sunday except in attachment, garnishment, sequestration, or distress proceedings. (e) *Alternative Service of Citation.* If the methods under (b) are insufficient to serve the defendant, the plaintiff, or the constable, sheriff, process server certified under order of the Supreme Court, or other person authorized to serve process, may make a request for alternative service. This request must include a sworn statement describing the methods attempted under (b) and stating the defendants' usual place of business or residence, or other place where the defendant can probably be found. The court may authorize the following types of alternative service: (1) mailing a copy of the citation with a copy of the petition attached by first class mail to the defendant at a specified address, and also leaving a copy of the citation with petition attached at the defendant's residence or other place where the defendant can probably be found with any person found there who is at least 16 years of age; or (2) mailing a copy of the citation with a copy of the petition attached by first class mail to the defendant at a specified address, and also serving by any other method that the court finds is reasonably likely to provide the defendant with notice of the suit. (f) *Service by Publication.* In the event that service of citation by publication is necessary, the process is governed by the rules in county and district court.	
RULE 501.3. DUTIES OF OFFICER OR PERSON RECEIVING CITATION (a) *Endorsement; Execution; Return.* The officer or authorized person to whom process is delivered must: (1) endorse on the process the date and hour on which he or she received it; (2) execute and return the same without delay; and (3) complete a return of service, which may, but need not, be endorsed on or attached to the citation. (b) *Contents of Return.* The return, together with any document to which it is attached, must include the following information: (1) the case number and case name; (2) the court in which the case is filed; (3) a description of what was served; (4) the date and time the process was received for service; (5) the person or entity served; (6) the address served; (7) the date of service or attempted service; (8) the manner of delivery of service or attempted service; (9) the name of the person who served or attempted service;	**Generally follows District Court rules**

Text of Rule of Civil Procedure	Summary of Rule Elements
(10) if the person named in (9) is a process server certified under Supreme Court Order, his or her identification number and the expiration date of his or her certification; and (11) any other information required by rule or law. (c) *Citation by Mail.* When the citation is served by registered or certified mail as authorized by Rule 501.2(b)(2), the return by the officer or authorized person must also contain the receipt with the addressee's signature. (d) *Failure to Serve.* When the officer or authorized person has not served the citation, the return must show the diligence used by the officer or authorized person to execute the same and the cause of failure to execute it, and where the defendant is to be found, if ascertainable. (e) *Signature.* The officer or authorized person who serves or attempts to serve a citation must sign the return. If the return is signed by a person other than a sheriff, constable, or clerk of the court, the return must either be verified or be signed under penalty of perjury. A return signed under penalty of perjury must contain the statement below in substantially the following form: "My name is (First) (Middle) (Last), my date of birth is (Month) (Day), (Year), and my address is (Street), (City), (State) (Zip Code), (Country). I declare under penalty of perjury that the foregoing is true and correct. Executed in _____ County, State of _____, on the _____ day of (Month), (Year). _____ Declarant" (f) *Alternative Service.* Where citation is executed by an alternative method as authorized by 501.2(e), proof of service must be made in the manner ordered by the court. (g) *Filing Return.* The return and any document to which it is attached must be filed with the court and may be filed electronically or by fax, if those methods of filing are available. (h) *Prerequisite for Default Judgment.* No default judgment may be granted in any case until proof of service as provided by this rule, or as ordered by the court in the event citation is executed by an alternative method under 501.2(e), has been on file with the clerk of the court 3 days, exclusive of the day of filing and the day of judgment.	
RULE 501.4. SERVICE OF PAPERS OTHER THAN CITATION (a) *Method of Service.* Other than a citation or oral motions made during trial or when all parties are present, every notice required by these rules, and every pleading, plea, motion, application to the court for an order, or other form of request, must be served on all other parties in one of the following ways.	**Generally follows District Court rules**

Text of Rule of Civil Procedure	Summary of Rule Elements
(1) In person. A copy may be delivered to the party to be served, or the party's duly authorized agent or attorney of record, in person or by agent. (2) Mail or courier. A copy may be sent by courier-receipted delivery or by certified or registered mail, to the party's last known address. Service by certified or registered mail is complete when the document is properly addressed and deposited in the United States mail, postage prepaid. (3) Fax. A copy may be faxed to the recipient's current fax number. Service by fax after 5:00 p.m. local time of the recipient will be deemed to have been served on the following day. (4) Email. A copy may be sent to an email address expressly provided by the receiving party, if the party has consented to email service in writing. Service by email after 5:00 p.m. local time of the recipient will be deemed to have been served on the following day. (5) Other. A copy may be delivered in any other manner directed by the court. (b) *Timing.* If a document is served by mail, 3 days will be added to the length of time a party has to respond to the document. Notice of any hearing requested by a party must be served on all other parties not less than 3 days before the time specified for the hearing. (c) *Who May Serve.* Documents other than a citation may be served by a party to the suit, an attorney of record, a sheriff or constable, or by any other person competent to testify. (d) *Certificate of Service.* The party or the party's attorney of record must include in writing on all documents filed a signed statement describing the manner in which the document was served on the other party or parties and the date of service. A certificate by a party or the party's attorney of record, or the return of the officer, or the sworn statement of any other person showing service of a notice is proof of service. (e) *Failure to Serve.* A party may offer evidence or testimony that a notice or document was not received, or, if service was by mail, that it was not received within 3 days from the date of mailing, and upon so finding, the court may extend the time for taking the action required of the party or grant other relief as it deems just.	

Text of Rule of Civil Procedure	Summary of Rule Elements
RULE 502. INSTITUTION OF SUIT	
RULE 502.1. PLEADINGS AND MOTIONS MUST BE WRITTEN, SIGNED, AND FILED Except for oral motions made during trial or when all parties are present, every pleading, plea, motion, application to the court for an order, or other form of request must be written and signed by the party or its attorney and must be filed with the court. A document may be filed with the court by personal or commercial delivery, by mail, or electronically, if the court allows electronic filing. Electronic filing is governed by Rule 21.	**Pleading to be In Writing**
RULE 502.2. PETITION (a) *Contents.* To initiate a lawsuit, a petition must be filed with the court. A petition must contain: (1) the name of the plaintiff; (2) the name, address, telephone number, and fax number, if any, of the plaintiff's attorney, if applicable, or the address, telephone number, and fax number, if any, of the plaintiff; (3) the name, address, and telephone number, if known, of the defendant; (4) the amount of money, if any, the plaintiff seeks; (5) a description and claimed value of any personal property the plaintiff seeks; (6) a description of any other relief requested; (7) the basis for the plaintiff's claim against the defendant; and (8) if the plaintiff consents to email service of the answer and any other motions or pleadings, a statement consenting to email service and email contact information. (b) Repealed effective February 26, 2019.	**Contents of Petition Described** **Pleading Requirement** • Name, address, telephone number, and fax number, if any, of the plaintiff and the plaintiff's attorney, if applicable; • Name, address, and telephone number, if known, of the defendant; • amount of money, if any, the plaintiff seeks; • description and claimed value of any personal property the plaintiff seeks; • the basis for the plaintiff's claim against the defendant; and • the plaintiff's email address, if consenting to service via email
RULE 502.3. FEES; INABILITY TO PAY (a) *Fees and Statement of Inability to Pay.* On filing the petition, the plaintiff must pay the appropriate filing fee and service fees, if any, with the court. A plaintiff who is unable to afford to pay the fees must file a sworn statement of inability to pay. Upon filing the statement, the clerk must docket the action, issue citation, and provide any other customary services.	**Generally follows District Court rules**

(b) *Contents of Statement of Inability to Pay.* (1) The statement must contain complete information as to the party's identity, nature and amount of governmental entitlement income, nature and amount of employment income, other income (interest, dividends, etc.), spouse's income if available to the party, property owned (other than homestead), cash or checking account, dependents, debts, and monthly expenses. (2) The statement must contain the following: "I am unable to pay court fees. I verify that the statements made in this statement are true and correct." The statement must be sworn before a notary public or other officer authorized to administer oaths or be signed under penalty of perjury. (c) *IOLTA Certificate.* If the party is represented by an attorney who is providing free legal services because of the party's indigence, without contingency, and the attorney is providing services either directly or by referral from a program funded by the Interest on Lawyers Trust Accounts (IOLTA) program, the attorney may file an IOLTA certificate confirming that the IOLTA funded program screened the party for income eligibility under the IOLTA income guidelines. A party's statement of inability to pay accompanied by an attorney's IOLTA certificate may not be contested under (d). (d) *Contest.* Unless an IOLTA certificate is filed, the defendant may file a contest of the statement of inability to pay at any time within 7 days after the day the defendant's answer is due. If the statement attests to receipt of government entitlement based on indigence, the statement may only be contested with regard to the veracity of the attestation. If contested, the judge must hold a hearing to determine the plaintiff's ability to pay. At the hearing, the burden is on the party who filed the statement to prove its inability to pay. The judge may, regardless of whether the defendant contests the statement, examine the statement and conduct a hearing to determine the plaintiff's ability to pay. If the judge determines that the plaintiff is able to afford the fees, the judge must enter a written order listing the reasons for the determination, and the plaintiff must pay the fees in the time specified in the order or the case will be dismissed without prejudice.	
RULE 502.4. VENUE — WHERE A LAWSUIT MAY BE BROUGHT (a) *Applicable Law.* Laws specifying the venue – the county and precinct where a lawsuit may be brought – are found in Chapter 15, Subchapter E of the Texas Civil Practice and Remedies Code, which is available online and for examination during the court's business hours. (b) *General Rule.* Generally, a defendant in a small claims case as described in Rule 500.3(a) or a debt claim case as described in Rule 500.3(b) is entitled to be sued in one of the following venues:	**Generally follows Civil Practice and Remedies Code Chapter 15** • The rule makes it clear that it **does not** replace CPRC Chapter 15; merely summarizes the basic venue issues for purposes of a pro se litigant **No Substantial Change from prior venue process**

Text of Rule of Civil Procedure	Summary of Rule Elements
(1) the county and precinct where the defendant resides; (2) the county and precinct where the incident, or the majority of incidents, that gave rise to the claim occurred; (3) the county and precinct where the contract or agreement, if any, that gave rise to the claim was to be performed; or (4) the county and precinct where the property is located, in a suit to recover personal property. (c) *Non-Resident Defendant; Defendant's Residence Unknown.* If the defendant is a non-resident of Texas, or if defendant's residence is unknown, the plaintiff may file the suit in the county and precinct where the plaintiff resides. (d) *Motion to Transfer Venue.* If a plaintiff files suit in an improper venue, a defendant may challenge the venue selected by filing a motion to transfer venue. The motion must be filed before trial, no later than 21 days after the day the defendant's answer is filed, and must contain a sworn statement that the venue chosen by the plaintiff is improper and a specific county and precinct of proper venue to which transfer is sought. If the defendant fails to name a county and precinct, the court must instruct the defendant to do so and allow the defendant 7 days to cure the defect. If the defendant fails to correct the defect, the motion will be denied, and the case will proceed in the county and precinct where it was originally filed. (1) Procedure. (A) Judge to Set Hearing. If a defendant files a motion to transfer venue, the judge must set a hearing on the motion. (B) Response. A plaintiff may file a response to a defendant's motion to transfer venue. (C) Hearing. The parties may present evidence at the hearing. A witness may testify at a hearing, either in person or, with permission of the court, by means of telephone or an electronic communication system. (D) Judge's Decision. If the motion is granted, the judge must sign an order designating the court to which the case will be transferred. If the motion is denied, the case will be heard in the court in which the plaintiff initially filed suit. (E) Review. Motions for rehearing and interlocutory appeals of the judge's ruling on venue are not permitted. (F) Time for Trial of the Case. No trial may be held until at least the 14th day after the judge's ruling on the motion to transfer venue.	

Text of Rule of Civil Procedure	Summary of Rule Elements
(G) Order. An order granting a motion to transfer venue must state the reason for the transfer and the name of the court to which the transfer is made. When such an order of transfer is made, the judge who issued the order must immediately make out a true and correct transcript of all the entries made on the docket in the case, certify the transcript, and send the transcript, with a certified copy of the bill of costs and the original papers in the case, to the court in the precinct to which the case has been transferred. The court receiving the case must then notify the plaintiff that the case has been received and, if the case is transferred to a different county, that the plaintiff has 14 days after receiving the notice to pay the filing fee in the new court, or file a sworn statement of inability to pay. The plaintiff is not entitled to a refund of any fees already paid. Failure to pay the fee or file a sworn statement of inability to pay will result in dismissal of the case without prejudice. (e) *Fair Trial Venue Change.* If a party believes it cannot get a fair trial in a specific precinct or before a specific judge, the party may file a sworn motion stating such, supported by the sworn statements of two other credible persons, and specifying if the party is requesting a change of location or a change of judge. Except for good cause shown, this motion must be filed no less than 7 days before trial. If the party seeks a change of judge, the judge must exchange benches with another qualified justice of the peace, or if no judge is available to exchange benches, the county judge must appoint a visiting judge to hear the case. If the party seeks a change in location, the case must be transferred to the nearest justice court in the county that is not subject to the same or some other disqualification. If there is only one justice of the peace precinct in the county, then the judge must exchange benches with another qualified justice of the peace, or if no judge is available to exchange benches, the county judge must appoint a visiting judge to hear the case. In cases where exclusive jurisdiction is within a specific precinct, as in eviction cases, the only remedy available is a change of judge. A party may apply for relief under this rule only one time in any given lawsuit. (f) *Transfer of Venue by Consent.* On the written consent of all parties or their attorneys, filed with the court, venue must be transferred to the court of any other justice of the peace of the county, or any other county.	
RULE 502.5. ANSWER (a) *Requirements.* A defendant must file with the court a written answer to a lawsuit as directed by the citation and must also serve a copy of the answer on the plaintiff. The answer must contain: (1) the name of the defendant; (2) the name, address, telephone number, and fax number, if any, of the defendant's attorney, if applicable, or the address, telephone number, and fax number, if any, of the defendant; and	**Defendant's Answer** • Due 14 days from date of service • Must be in writing • Rule allows for a general denial

Text of Rule of Civil Procedure	Summary of Rule Elements
(3) if the defendant consents to email service, a statement consenting to email service and email contact information. (b) *General Denial.* An answer that denies all of the plaintiff's allegations and demands that they be proven without specifying the reasons is sufficient to constitute an answer or appearance and does not bar the defendant from raising any defense at trial. (c) *Answer Docketed.* The defendant's appearance must be noted on the court's docket. (d) *Due Date.* Unless the defendant is served by publication, the defendant's answer is due by the end of the 14th day after the day the defendant was served with the citation and petition, but (1) if the 14th day is a Saturday, Sunday, or legal holiday, the answer is due on the next day that is not a Saturday, Sunday, or legal holiday; or (2) if the 14th day falls on a day during which the court is closed before 5:00 p.m., the answer is due on the court's next business day. (e) *Due Date When Defendant Served by Publication.* If a defendant is served by publication, the defendant's answer is due by the end of the 42nd day after the day the citation was issued, but (1) if the 42nd day is a Saturday, Sunday, or legal holiday, the answer is due on the next day that is not a Saturday, Sunday, or legal holiday; or (2) if the 42nd day falls on a day during which the court is closed before 5:00 p.m., the answer is due on the court's next business day.	**What is Not Required** • Affirmative Defenses need not be pled
RULE 502.6. COUNTERCLAIM; CROSS-CLAIM; THIRD-PARTY CLAIM (a) *Counterclaim.* A defendant may file a petition stating as a counterclaim any claim against a plaintiff that is within the jurisdiction of the justice court, whether or not related to the claims in the plaintiff's petition. The defendant must file a counterclaim petition as provided in Rule 502.2, and must pay a filing fee or provide a sworn statement of inability to pay the fees. The court need not generate a citation for a counterclaim and no answer to the counterclaim need be filed. The defendant must serve a copy of the counterclaim as provided by Rule 501.4. (b) *Cross-Claim.* A plaintiff seeking relief against another plaintiff, or a defendant seeking relief against another defendant may file a cross-claim. The filing party must file a cross-claim petition as provided in Rule 502.2, and must pay a filing fee or provide a sworn statement of inability to pay the fees. A citation must be issued and served as provided by Rule 501.2 on any party that has not yet filed a petition or an answer, as appropriate. If the party filed against has filed a petition or an answer, the filing party must serve the cross-claim as provided by Rule 501.4.	**Counterclaims** • Must follow pleading requirements set forth in 502.2 • Must pay a fee or file an sworn statement of inability to pay

Text of Rule of Civil Procedure	Summary of Rule Elements
(c) *Third Party Claim.* A defendant seeking to bring another party into a lawsuit who may be liable for all or part of the plaintiff's claim against the defendant may file a petition as provided in Rule 502.2, and must pay a filing fee or provide a sworn statement of inability to pay the fees. A citation must be issued and served as provided by Rule 501.2.	
RULE 502.7. AMENDING AND CLARIFYING PLEADINGS (a) *Amending Pleadings.* A party may withdraw something from or add something to a pleading, as long as the amended pleading is filed and served as provided by Rule 501.4 not less than 7 days before trial. The court may allow a pleading to be amended less than 7 days before trial if the amendment will not operate as a surprise to the opposing party. (b) *Insufficient Pleadings.* A party may file a motion with the court asking that another party be required to clarify a pleading. The court must determine if the pleading is sufficient to place all parties on notice of the issues in the lawsuit, and may hold a hearing to make that determination. If the court determines a pleading is insufficient, the court must order the party to amend the pleading and set a date by which the party must amend. If a party fails to comply with the court's order, the pleading may be stricken.	**Pleading Amendments** • Up until 7 days before trial without leave of Court • 7 days before trial or sooner, upon a showing that the amendment would not operate as a surprise **Special Exception** • The issue is the sufficiency of pleading to place all parties on notice of the issues • A hearing is not required
RULE 503. DEFAULT JUDGMENT; PRE-TRIAL MATTERS; TRIAL	
RULE 503.1. IF DEFENDANT FAILS TO ANSWER (a) *Default Judgment.* If the defendant fails to file an answer by the date stated in Rule 502.5, the judge must ensure that service was proper, and may hold a hearing for this purpose. If it is determined that service was proper, the judge must render a default judgment in the following manner: (1) Claim Based on Written Document. If the claim is based on a written document signed by the defendant, and a copy of the document has been filed with the court and served on the defendant, along with a sworn statement from the plaintiff that this is a true and accurate copy of the document and the relief sought is owed, and all payments, offsets or credits due to the defendant have been accounted for, the judge must render judgment for the plaintiff in the requested amount, without any necessity for a hearing. The plaintiff's attorney may also submit affidavits supporting an award of attorney fees to which the plaintiff is entitled, if any.	**Default Judgment** • Judge must determine sufficiency of service and may hold hearing • Appearance may be by telephonic or electronic communication, at the judge's discretion **Sworn Account/Liquidated Damage Cases** • Requires Sworn Statement • May be granted on submission **Non-Sworn Accounts/ Unliquidated Damage Cases** • Requires request for hearing • May not be granted on submission

Text of Rule of Civil Procedure	Summary of Rule Elements
(2) Other Cases. Except as provided in (1), a plaintiff who seeks a default judgment against a defendant must request a hearing, orally or in writing. The plaintiff must appear at the hearing and provide evidence of its damages. If the plaintiff proves its damages, the judge must render judgment for the plaintiff in the amount proven. If the plaintiff is unable to prove its damages, the judge must render judgment in favor of the defendant. With the permission of the court, a party may appear at a hearing by means of telephone or an electronic communication system. (b) *Appearance.* If a defendant files an answer or otherwise appears in a case before a default judgment is signed by the judge, the judge must not enter a default judgment and the case must be set for trial as described in Rule 503.3. (c) *Post-Answer Default.* If a defendant who has answered fails to appear for trial, the court may proceed to hear evidence on liability and damages and render judgment accordingly. (d) *Notice.* The plaintiff requesting a default judgment must provide to the clerk in writing the last known mailing address of the defendant at or before the time the judgment is signed. When a default judgment is signed, the clerk must immediately mail written notice of the judgment to the defendant at the address provided by the plaintiff, and note the fact of such mailing on the docket. The notice must state the number and style of the case, the court in which the case is pending, the names of the parties in whose favor and against whom the judgment was rendered, and the date the judgment was signed. Failure to comply with the provisions of this rule does not affect the finality of the judgment.	**Judge Must Render Judgment** • Rule makes no allowances for curing a deficiency in plaintiff's proof of damages **Clerk to Mail Notice of Judgment**
RULE 503.2. SUMMARY DISPOSITION (a) *Motion.* A party may file a sworn motion for summary disposition of all or part of a claim or defense without a trial. The motion must set out all supporting facts. All documents on which the motion relies must be attached. The motion must be granted if it shows that: (1) there are no genuinely disputed facts that would prevent a judgment in favor of the party; (2) there is no evidence of one or more essential elements of a defense which the defendant must prove to defeat the plaintiff's claim; or (3) there is no evidence of one or more essential elements of the plaintiff's claim. (b) *Response.* The party opposing the motion may file a sworn written response to the motion. (c) *Hearing.* The court must not consider a motion for summary disposition until it has been on file for at least 14 days. The judge may consider evidence offered by the parties at the hearing. By agreement of the parties, the judge may decide the motion and response without a hearing.	**Summary Judgment Procedure** • Requires "sworn motion" • Requires evidence be attached • Provides for "sworn written response" **Hearing** • After Motion on file for 14 days • Response time line not stated, only required prior to hearing • May be on submission if agreed to by the parties **Motion to be Granted if:** • There are no "genuinely disputed facts" • There is "no evidence" of one or more essential elements of a defense

Text of Rule of Civil Procedure	Summary of Rule Elements
(d) *Order.* The judge may enter judgment as to the entire case or may specify the facts that are established and direct such further proceedings in the case as are just.	• There is "no evidence" of one or more essential elements of a plaintiff's claim
RULE 503.3. SETTINGS AND NOTICE; POSTPONING TRIAL (a) *Settings and Notice.* After the defendant answers, the case will be set on a trial docket at the discretion of the judge. The court must send a notice of the date, time, and place of this setting to all parties at their address of record no less than 45 days before the setting date, unless the judge determines that an earlier setting is required in the interest of justice. Reasonable notice of all subsequent settings must be sent to all parties at their addresses of record. (b) *Postponing Trial.* A party may file a motion requesting that the trial be postponed. The motion must state why a postponement is necessary. The judge, for good cause, may postpone any trial for a reasonable time.	**Notice of Trial Date Required** • Requires 45 day notice • Resetting of trial date only requires "reasonable notice" **Continuances** • Requires sworn motion • Requires showing of "good cause"
RULE 503.4. PRETRIAL CONFERENCE (a) *Conference Set; Issues.* If all parties have appeared in a lawsuit, the court, at any party's request or on its own, may set a case for a pretrial conference. Reasonable notice must be sent to all parties at their addresses of record. Appropriate issues for the pretrial conference include: (1) discovery; (2) the amendment or clarification of pleadings; (3) the admission of facts and documents to streamline the trial process; (4) a limitation on the number of witnesses at trial; (5) the identification of facts, if any, which are not in dispute between the parties; (6) mediation or other alternative dispute resolution services; (7) the possibility of settlement; (8) trial setting dates that are amenable to the court and all parties; (9) the appointment of interpreters, if needed; (10) the application of a Rule of Civil Procedure not in Part V or a Rule of Evidence; and (11) any other issue that the court deems appropriate. (b) *Eviction Cases.* The court must not schedule a pretrial conference in an eviction case if it would delay trial.	**Pre-Trial Conference** • Court may set on own motion or that of a party **Conference Topic List** • (See Rule)

Text of Rule of Civil Procedure	Summary of Rule Elements
RULE 503.5. ALTERNATIVE DISPUTE RESOLUTION (a) *State Policy.* The policy of this state is to encourage the peaceable resolution of disputes through alternative dispute resolution, including mediation, and the early settlement of pending litigation through voluntary settlement procedures. For that purpose, the judge may order any case to mediation or another appropriate and generally accepted alternative dispute resolution process. (b) *Eviction Cases.* The court must not order mediation or any other alternative dispute resolution process in an eviction case if it would delay trial.	**Alternative Dispute Resolution** • Court may order ADR
RULE 503.6. TRIAL (a) *Docket Called.* On the day of the trial setting, the judge must call all of the cases set for trial that day. (b) *If Plaintiff Fails to Appear.* If the plaintiff fails to appear when the case is called for trial, the judge may postpone or dismiss the suit. (c) *If Defendant Fails to Appear.* If the defendant fails to appear when the case is called for trial, the judge may postpone the case, or may proceed to take evidence. If the plaintiff proves its case, judgment must be awarded for the relief proven. If the plaintiff fails to prove its case, judgment must be rendered against the plaintiff.	**Failure to Appear** • Court may continue the case • Court may proceed and call the case to trial – If plaintiff fails to prove its case, the Court **must** enter a take-nothing judgment
RULE 504. JURY	
RULE 504.1. JURY TRIAL DEMANDED (a) *Demand.* Any party is entitled to a trial by jury. A written demand for a jury must be filed no later than 14 days before the date a case is set for trial. If the demand is not timely, the right to a jury is waived unless the late filing is excused by the judge for good cause. (b) *Jury Fee.* Unless otherwise provided by law, a party demanding a jury must pay a fee of $22.00 or must file a sworn statement of inability to pay the fee at or before the time the party files a written request for a jury. (c) *Withdrawal of Demand.* If a party who demands a jury and pays the fee withdraws the demand, the case will remain on the jury docket unless all other parties present agree to try the case without a jury. A party that withdraws its jury demand is not entitled to a refund of the jury fee. (d) *No Demand.* If no party timely demands a jury and pays the fee, the judge will try the case without a jury.	**No Substantive Change from Prior Rules**

Text of Rule of Civil Procedure	Summary of Rule Elements
RULE 504.2. EMPANELING THE JURY (a) *Drawing Jury and Oath.* If no method of electronic draw has been implemented, the judge must write the names of all prospective jurors present on separate slips of paper as nearly alike as may be, place them in a box, mix them well, and then draw the names one by one from the box. The judge must list the names drawn and deliver a copy to each of the parties or their attorneys. (b) *Oath.* After the draw, the judge must swear the panel as follows: "You solemnly swear or affirm that you will give true and correct answers to all questions asked of you concerning your qualifications as a juror." (c) *Questioning the Jury.* The judge, the parties, or their attorneys will be allowed to question jurors as to their ability to serve impartially in the trial but may not ask the jurors how they will rule in the case. The judge will have discretion to allow or disallow specific questions and determine the amount of time each side will have for this process. (d) *Challenge for Cause.* A party may challenge any juror for cause. A challenge for cause is an objection made to a juror alleging some fact, such as bias or prejudice, that disqualifies the juror from serving in the case or that renders the juror unfit to sit on the jury. The challenge must be made during jury questioning. The party must explain to the judge why the juror should be excluded from the jury. The judge must evaluate the questions and answers given and either grant or deny the challenge. When a challenge for cause has been sustained, the juror must be excused. (e) *Challenges Not for Cause.* After the judge determines any challenges for cause, each party may select up to 3 jurors to excuse for any reason or no reason at all. But no prospective juror may be excused for membership in a constitutionally protected class. (f) *The Jury.* After all challenges, the first 6 prospective jurors remaining on the list constitute the jury to try the case. (g) *If Jury Is Incomplete.* If challenges reduce the number of prospective jurors below 6, the judge may direct the sheriff or constable to summon others and allow them to be questioned and challenged by the parties as before, until at least 6 remain. (h) *Jury Sworn.* When the jury has been selected, the judge must require them to take substantially the following oath: "You solemnly swear or affirm that you will render a true verdict according to the law and the evidence presented."	**No Substantive Change from Prior Rules**
RULE 504.3. JURY NOT CHARGED The judge must not charge the jury.	**No Substantive Change from Prior Rules**

RULE 504.4. JURY VERDICT FOR SPECIFIC ARTICLES When the suit is for the recovery of specific articles and the jury finds for the plaintiff, the jury must assess the value of each article separately, according to the evidence presented at trial.	**No Substantive Change from Prior Rules**
RULE 505. JUDGMENT; NEW TRIAL	
RULE 505.1. JUDGMENT (a) *Judgment Upon Jury Verdict.* Where a jury has returned a verdict, the judge must announce the verdict in open court, note it in the court's docket, and render judgment accordingly. The judge may render judgment on the verdict or, if the verdict is contrary to the law or the evidence, judgment not withstanding the verdict. (b) *Case Tried by Judge.* When a case has been tried before the judge without a jury, the judge must announce the decision in open court, note the decision in the court's docket, and render judgment accordingly. (c) *Form.* A judgment must: (1) clearly state the determination of the rights of the parties in the case; (2) state who must pay the costs; (3) be signed by the judge; and (4) be dated the date of the judge's signature. (d) *Costs.* The judge must award costs allowed by law to the successful party. (e) *Judgment for Specific Articles.* Where the judgment is for the recovery of specific articles, the judgment must order that the plaintiff recover such specific articles, if they can be found, and if not, then their value as assessed by the judge or jury with interest at the prevailing post-judgment interest rate.	**No Substantive Change from Prior Rules**
RULE 505.2. ENFORCEMENT OF JUDGMENT Justice court judgments are enforceable in the same method as in county and district court, except as provided by law. When the judgment is for personal property, the court may award a special writ for the seizure and delivery of such property to the plaintiff, and may, in addition to the other relief granted in such cases, enforce its judgment by attachment or fine.	**No Substantive Change from Prior Rules**
RULE 505.3. MOTION TO SET ASIDE; MOTION TO REINSTATE; MOTION FOR NEW TRIAL (a) *Motion to Reinstate after Dismissal.* A plaintiff whose case is dismissed may file a motion to reinstate the case no later than 14 days after the dismissal order is signed. The plaintiff must serve the defendant with a copy of the motion no later than the next business day using a method approved under Rule 501.4. The court may reinstate the case for good cause shown.	**No Substantive Change from Prior Rules, Except** • Enlarges time period for request to <u>14 days</u> **Motion Denied as a Matter of Law if no Order is signed within <u>21 days</u> after the Judgment was signed**

Text of Rule of Civil Procedure	Summary of Rule Elements
(b) *Motion to Set Aside Default.* A defendant against whom a default judgment is granted may file a motion to set aside the judgment no later than 14 days after the judgment is signed. The defendant must serve the plaintiff with a copy of the motion no later than the next business day using a method approved under Rule 501.4. The court may set aside the judgment and set the case for trial for good cause shown. (c) *Motion for New Trial.* A party may file a motion for a new trial no later than 14 days after the judgment is signed. The party must serve all other parties with a copy of the motion no later than the next business day using a method approved under Rule 501.4. The judge may grant a new trial upon a showing that justice was not done in the trial of the case. Only one new trial may be granted to either party. (d) *Motion Not Required.* Failure to file a motion under this rule does not affect a party's right to appeal the underlying judgment. (e) *Motion Denied as a Matter of Law.* If the judge has not ruled on a motion to set aside, motion to reinstate, or motion for new trial, the motion is automatically denied at 5:00 p.m. on the 21st day after the day the judgment was signed.	
RULE 506. APPEAL	
RULE 506.1. APPEAL (a) *How Taken; Time.* A party may appeal a judgment by filing a bond, making a cash deposit, or filing a sworn statement of inability to pay with the justice court within 21 days after the judgment is signed or the motion to reinstate, motion to set aside, or motion for new trial, if any, is denied. (b) *Amount of Bond; Sureties; Terms.* A plaintiff must file a $500 bond. A defendant must file a bond in an amount equal to twice the amount of the judgment. The bond must be supported by a surety or sureties approved by the judge. The bond must be payable to the appellee and must be conditioned on the appellant's prosecution of its appeal to effect and payment of any judgment and all costs rendered against it on appeal. (c) *Cash Deposit in Lieu of Bond.* In lieu of filing a bond, an appellant may deposit with the clerk of the court cash in the amount required of the bond. The deposit must be payable to the appellee and must be conditioned on the appellant's prosecution of its appeal to effect and payment of any judgment and all costs rendered against it on appeal. (d) *Sworn Statement of Inability to Pay.* (1) Filing. An appellant who cannot furnish a bond or pay a cash deposit in the amount required may instead file a sworn statement of inability to pay. The statement must meet the requirements of Rule 502.3 and may be the same one that was filed with the petition.	**Timetable for Appeal is Enlarged** • Within 21 days after the judgment is signed **Bond Requirements for Appeal** • Plaintiff: $500 • Defendant: Twice the amount of the judgment • **Payable to Appellee** • Pauper's Bond described

Text of Rule of Civil Procedure	Summary of Rule Elements
(2) Contest. The statement may be contested as provided in Rule 502.3(d) within 7 days after the opposing party receives notice that the statement was filed. (3) Appeal If Contest Sustained. If the contest is sustained, the appellant may appeal that decision by filing notice with the justice court within 7 days of that court's written order. The justice court must then forward all related documents to the county court for resolution. The county court must set the matter for hearing within 14 days and hear the contest de novo, as if there had been no previous hearing, and if the appeal is granted, must direct the justice court to transmit to the clerk of the county court the transcript, records, and papers of the case, as provided in these rules. (4) If No Appeal or If Appeal Overruled. If the appellant does not appeal the ruling sustaining the contest, or if the county court denies the appeal, the appellant may, within five days, post an appeal bond or make a cash deposit in compliance with this rule. (e) *Notice to Other Parties Required.* If a statement of inability to pay is filed, the court must provide notice to all other parties that the statement was filed no later than the next business day. Within 7 days of filing a bond or making a cash deposit, an appellant must serve written notice of the appeal on all other parties using a method approved under Rule 501.4. (f) *No Default on Appeal Without Compliance With Rule.* The county court to which an appeal is taken must not render default judgment against any party without first determining that the appellant has fully complied with this rule. (g) *No Dismissal of Appeal Without Opportunity for Correction.* An appeal must not be dismissed for defects or irregularities in procedure, either of form or substance, without allowing the appellant, after 7 days' notice from the court, the opportunity to correct such defect. (h) *Appeal Perfected.* An appeal is perfected when a bond, cash deposit, or statement of inability to pay is filed in accordance with this rule. (i) *Costs.* The appellant must pay the costs on appeal to a county court in accordance with Rule 143a.	
RULE 506.2. RECORD ON APPEAL When an appeal has been perfected from the justice court, the judge must immediately send to the clerk of the county court a certified copy of all docket entries, a certified copy of the bill of costs, and the original papers in the case.	**No Substantive Change from Prior Rules**
RULE 506.3. TRIAL DE NOVO The case must be tried de novo in the county court. A trial de novo is a new trial in which the entire case is presented as if there had been no previous trial.	**No Substantive Change from Prior Rules**

Text of Rule of Civil Procedure	Summary of Rule Elements
RULE 506.4. WRIT OF CERTIORARI (a) *Application.* Except in eviction cases, after final judgment in a case tried in justice court, a party may apply to the county court for a writ of certiorari. (b) *Grounds.* An application must be granted only if it contains a sworn statement setting forth facts showing that either: (1) the justice court did not have jurisdiction; or (2) the final determination of the suit worked an injustice to the applicant that was not caused by the applicant's own inexcusable neglect. (c) *Bond, Cash Deposit, or Sworn Statement of Indigency to Pay Required.* If the application is granted, a writ of certiorari must not issue until the applicant has filed a bond, made a cash deposit, or filed a sworn statement of indigency that complies with Rule 145. (d) *Time for Filing.* An application for writ of certiorari must be filed within 90 days after the date the final judgment is signed. (e) *Contents of Writ.* The writ of certiorari must command the justice court to immediately make and certify a copy of the entries in the case on the docket, and immediately transmit the transcript of the proceedings in the justice court, together with the original papers and a bill of costs, to the proper court. (f) *Clerk to Issue Writ and Citation.* When the application is granted and the bond, cash deposit, or sworn statement of indigency have been filed, the clerk must issue a writ of certiorari to the justice court and citation to the adverse party. (g) *Stay of Proceedings.* When the writ of certiorari is served on the justice court, the court must stay further proceedings on the judgment and comply with the writ. (h) *Cause Docketed.* The action must be docketed in the name of the original plaintiff, as plaintiff, and of the original defendant, as defendant. (i) *Motion to Dismiss.* Within 30 days after the service of citation on the writ of certiorari, the adverse party may move to dismiss the certiorari for want of sufficient cause appearing in the affidavit, or for want of sufficient bond. If the certiorari is dismissed, the judgment must direct the justice court to proceed with the execution of the judgment below. (j) *Amendment of Bond or Oath.* The affidavit or bond may be amended at the discretion of the court in which it is filed. (k) *Trial De Novo.* The case must be tried de novo in the county court and judgment must be rendered as in cases appealed from justice courts. A trial de novo is a new trial in which the entire case is presented as if there had been no previous trial.	**No Substantive Change from Prior Rules**

RULE 507. ADMINISTRATIVE RULES FOR JUDGES AND COURT PERSONNEL	
RULE 507.1. PLENARY POWER A justice court loses plenary power over a case when an appeal is perfected or if no appeal is perfected, 21 days after the later of the date judgment is signed or the date a motion to set aside, motion to reinstate, or motion for new trial, if any, is denied.	**Expanded Plenary Powers** • Plenary Power enlarged to 21 days, consistent with enlarged appeal time frame
RULE 507.2. FORMS The court may provide forms to enable a party to file documents that comply with these rules. No party may be forced to use the court's forms.	**No Substantive Change from Prior Rules**
Text of Rule of Civil Procedure	**Summary of Rule Elements**
RULE 507.3. DOCKET AND OTHER RECORDS (a) *Docket.* Each judge must keep a civil docket in a permanent record containing the following information: (1) the title of all suits commenced before the court; (2) the date when the first process was issued against the defendant, when returnable, and the nature of that process; (3) the date when the parties, or either of them, appeared before the court, either with or without a citation; (4) a description of the petition and any documents filed with the petition; (5) every adjournment, stating at whose request and to what time; (6) the date of the trial, stating whether the same was by a jury or by the judge; (7) the verdict of the jury, if any; (8) the judgment signed by the judge and the date the judgment was signed; (9) all applications for setting aside judgments or granting new trials and the orders of the judge thereon, with the date; (10) the date of issuing execution, to whom directed and delivered, and the amount of debt, damages and costs and, when any execution is returned, the date of the return and the manner in which it was executed; and (11) all stays and appeals that may be taken, and the date when taken, the amount of the bond and the names of the sureties. (b) *Other Records.* The judge must also keep copies of all documents filed; other dockets, books and records as may be required by law or these rules; and a fee book in which all costs accruing in every suit commenced before the court are taxed. (c) *Form of Records.* All records required to be kept under this rule may be maintained electronically.	**No Substantive Change from Prior Rules**

Text of Rule of Civil Procedure	Summary of Rule Elements
RULE 507.4. ISSUANCE OF WRITS Every writ from the justice courts must be in writing and be issued and signed by the judge officially. The style thereof must be "The State of Texas." It must, except where otherwise specially provided by law or these rules, be directed to the person or party upon whom it is to be served, be made returnable to the court, and note the date of its issuance.	**No Substantive Change from Prior Rules**
RULE 508. DEBT CLAIM CASES	
RULE 508.1. APPLICATION Rule 508 applies to a claim for the recovery of a debt brought by an assignee of a claim, a financial institution, a debt collector or collection agency, or a person or entity primarily engaged in the business of lending money at interest.	**Debt Claim Case Defined** • Assignee of a Claim • A Financial Institution • A Debt Collector or Collection Agency • A person or entity primarily engaged in the business of lending money at interest
RULE 508.2. PETITION (a) *Contents.* In addition to the information required by Rule 502.2, a petition filed in a suit governed by this rule must contain the following information: (1) Credit Accounts. In a claim based upon a credit card, revolving credit, or open account, the petition must state: (A) the account or credit card name; (B) the account number (which may be masked); (C) the date of issue or origination of the account, if known; (D) the date of charge-off or breach of the account, if known; (E) the amount owed as of a date certain; and (F) whether the plaintiff seeks ongoing interest. (2) Personal and Business Loans. In a claim based upon a promissory note or other promise to pay a specific amount as of a date certain, the petition must state: (A) the date and amount of the original loan; (B) whether the repayment of the debt was accelerated, if known; (C) the date final payment was due; (D) the amount due as of the final payment date; (E) the amount owed as of a date certain; and (F) whether plaintiff seeks ongoing interest. (3) Ongoing Interest. If a plaintiff seeks ongoing interest, the petition must state: (A) the effective interest rate claimed; (B) whether the interest rate is based upon contract or statute; and	**All Pleadings to Include the Information Described in Rule 502.2** **Pleading Standards (Credit Acct)** • Account or card name; • Account number (masked) • Date of issue (if known) • Date of charge-off (if known) • Amount owed on date certain; and • Whether plaintiff seeks interest **Pleading Standard (Loan)** • Date and amount of original loan; • Whether loan was accelerated; • Date final payment was due; • Amount due on payment date; • Amount owed on date certain; and • Whether plaintiff seeks interest

Text of Rule of Civil Procedure	Summary of Rule Elements
(C) the dollar amount of interest claimed as of a date certain. (4) Assigned Debt. If the debt that is the subject of the claim has been assigned or transferred, the petition must state: (A) that the debt claim has been transferred or assigned; (B) the date of the transfer or assignment; (C) the name of any prior holders of the debt; and (D) the name or a description of the original creditor.	**Ongoing Interest** • The effective interest rate; • Whether interest rate is based upon contract or statute; and • The dollar amount of interest claimed as of a date certain **Assigned Debt Cases** • Statement that debt claim has been transferred or assigned; • Date of the transfer/assignment; • Names of any prior holders; and • Name or description of the original creditor
RULE 508.3. DEFAULT JUDGMENT (a) *Generally.* If the defendant does not file an answer to a claim by the answer date or otherwise appear in the case, the judge must promptly render a default judgment upon the plaintiff's proof of the amount of damages. (b) *Proof of the Amount of Damages.* (1) *Evidence Must Be Served or Submitted.* Evidence of plaintiff's damages must either be attached to the petition and served on the defendant or submitted to the court after defendant's failure to answer by the answer date. (2) *Form of Evidence.* Evidence of plaintiff's damages may be offered in a sworn statement or in live testimony. The evidence offered may include documentary evidence. (3) *Establishment of the Amount of Damages.* The amount of damages is established by evidence: (A) that the account or loan was issued to the defendant and the defendant is obligated to pay it; (B) that the account was closed or the defendant breached the terms of the account or loan agreement; (C) of the amount due on the account or loan as of a date certain after all payment credits and offsets have been applied; and (4) *Documentary Evidence Offered By Sworn Statement.* Documentary evidence may be considered if it is attached to a sworn statement made by the plaintiff or its representative, a prior holder of the debt or its representative, or the original creditor or its representative, that attests to the following: (A) the documents were kept in the regular course of business;	**Requires the court to "promptly render a default judgment"** **Requires that Proof of Damage Amount be <u>either:</u>** • Served on the Defendant • Submitted to the Court **Forms of Evidence** • Sworn Statement • Live Witness • Documents **Requirements of Proof** • Defendant's Account and obligation to pay • Breach • Amount Due • Plaintiff if Owner of the Account – If Acquired, then How **If Proof Relies on Documents** • Requires a Business Records Affidavit (BRA) **Requirements of a BRA** • Affidavit may be made by person **<u>other than the original issuer</u>**

Text of Rule of Civil Procedure	Summary of Rule Elements
(B) it was the regular course of business for an employee or representative with knowledge of the act recorded to make the record or to transmit information to be included in such record; (C) the documents were created at or near the time or reasonably soon thereafter; and (D) the documents attached are the original or exact duplicates of the original. (5) *Consideration of Sworn Statement.* A judge is not required to accept a sworn statement if the source of information or the method or circumstances of preparation indicate lack of trustworthiness. But a judge may not reject a sworn statement only because it is not made by the original creditor or because the documents attested to were created by a third party and subsequently incorporated into and relied upon by the business of the plaintiff. (c) *Hearing.* The judge may enter a default judgment without a hearing if the plaintiff submits sufficient written evidence of its damages and should do so to avoid undue expense and delay. Otherwise, the plaintiff may request a default judgment hearing at which the plaintiff must appear, in person or by telephonic or electronic means, and prove its damages. If the plaintiff proves its damages, the judge must render judgment for the plaintiff in the amount proven. If the plaintiff is unable to prove its damages, the judge must render judgment in favor of the defendant. (d) *Appearance.* If the defendant files an answer or otherwise appears in a case before a default judgment is signed by the judge, the judge must not render a default judgment and must set the case for trial. (e) *Post-Answer Default.* If a defendant who has answered fails to appear for trial, the court may proceed to hear evidence on liability and damages and render judgment accordingly.	• Attests to: – Documents kept in regular course of business – Employee obligation to make the record – Records created at or near the time of the event – Documents attached are originals or exact duplicates of the original. **Sworn Statements** • Judge **is not required to accept** if source of information or method/circumstance of preparation indicates lack of trustworthiness • Judge **cannot reject** simply because the sworn statement is not made by the original creditor **Hearing May Be by Submission, but Court Is Not Required to Do So** **Plaintiff May Request a Hearing** • May be telephonic (Court is encouraged to minimize cost) • Hearing must result in a judgment (No Continuance??)

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